

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

UM 1248

ROATS WATER SYSTEM, INC., an active)
Oregon business corporation,)
Complainant,)
vs.)
GOLFSIDE INVESTMENTS, LLC, an active)
Oregon limited liability company,)
Defendant.)

COMPLAINANT ROATS WATER
SYSTEM, INC.'S OPENING BRIEF

1. THE PARTIES

ROATS WATER SYSTEM, INC. (“Roats”), located in Bend, Oregon, is regulated by the Public Utility Commission. GOLFSIDE INVESTMENTS, LLC, (hereinafter “Golfside”), which is the successor-in-interest to 523, LLC, (hereinafter “523”), is developing property located at 61055 Parrell Road in Bend.

2. THE AGREEMENT

On or about January 31, 2000, Roats entered into a Water Service Agreement (hereinafter “Agreement”) with 523, a copy of which is attached to Roat’s Complaint as “**Exhibit A**”. In the Agreement, Roats agreed to provide water services to 523 and 523 agreed to pay hook-up charges pursuant to a schedule of fees which identified different rates for different types of developments in accordance with the tariff structure required of Roats by the Public Utilities Commission.

3. THE CHANGE FROM A MANUFACTURED HOME PARK TO A PUD

The property subject to the Water Service Agreement was originally one tax lot permitted and developed by 523 as a manufactured home park. On or about December 18, 2003, the owner of the property recorded a Subdivision Plat which created a 94 tax lot residential subdivision on the property.

1 The replat, which was approved by the City of Bend pursuant to its Zoning Ordinance
2 and Land Division Ordinance, allows Golfside to build stick-built homes on the property which
3 was previously limited only to manufactured dwellings.

4 4. THE APPLICABLE TARIFF

5 Pursuant to the Water Service Agreement between the Roats and 523, the owner of the
6 property is responsible for paying residential development charges in conformance with the
7 Oregon Public Utility Commission Tariff Rules and Regulations. These charges are listed on
8 the Company's Schedule 5, and explained in the Company's Rule 9a, which was approved by
9 the Commission in Commission Order No. 05-811 (UW 107), dated June 24, 2005. The
10 residential development charge and rule (originally recorded as Rule 6a) were previously filed
11 with the Commission in December 1999. A copy of a letter from Marc Hellman,
12 Administrator, Economic Research and Financial Analysis with the PUC dated June 27, 2005,
13 and the approved Naming Rates For Roats Water System, Inc., is attached to Roat's Complaint
14 as "**Exhibit C**".

15 The Agreement signed by 523 LLC, on page 3 of 3, lists the Residential/Multi-
16 Residential Development Charge and states:

17 "As per OPUC tariff rules & regulations schedule No. 5 and rule
18 6a."

19 The applicable tariff provides for the following residential development charges:

20 Lots less than 4,000 square feet:	\$ 975.00
21 Lots of at least 4,000 but less than 6,000 square feet:	\$1,375.00
22 Lots of at least 6,000 but less than 9,999 square feet:	\$1,975.00

23 Golfside's subdivision consists of 13 lots less than 4,000 square feet; 71 lots of at least
24 4,000 square feet but less than 6,000 square feet; and 10 lots of at least 6,000 square feet but
25 less than 9,999 square feet. The total PUC tariff for this development is \$130,050.00.

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1 As part of its existing tariffs, Roats has an approved rule (Rule 9a) that addresses the
2 residential/multi-residential charge. The rule states in part:

3 “The residential development charge is assessed (based on the lot
4 size) on any lot or lots for which a permanent new water service
5 is established to serve one or more residential dwellings. The
6 residential development charge is assessed in addition to the
7 meter set charge.

8 A residential development located on a single tax lot for which a
9 metered water service is established to serve multiple residences,
10 shall (in lieu of the charge based on lot size) be assessed a
11 residential development charge based on the size of the master
12 water meter required to serve the development (including all area
13 to be served in future phases of the development).

14 Subsequent to setting the meter(s) or master meter and payment
15 of fees, if lots within the development become separately
16 identified tax lots, the developer(s) of the separately identified tax
17 lots will then be assessed an additional charge equal to the greater
18 of (a) or (b), and reduced by (c); where (a) is a residential
19 development charge (based on each individual new lot size), (b)
20 is the master meter set charge, and (c) is the fee previously paid
21 to set the master meter for this development. In the event that
22 this calculation produces a number less than zero, no refund will
23 be given, and the amount of the fee shall be zero.”

24 Payment of the residential charge is recorded as contributions in aid of construction
25 (CIAC). CIAC is a liability to Roats that reduces rate base. Pursuant to Oregon Administrative
26 Rule (OAR) 860-036-0756, CIAC and its resulting depreciation is excluded from water utility
ratemaking. As such, when the Company receives payment for the residential development
charge, Roats records a reduction to rate base. This will have the effect of reduced revenue
requirement because Roat’s rate base is lower than it would have been without the CIAC.
Additionally, cash received for the payments increases Roat’s cash flow, which in turn, allows
Roats an increased opportunity to invest in future plant improvements.

Pursuant to ORS 757.225, Roats is obligated to collect the residential development
charge since it is recorded in a Commission approved rate schedule. ORS 757.225 states:

1 “No public utility shall charge, demand, collect or receive a
2 greater or less compensation for any service performed by it
3 within the state, or for any service in connection therewith, than
4 is specified in printed rate schedules as may at the time be in
5 force, or demand, collect or receive any rate not specified in such
6 schedule. The rates named therein are the lawful rates until they
7 are changed as provided in ORS 757.210 to 757.220.”

8 The total amount Roats believes is owed by Golfside is \$130,050.00 for residential
9 development charges pursuant to the Water Service Agreement and the applicable tariffs.
10 Golfside has refused to pay the development charges specified in the tariffs, nor any part
11 thereof. Roats requests an order confirming that Golfside must pay the applicable PUC tariff.

12 5. RESPONSES TO GOLFSIDE’S AFFIRMATIVE DEFENSES

13 1. Jurisdiction.

14 Golfside relies on ORS 756.500(1) arguing that the PUC lacks personal jurisdiction
15 over Golfside and/or lacks subject matter jurisdiction over Roat’s Complaint “because Golfside
16 is not regulated.” Golfside furtherer relies on *Coalition for Safe Power v. Oregon Public*
17 *Utility Com’n*, 325 Or. 447, 939 P.2d 1167, 1170 (1997) when it argues that “[T]here is no
18 authority to file a PUC complaint against an unregulated person or entity. Defendant’s reliance
19 on the first section of the identified statute fails to take into consideration Section 5 of that
20 statute. ORS 756.500(5) states as follows:

21 “Notwithstanding (1) of this Section, any public utility or telecommunications
22 utility may make complaint as to any matter affecting its own rates or service
23 with like effect as though made by any other person, by filing an application,
24 petition or complaint with the Commission.”

25 The PUC has both personal jurisdiction over Golfside and subject matter jurisdiction over
26 Roats’ Complaint. Golfside’s argument fails to consider Section 5 of the applicable statute.

27 2. System Development Charges (ORS 92.845)

28 Concerning the hook up charges, Golfside’s reliance on ORS 92.845 is misplaced. That
29 statute is intended to create a mechanism for owners of manufactured dwellings in existing
30 manufactured dwelling parks and mobile home parks to acquire individual ownership interests

1 in the lot on which the dwelling is located. When Golfside Investments applied for a tentative
2 plan for replat of Golfside Manufactured Home Park Subdivision, Phases I and II, and a
3 conditional use permit for a planned unit development, it did not rely upon ORS 92.830 to
4 92.845. Rather, the PUD was created and approved pursuant to City of Bend Zoning
5 Ordinance and Land Division Ordinance.

6 Golfside could not have relied upon ORS 92.830 to 92.845 because that statute is
7 intended for and requires protection of manufactured homes, not stick-built homes. Golfside
8 chose this option to enable it to build stick built homes on its property. To take advantage of
9 the statute, Golfside would have to restrict the use of the lots in the subdivision to the
10 installation of manufactured dwellings only. ORS 92.835 states:

11 “restricts the use of lots in the subdivision to the installation of manufactured
12 dwellings and restricts any other property in the subdivision to use as common
13 property as defined in ORS 94.550 or for public purposes; . . .”.

14 Since the development was not submitted or approved in conformance with this statute, it
15 cannot receive benefit from it.

16 The legislative history and public policy also supports Roats understanding of the rules.
17 ORS 92.830 to 92.845 certainly is not intended to allow a developer to obtain manufactured
18 dwelling exemptions when it builds and markets stick-built homes. Golfside has thus far not
19 responded to this criticism of its interpretation. Under its theory, Golfside or any other
20 developer in Oregon can avoid statutorily required charges simply by initially promising one
21 type of development and then changing to another.

22 Golfside has argued that this matter was not appropriate for a Commission Declaration
23 as originally requested by Roats because factual disagreements exist as to the actions of the
24 City of Bend. There are no factual disagreements as to the City of Bend decisions and process,
25 only disagreement concerning the meaning and effect of the City’s actions. That the City of
26 Bend may have allowed some permitting concessions to Golfside for their own purposes has no

1 effect on whether Golfside’s PUD is subject to the charges that are being assessed by Roats in
2 accordance with its tariff and its contractual agreement with Golfside.

3 3. Master Meter (Rule 6A)

4 Golfside argues that Roats “cannot recover under Rule 6a because that rule requires the
5 setting of a master meter as a prerequisite to recovering residential development charges”.

6 Golfside’s interpretation of the language of the statute is taken out of context. The language is
7 not intended to require the setting of a master meter, especially in this case where Golfside
8 itself chose not to use a master meter.

9 4. Statute of Limitations (ORS 12.080 & ORS 12.100)

10 Roats submitted its bill pursuant to the applicable tariffs in 2005 immediately after it
11 learned that the Golfside had converted the development from a single tax lot manufactured
12 home park to a planned unit development with 94 separate tax lots. Most of those tax lots had
13 not and have not been sited with a manufactured or mobile home. They were and are vacant
14 lots on which Golfside is now building stick-built homes. Roats cause of action did not accrue
15 until 2005 when it became aware of the change. Even if it can be argued that the cause of
16 action arose in 2003 when the actual change was made, the six year contract statute of
17 limitations applies and the claim was timely filed. Although the original contract was signed
18 in 1999, the statute of limitations does not begin to run until such time as the cause of action
19 has accrued. ORS 12.010. Roats cause of action accrued when Golfside’s breach occurred.
20 The claims were filed within the applicable statute of limitations.

21 5. Laches

22 Roats reminded Golfside of the tariff charges Golfside previously agreed to pay
23 immediately after learning of Golfside’s attempt to circumvent them. There was no delay and
24 no reasonable way for Roats to be aware that Golfside would seek to circumvent the tariffs.
25 Roats had no previous notice from Golfside or the City of Bend. The claim was timely filed.

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1 6. Justness and Reasonableness of Charge (ORS 757.020)

2 The tariffs are not set by Roats. The tariffs are set by rule to offset infrastructure costs.
3 The tariff amounts do not have to be used for the particular project for which the tariff applies.
4 In any event, Golfside agreed to pay the charges.

5 7. Privity of Contract

6 The tariffs are applicable to the owner of the property, regardless of who owns or
7 owned the development. The current owner (which is a related entity to the original owner) is
8 responsible for contracts his predecessor entered into with respect to the services provided on
9 the property including hook-up charges. Golfside cannot avoid its obligations simply by
10 changing its name or transferring ownership to a related entity. Even if the current entity is not
11 related to the original, the owner of the property is responsible for the PUC required tariffs.

12 8. Estoppel

13 Roats did nothing to suggest that it would agree that Golfside could avoid the tariffs by
14 starting out as a manufactured home park and then changing into a planned unit stick built
15 home development. Roats is simply enforcing the PUC tariffs. Golfside specifically agreed to
16 be bound by those tariffs including the tariffs applicable to individual planned unit
17 development lots. Pursuant to its obligations under the PUC tariffs, Roats agreed to nothing
18 less and nothing more.

19 9. Ripeness

20 Golfside's claim that Roats charges are not ripe since the City's system development
21 charges are not due until building permits have issued lacks merit. Roats is not seeking to
22 compel payment of City of Bend system development charges. Rather, it seeks to compel
23 payment of its tariff amounts which do not require the issuance of building permits.

24 10. Consideration

25 Roats agreed to provide hook-ups and Golfside agreed to pay the mandated tariff
26 amounts so it could proceed with its project. Even if it wanted to, Roats is not authorized to

1 choose which tariff amount applies. Golfside agreed to pay the hook-up amount Roats is
2 required to charge under the tariff depending on how Golfside develops the land. The
3 agreement included sufficient consideration.

4 6. CONCLUSION

5 Pursuant to the applicable PUC rules which cannot be bypassed by agreement or
6 otherwise and the contractual agreement between the parties, Golfside cannot amend its
7 development plan without making another tariff apply. Golfside has a duty of good faith and
8 fair dealing concerning the contract it entered into with Roats. Attempting to avoid the PUC
9 required tariffs by claiming their inapplicability based on protection of individual owners of
10 manufactured home lots when there are none while at the same time building and selling
11 individual lot stick built homes violates that duty of good faith and fair dealing required under
12 Oregon law. Roats respectfully requests an order requiring Golfside Investments to pay to
13 Roats the amounts identified in the tariffs for the hook-up charges for each newly platted lot
14 and for Roat's costs and disbursements incurred herein.

15 DATED THIS ____ day of October 2006.

16 BRYANT, LOVLIE & JARVIS,

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18 MARK G. REINECKE, OSB 91407
19 Of Attorneys for Roats Water Systems
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