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March 29, 2007

File No

Public Utility Commission of Oregon  
Attn. Filing Center  
P.O. Box 2148  
Salem, OR 97308-2148

Re: Rice Hill Water District  
Docket No. WJ9  
Order No. 06-675

Attention Filing Center:

Enclosed for filing in the above-captioned docket is one original and one copy of the *RHOA's Reply to PUC Staff's Responding Memorandum to Application for Reconsideration, Rehearing and Withdrawal of Order No. 06-675*. This document was filed electronically on March , 2007. (See attached confirmation email.)

Please return a file stamped copy in the self addressed envelope provided. Thank you for your assistance.

Sincerely,

John A. Hudson  
Attorney at Law, LLC

JAH:jp

Encl: original and one copy of the *RHOA's Reply to PUC Staff's Responding Memorandum to Application for Reconsideration, Rehearing and Withdrawal of Order No. 06-675*

Copy: Service List  
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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

WJ9

In the Matter of

RICE HILL WATER DISTRICT

Assertion of Jurisdiction pursuant to  
ORS 757.

RHOA'S REPLY TO PUC STAFF'S  
RESPONDING MEMORANDUM  
TO APPLICATION FOR  
RECONSIDERATION,  
REHEARING AND WITHDRAWAL  
OF  
ORDER NO. 06-675

**1. INTRODUCTION**

The Rice Hill Owner's Association, Inc., ("RHOA") through its President, Ellis E. Emory<sup>1</sup>, filed its *Application for Reconsideration, Rehearing and Withdrawal of Order No. 06-675 Re: Rice Hill Water District* herein on February 20, 2007. RHOA therein requests the Oregon Public Utility Commission ("PUC") to reconsider and withdraw its Order No. 06-675, WJ9 ("Order"), and if necessary, allow an evidentiary hearing for evidence and submission of legal arguments by the interested parties on the appropriateness of a jurisdictional order vis-a-vis RHOA and other interested parties.

The Staff ("Staff") of the Oregon Public Utility Commission ("PUC") has filed its *Staff's Reply to Application for Reconsideration, Rehearing and Withdrawal of Order No. 06-675 ("Staff Memo")* in response to the application of RHOA for reconsideration, withdrawal and an evidentiary hearing.

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<sup>1</sup>To the extent that PUC Order No. 06-675 is intended to effect Ellis E. Emory individually as President of the Rice Hill Owner's Association, Inc., he joins in this application, individually.

The purpose of this memorandum is to briefly respond the *Staff Memo*, to encourage the PUC to withdraw its Order pending an evidentiary hearing, appropriate factual determinations and to focus on the matters and procedure which RHOA submits should be followed.

**2. NO HEARING, NO OPPORTUNITY TO SUBMIT EVIDENCE, AND NO OPPORTUNITY TO BE HEARD ON THE “RICE HILL WATER DISTRICT.”**

The *Staff Memo* rightly concludes with its recommendation:

“ \* \* \* Staff also understands the importance of a complete record. Because of the nature of this proceeding, *there has not been a hearing and Staff did not have all the information that has since been provided.* Therefore, Staff does not oppose the Application [of RHOA] to the extent that it requests reconsideration and rehearing for the purpose of seeking to offer new evidence for the record.” *Staff Memo*, p.8, lines 17-21. (*Italics provided.*)

The *Staff Memo* concludes that the PUC “may desire to establish an evidentiary process to add this new information to the record.” *Staff Memo*, p.8, lines 17-21. RHOA submits that if there is to be any meaningful order of jurisdiction, an evidentiary hearing is essential.

**3. ACTION RECOMMENDED BY PUC STAFF**

It is apparent from the *Staff Memo* that the jurisdictional Order of the PUC was submitted to the PUC without an appropriate and thorough determination of a complex factual and legal issues necessary to underpin such an order. The December 19, 2006 Order is so flawed that it should be withdrawn and an evidentiary hearing should be convened where RHOA can submit additional evidence and have an opportunity to have its positions and supporting arguments fairly considered. Then if an jurisdictional order is appropriate, the PUC will then have all of the relevant information for such a properly limited order.

**4. PROCEDURAL MATTERS.**

The following are some of the procedural matters which RHOA urges the PUC to and to allow RHOA to submit more complete evidence on these jurisdictional and other issues.

**a. Failure to Define or Identify the “Rice Hill Water District” to which the Order Applies.** The Order of the PUC is defective from its inception as the Rice Hill Water District (RHWD) (the “public utility”<sup>2</sup> and “water utility”<sup>3</sup> to which it applies and over which it asserts regulative) is not a legal or identified entity and is nowhere defined in the Order.

Before there can be a valid order, there needs to be a definition which describes the “public utility” and the “water system” to which it applies and the entity or entities are included and excluded. While the *Staff Memo* correctly notes that there need not be a corporate or assumed business name, yet, if there is none, then there needs to be a description of the system, customers, parties to which it does apply, and properties (geographic area) which are within the pale of the Order.

Any jurisdictional order issued should define the Rice Hill Water District as follows: “Rice Hill Water District” means the system of waterlines, equipment, and easements which begin at the point where water is received from the RHOA water main [location to be specifically defined] for delivery of water to the ‘Webb’ properties located on the westside of Interstate Highway 5, more fully described in [attach legal description].”

**b. No Hearing / Staff’s Failure to Fairly Investigate.** In order for the PUC to properly perform its statutory mandates it must do so in manner which complies with fundamental fairness and procedural Due Process of Law. It is a fundamental tenement of the

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ORS 757.005(A).

Due Process of Law clause of the Fourteenth Amendment, Sect. 1, U.S. Constitution, that parties directly affected by an administrative order must be afforded fairness through a modicum of procedural due process of law, i.e., the right to notice, the opportunity to be heard, and the right to present evidence and arguments. The procedure must also be fair and impartial.

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c. The *Staff Memo* acknowledges that there was no hearing to make a determination of any of the facts to support the jurisdictional Order.<sup>4</sup> Rather, the PUC's Order "was based upon [the] Staff's investigation *and receipt of evidence.*"<sup>5</sup> (*Italics added.*)

Although the Staff communicated freely with only one source, Daniel M. Webb, the admitted owner of the RHWD water system, the Staff never communicated with RHOA or its President, Ellis Emory. The Staff knew that Webb operated and accounted for the RHWD water system which supplied water to the purchasers of the parcels of land which Webb subdivided and sold to those who petitioned the PUC. See generally *Staff Memo*, p. 2, line 8, through RHOA

The *Staff Memo* further reveals that its investigation found no entity, public or private exists under the name of the Rice Hill Water District ("RHWD"). From informal

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<sup>3</sup>

ORS 757.061.

<sup>4</sup>

*Staff Memo*, p. 1, line 24.

<sup>5</sup>

It is apparent that the "receipt of evidence" can only mean whatever the Staff gathered orally or assumed, as there was no hearing or opportunity for interested persons, and certainly not RHOA or Mr. Emory, were never contacted by the Staff prior to December 21, 2006 when the Order was mailed to Mr. Emory. *Staff Memo*, p. 25.

communications the Staff says that it learned that Daniel M. Webb was the purported owner of RHWD. The Staff says Webb told the Staff that “he and Ellis E. Emory (Mr. Emory) were owners of *the water system*. Mr. Webb did not distinguish between the two systems, but inferred the systems were owned by both him and Mr. Emory.”<sup>6</sup>

However, it is apparent that the Staff, after having learned that Mr. Webb claimed Mr. Emory was an owner, made a conscious decision *not* to talk with Mr. Emory, but instead to accept Mr. Webb’s representations at face value even though it knew from Mr. Webb’s attorney, John Fisher, that there was long conflict surrounding this alleged water system:

“Mr. Fisher explained to [the] Staff that Mr. Webb and Mr. Emory had **a long history of conflict, including issues surrounding the water system**. Mr. Fisher explained to [the] Staff that there was a series of documents that outline control of the water system.” *Staff Memo*, p.2, lines 14-15. (Bold added.)

Although alerted to differences between two alleged owners, the Staff failed to contact the other alleged owner, Mr. Emory, even though told there was “a long history of conflict, **including issues surrounding the water system**.” *Id.* The Staff also apparently failed to ask for or examine the “series of documents that outline control of the water system.”

“However, Mr. Fisher explained that the two entities [what two entities?] who own rights to *the system* are unincorporated individuals and that the rights to the water arise from various Declarations of Covenants and Restrictions of three associations including the Rice Hill West Subdivision (West Subdivision), Addition [to] the Rice Hill West Subdivision (Addition), and the Truck Stop Property.” *Staff Memo*, p. 2, lines 15-19.

(In fact, RHOA is an incorporated, not for profit corporation, duly registered with the Oregon Corporation Commission, “Mutual Benefit with members,” Oregon Registry No. 128698-89 and files annual income tax returns.)

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<sup>6</sup> Perhaps it would also be accurate to say that the Staff assumed such without any further to investigate or verify this – not even the least effort was made to contact Mr. Emory, who the Staff well knew was

Without pausing the *Staff Memo* then informs us that the Staff learned that there were not one, but *three separate water systems*:

“After additional inquiries, [the] Staff was informed by Mr. Webb that water was delivered to the Truck Stop Property [not defined] by the system controlled by Mr. Emory, water was delivered to the West Subdivision by the system controlled jointly by Mr. Webb and Mr. Emory, and water was delivered to the Addition by the system controlled by Mr. Webb.” *Staff Memo*, p. 2, lines 20-23. (Underline added.)

Notwithstanding ample evidence to put the Staff on notice of a complex set of facts and the need for further inquiry and a complete investigation, the PUC’s Staff, submitted an Order to the PUC claiming jurisdiction of an unidentified and undefined entity or association dubbed “Rice Hill Water District.”

Only after the December 19, 2006, jurisdictional Order was entered was it served on Mr. Emory, who first learned of the issues, having had no prior contact by PUC Staff.

Whatever the reason for failure to contact Mr. Emory or the RHOA, the Staff now admits:

“Customers and Staff were not aware of all the complexities concerning the relationship with, contributions to, and interactions of Mr. Webb and Mr. Emory. In researching the status of RHWD, Staff made its determination based on information provided by customers and Mr. Webb, who still owned part of the system. [footnote omitted].”

Notwithstanding the ample notice of complexities and other entities involved, the Staff made no effort to communicate with RHOA President, Ellis Emory, or to gain a full understanding of the entities and water systems involved and their operational structure: physical, functional and financial. Such failure to inquire was either neglect, hegemony, or some undisclosed bias. While Staff’s admission of these complexities is belated and unexplained, it is in the right direction, and a fair hearing for receipt of evidence needs to be

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two purported “owners.”

allowed to present evidence, discussion and legal authority on these admittedly complex issues needs to be allowed. Comments on other specific issues follow.

**5. FACTUAL AND LEGAL MATTERS TO BE CONSIDERED.**

The following is a summary of some of the more significant matters which need to be considered.

**a. Emory Not Party.** Mr. Emory is not and need not be a party, personally, to these proceedings. His presence is needed only as President of the RHOA, which owns and operates a water and sewer system for other commercial properties. The PUC Order should be clarified accordingly.

**b. RHOA a Separate Water System.** The RHOA and the Rice Hill West Subdivision (West Subdivision) and the Rice Hill West Subdivision Addition (Addition) must be distinguished from the RHOA's water system for the eastside (Truck Stop Property). The basis is both logical, practical, and necessary to reduce the "complexity" which the PUC Staff Memo expressly recognizes. The apparent hegemony of the Staff which appears intent to force three separate operating entities into a single "public utility" is the same sort of disregard for existing circumstances which led on a larger scale to the imbroglio of present day Iraq. The practical and operational realities need to be explained and fully considered.

RHOA is a separate and distinct water supply system from the water system which supplies water to Webb (the WSO) and petitioners, and there is no need or reason to confuse the RHOA water system with the RHWD water system which supplies water to the Webb properties and the Westside property owners and which is maintained as a distinct entity with its own accounting.



As noted above, the *Staff Memo* acknowledges that it was informed that there are at least *three separate water systems and three separate entities involved*. *Staff Memo*, p. 2, lines 20-23. These entities and water systems are practically, operationally and physically segregated,<sup>7</sup> and there is no good reason why they should not continue as such, *even assuming for the sake of argument that they could be lumped together*.

**c. RHOA is Not a “Public Utility” under ORS 757.005(1)(a)(A).** RHOA is not a “public utility” as it does not supply water to the public as set forth in ORS 757.005(1)(a)(A). The *Staff Memo* states that “RHOA is supplying water to the public and is subject to the Commission’s jurisdiction. However, the petitioners are not members of the “public,” and if they have rights at all, it is because of ownership of specific lands, i.e., covenants which run with the land. These are not members of the public at large.

**d. RHOA is Not a “Public Utility” as It Is Excepted under ORS 757.005 (1)(b)(B).** The *Staff Memo* expressly recognizes that its own research shows that there is no other “municipal or public utility plant” for the Rice Hill properties involved, that RHOA is an “industrial concern” which supplies water to the industrial concern “without profit to itself” to the “inhabitants” of this unincorporated area. Therefore, RHOA is exempt from the definition of “public utility.” *Staff Memo*, p. 2, lines 1-7.

Even if RHOA is or would otherwise be a “public utility” as under ORS 757.005(1)(a)(A), it is excluded pursuant to ORS 757.005(1)(b)(B) as “. . . any industrial concern by reason of the fact that it furnishes, without profit to itself, . . . water . . . to the inhabitants of any locality where there is no municipal or public utility plant to furnish the

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Only the source of water is in common.

same.” To date RHOA has charged none of the petitioners or Mr. Webb anything for any water received by them through Mr. Webb.

**e. RHOA, if a “Public Utility” is Exempt from PUC Regulation under ORS 757.061.** The fees charged to the Petitioners (owners of West Subdivision and Addition properties) are by the petitioners’ own separate Homeowners’ Association, not by RHOA or Emory. RHOA receives none of these fees, has no control over the billings, and makes no determination as to what is charged. To the extent that these fees are used for any water system, it is for the Westside Water System (WWS) which is sole owned and operated by Daniel Webb, not the RHOA.

Therefore, even if RHOA is a “public utility,” it is exempt from PUC regulation as a “water utility” under ORS 757.061 as it serves fewer than 500 customers and is not otherwise subject to regulation under other subsections of ORS 757.061, notably under ORS 757.061(5) as it does not and has not charged fees to Webb or the Westside property owners, who have their own separate Homeowner Association, and either they, themselves, or Webb determine the fees charged, all of which have been paid to Webb for the Westside Water System (aka Rice Hill Water District) still owned and operated by Daniel Webb.

The Staff’s Memo readily admits that it is the Petitioners (Westside property owners), or Mr. Webb who through their own Homeowners’ Association assess charges, none of which are paid to RHOA or used for maintenance of its water system.<sup>8</sup>

## **6. CONCLUSION**

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(*Staff Memo*, p. 3, lines 18-19 “customers who petitioned the Commission received bills from [actually, their own Homeowners Association] and made payments to RHWD”; p. 4, line 1-2 “petitioners . . .

A hearing needs to be held where evidence and facts can be fairly reported, sorted and considered. Practically, there is no need or reason to make this situation complex by a mistaken effort to lump apples and oranges together into one basket when each system has maintained its own financial records, assessments to its “customers” and is recognized by three other Oregon and Douglas County entities (Oregon Public Health Department, Drinking Water Program (DWP), the Oregon Dept. of Human Services (DHS), and the Douglas County Environmental Health and Social Services (DCEHSS), and the Douglas County Planning Department (DCPD).

The PUC *Staff Memo* tries to sum up its position by paraphrasing “In this case, all the Commission has to do is “follow the water.” (PUC Staff Memo, p. 8, line 9). This is an erroneous and misguided effort to misquote the infamous Watergate “Deep Throat” who exhorted Washington Post reporters Woodward and Bernstein to “Follow the money.” If the PUC followed that original admonition to “Follow the money,” it leads to Daniel Webb the owner and exclusive controller of the segregated Westside Water System (known as the Rice Hill Water District), not to the RHOA which charges nothing and receives nothing from the Petitioners.

Respectfully submitted this 27<sup>th</sup> day of March, 2007.

The Rice Hill Owners Association, Inc.

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and billing information from an accountant contracted by Mr. Webb”; p. 6, lines 3-4 “paying the RHWD [their Owners Association] for monthly water charges”; p.6, line 17 “RHOA did not charge Mr. Webb for water service”.

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CERTIFICATE OF SERVICE

I, John A. Hudson, hereby certify that I am the attorney for Ellis E. Emory, President of the Rice Hill Owner's Association, Inc. herein; that I served the within *RHOA'S REPLY TO PUC STAFF'S RESPONDING MEMORANDUM TO APPLICATION FOR RECONSIDERATION, REHEARING AND WITHDRAWAL OF ORDER NO. 06-675* on March \_\_\_\_, 2007, by placing a duly certified copy thereof in a sealed envelope plainly addressed as follows:

(SEE ATTACHED SERVICE LIST)

- postage prepaid and deposited in the United States Post Office at Eugene, Oregon and
- by e-filing a true copy to the email address listed on the PUC website filing center: PUC.FilingCenter@state.or.us only.

JOHN A. HUDSON, OSB #74149  
of John A. Hudson Attorney at Law, LLC  
Attorney for Ellis E. Emory, President  
RHOA

\* \* \* \* \*

I, John A. Hudson, attorney for Ellis E. Emory, President of the Rice Hill Owner's Association, Inc., do hereby certify that the foregoing is a true copy.

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