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BEFORE THE OREGON PUBLIC UTILITY COMMISSION

PUBLIC UTILITY COMMISSION OF OREGON,

Complainant,

v.

VCI COMPANY f/k/a STAN EFFERDING and STANLEY JOHNSON d/b/a VILAIRE, and VCI COMPANY, a Washington corporation,

Defendants.

Docket No. UM1288

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO VACATE DEFAULT ORDER AND TO DISMISS CLAIM

Defendants file this Reply pursuant to the Order in this docket allowing a Reply entered November 15, 2007.

Defendants' Motion to Vacate Default Order and to Dismiss Claim is based on the Commission's lack of *subject matter jurisdiction* over the controversy, not whether the complainant has standing to bring the claim or whether the Commission has jurisdiction over the defendant VCI Company. Subject matter jurisdiction is essentially the authority conferred by the legislature to a body to decide a given type of case one way or the other. *Hagans v. Lavine*, 415 U.S. 528, 538 (1974). "Jurisdiction depends on whether the matter is one that the legislature has authorized the agency to decide." *In re Permit Application No. 63266*, 306 Or. 287, 293, 759 P.2d 1070 (1988).

The statutes and argument of the complainant in its Response to the Motion relate to whether or not the complainant has the authority to seek "enforcement" of the alleged debt, that is whether the complainant is the proper "plaintiff," and whether the Commission has jurisdiction over the defendants. Defendants do not dispute that if money is owing to the OTAP program,

1 the complainant is the proper party to recover the funds. Nor do defendants contend that the  
2 Commission does not have personal jurisdiction over the regulated entity, VCI Company.<sup>1</sup>

3 The Commission, however, is a forum of limited subject matter jurisdiction, and it is the  
4 complainant's burden to rebut the presumption that no jurisdiction exists. "The commission[]'s  
5 jurisdiction is limited. [Its] authority must affirmatively appear from the law creating [its] office  
6 and defining [its] powers." *Oregon - Wash. R. & N. Co. v. McColloch*, 153 Or. 32, 46, 55 P.2d  
7 1133 (1936). A cause of action is presumed to be outside the jurisdiction of a limited forum and  
8 the burden of establishing jurisdiction rests on the party asserting jurisdiction. *Kokkonen v.*  
9 *Guardian Life Insurance Co. of America*, 511 U.S. 375, 377 (1994). Finally, once a question of  
10 subject matter jurisdiction arises, since it cannot be waived and since it is a threshold matter, the  
11 adjudicating authority is under an independent obligation to satisfy itself that it has jurisdiction to  
12 adjudicate the claim. *See e.g. Sessions v. Chrysler Corp.*, 517 F.2d 579, 561 (9<sup>th</sup> Cir. 1975) (it is  
13 the obligation of the adjudicating authority to determine subject matter jurisdiction as a threshold  
14 matter).

15 Complainant's sole remedy requested in this case is for money. Complainant in its  
16 Response, reiterates that the claim is for the payment of money from defendants. *Response* at  
17 p. 6. Complainant proposes no theory of recovery other than those noted by defendants in their  
18 Motion; that is for breach of contract or money had a received. Without citing to any authority,  
19 complainant contends that what is sought is not "damages;" but fails to provide an alternative.  
20 Complainant has not requested an injunction or specific performance. What complainant  
21 requests is a "Money Award" as defined in ORS 18.005. A "Money Award" is "a judgment or  
22 portion of a judgment that requires the payment of money." *Id.* Money Awards under the  
23 theories of money had and received and breach of contract are claims for "damages." *See, e.g.,*  
24 *State Accident Ins. Fund Corp. v. Anderson*, 321 Or. 139, 142, 894 P.2d 1152 (1995)

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25 <sup>1</sup> Defendants do contend that the individuals Stan Efferding and Stanley Johnson are not  
26 proper parties in this proceeding. *See Answer*, Fourth Affirmative Defense.

1 (“Defendants appealed the judgments awarding SAIF damages on its claims for money had and  
2 received”); *Comcast of Or. II, Inc. v. City of Eugene*, 211 Ore. App. 573, 578-9, 155 P.3d 99;  
3 2007 (“in a separate claim for money had and received, [plaintiff] sought damages in the amount  
4 that the city allegedly overcharged for permits.”); *Zehr v. Haugen*, 318 Or. 647, 658, 817 P.2d  
5 1006 (1994) (“As we did in relation to plaintiffs' negligence claim, we examine established  
6 principles relating to the recovery of damages for breach of contract, in order to determine  
7 whether plaintiffs' allegations in this case are of a kind that may be pleaded in a contract  
8 action.”).

9 Complainant cites to no authority that would confer upon the Commission the jurisdiction  
10 to enter a Money Award for damages under a theory of money had and received or breach of  
11 contract. The statutes and cases cited by complainant in its Response support either personal  
12 jurisdiction or standing, they do not confer subject matter jurisdiction on the Commission.

13 ORS 756.040(1) provides that “the Commission shall represent the customers of any  
14 public utility or telecommunications utility...” This statute provides that the Commission can  
15 act as a party on behalf of utility customers, not that it has jurisdiction to adjudicate claims.

16 ORS 756.040(2) provides that “the Commission is vested with the power and jurisdiction  
17 to supervise and regulate every public utility and telecommunications utility in this state,...”  
18 This provision confers jurisdiction over a party such as defendant VCI Company, but does not  
19 confer jurisdiction over a subject.

20 ORS 756.062 is the general grant of authority to the Commission to adopt rules and  
21 regulations, however, an agency cannot expand its subject matter jurisdiction by rule or  
22 regulation. Jurisdiction is something granted only by the legislature. *See e.g., Kokkonen*, 511  
23 U.S. at 377.

24 Finally, ORS 756.070 and ORS 756.075 relate to the Commission’s authority to  
25 investigate and oversee public utilities. This again relates to the Commission being the proper  
26 party to bring the claim, not the proper forum to adjudicate the claim. The authority to

1 investigate and prosecute is separate and distinct from the authority to adjudicate. For example,  
2 the district attorney of any county has the authority to investigate and prosecute crimes, however,  
3 they do not also act as the judge. ORS 8.660. As specifically noted in defendant's initial brief,  
4 there is no prohibition on the Commission bringing a breach of contract or money had and  
5 received claim against defendant VCI Company in a court of proper jurisdiction.

6 Complainant also attempts to distinguish the cases cited by defendants, *McPherson v.*  
7 *Pacific Power & Light Company*, 207 Or. 433, 296 P.2d 232 (1956) and *Oregon-Wash. R. & N.*  
8 *Co. v. McColloch*, 153 Or. 32, 56 P.2d 1133 (1936) by pointing out that the complainant in those  
9 cases were private utility customers seeking the return of overpayments to public utilities. The  
10 remedy sought in those cases, however, was the same as the present case; that is, the return of  
11 money allegedly overpaid to a regulated utility. Further, complainant does not explain how the  
12 statutory authorities granting adjudicative jurisdiction to the Commission differs depending on  
13 who is making the claim. The cited cases and the prior orders of the Commission denying  
14 subject matter jurisdiction have focused on the nature of the claim, not the nature of the  
15 complainant. The distinguishing characteristic addressed by the Oregon Supreme Court in  
16 determining subject matter jurisdiction in the previous cases was whether the claim invoked the  
17 authority of the Commission to regulate just and reasonable rates or whether the claim case  
18 merely involved a claim for the overpayment of unchallenged rates. The Court and the  
19 Commission have consistently held that when a dispute seeks money and does not contest  
20 matters within the regulatory discretion of the Commission (*i.e.*, whether a rate is just and  
21 reasonable) than the Commission is without jurisdiction and the action should be brought in  
22 court.

23 If anything, the collection action by the complainant in the present case implicates the  
24 Commission's regulatory discretion to an even lesser degree than the circumstances in  
25 *McPherson* and *Oregon-Wash. R. & N. Co.* The claims in those cases were based on the alleged  
26 overpayment calculated upon the divergence from a Commission approved "filed rate." In the

1 present case, however, the claim is based on what appears to be an issue of accounting, and does  
2 not touch upon in anyway a rate approved by the Commission or the Commission's rate making  
3 authority.

4 More significantly, complainant does not explain why there should be jurisdiction in the  
5 present case, and upon which statute, and why that statutory grant of jurisdiction does not apply  
6 equally to the facts in the *McPherson* and *Oregon-Wash. R. & N. Co* cases. For example, if  
7 ORS 756.040(1), which mandates that the Commission represent "customers" interests, granted  
8 the Commission jurisdiction to adjudicate the claims in the present case and brought by the  
9 Commission itself, why does that same statutory provision (or its earlier equivalent) not provide  
10 for jurisdiction in *McPherson* and *Oregon-Wash. R. & N. Co*, where the claims were specifically  
11 brought by customers of regulated public utilities?

12 For a statute to confer subject matter jurisdiction upon the Commission, the jurisdiction  
13 must "affirmatively appear from the law creating [its] office and defining [its] powers." *Oregon*  
14 *-Wash. R. & N. Co.*, 153 Or. at 46. The statutes cited by complainant in its Response fail to  
15 affirmatively create jurisdiction over the subject matter of the present case in the same manner  
16 that those same statutes failed to provide for jurisdiction in the numerous prior decisions of the  
17 Oregon Supreme Court and the Commission where there was found to be no jurisdiction to  
18 award money damages.

19 Additionally, in support of a finding of jurisdiction, the complainant cites to a handful of  
20 collection actions brought by the Commission, before the Commission, to collect damages of  
21 between \$27-50 for the failure to return TDAP equipment. It does not appear, however, that  
22 jurisdiction was ever challenged in any of those cases -- or that any of the defendants even  
23 bothered to appear to defend against the complaints. *See PUC v. Stanton*, TT 50, Order No. 01-  
24 146 (Feb. 1, 2001)(\$27 default order); *PUC v. Starrett*, TT 51, Order No. 01-148 (Feb. 1,  
25 2001)(\$37 default order); *PUC v. Pate*, TT 45 , Order No. 01-127 (Jan. 25, 2001)(\$50 default  
26 order). It would not appear to even make economic sense to challenge the Commission on these


1 claims since the amount sought is significantly less than even the filing fee in the Court of  
2 Appeals (currently \$212).

3 What these cases do tell us is that they are the only cases complainant could site in  
4 support of its claim for jurisdiction. The Commission has been in existence in one form or  
5 another for well over a hundred years. Yet, complainant cannot cite to one similar case where  
6 jurisdiction has been challenged and upheld; whereas there are numerous cases to the contrary.  
7 Under these circumstances, and especially in light of complainant's burden to establish  
8 jurisdiction, the Commission should find jurisdiction lacking in this case as well.

9 Finally, complainant cites to no policy consideration as to why the Commission should  
10 choose this case to seek to expand its jurisdiction. As noted in defendant's initial brief, the  
11 present case involves the Commission acting as both the adjudicator and the prosecutor in a case  
12 that has no ramifications on the determination of just and reasonable rates. If anything, the  
13 present case is even more compelling than the cases of *McPherson* and *Oregon-Wash. R. & N.*  
14 *Co.* in its failure to invoke the traditional regulatory responsibilities of the Commission.  
15 Therefore, even if an argument could be made for the existence of jurisdiction, the Commission  
16 should decline to do so in a case where it is also acting as a party.

17 Dated this 21<sup>st</sup> day of November, 2007.

18 SCHWABE, WILLIAMSON & WYATT, P.C.

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24 Of Attorneys for VCI COMPANY f/k/a  
25 STAN EFFERDING and STANLEY  
26 JOHNSON d/b/a VILAIRE, and VCI  
COMPANY, a Washington corporation

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 21<sup>st</sup> day of November 2007, I served the foregoing  
3 DEFENDANTS' REPLY IN SUPPORT OF MOTION TO VACATE DEFAULT ORDER AND  
4 DISMISS CLAIM on the following party at the following address:

5 David B. Hatton  
6 Assistant Attorney General  
7 1162 Court Street NE  
8 Salem, OR 97301-4096  
9 David.Hatton@state.or.us

10 by electronic filing and emailing to him a true and correct copy thereof, certified by me as such,  
11 placed in a sealed envelope addressed to him at the address set forth above, and deposited in the  
12 U.S. Post Office at Portland, Oregon, on said day with postage prepaid.

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15 William J. Ohle  
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