

1 **DISCUSSION**

2 1. Oregon Revised Statute (“ORS”) applies by its plain terms.

3 As discussed in Staff’s Trial Brief and not rebutted by the Company, ORS 757.063
4 applies to this situation. ORS 757.063 provides that “any association . . . is subject to regulation
5 . . . if 20 percent or more of the members of association file a petition. . . .” See Staff Trial Brief
6 at 2-4. Indeed, the Company has never asserted that the terms of ORS 757.063 mean anything
7 different. Rather, they have claimed that a letter from Staff and its alleged after-the-fact change
8 to a cooperative exempt it from ORS 757.063.

9 If the Company were to make a textual argument for the first time in its reply brief, such
10 comments are inappropriate because the Company did not raise them (although it knew of the
11 textual argument from the trial brief) in its opening post-hearing brief. Regardless, the text is
12 straightforward and unambiguous in stating that the Company is subject to Commission
13 regulation when a sufficient number of petitions are received.

14 2. Staff’s letter does not impact the jurisdictional status of the Company.

15 The Company seems to contend that Staff’s letter of April 28, 2005, does not confer
16 jurisdiction to the Commission. See Company Post-Hearing Brief at 2. Of course, the Company
17 is correct insofar as it is ORS 757.063 and not Staff’s letter that confers jurisdiction to the
18 Commission. As discussed in Staff’s opening brief, the letter cited by the Company does not
19 state that jurisdiction had not attached. See Staff’s Opening Brief at 2-3. Rather, it states that the
20 Company has a right to a hearing to challenge the validity of the petitions. The letter simply does
21 not discuss when jurisdiction legally attaches. In contrast, ORS 757.063 is clear that jurisdiction
22 attaches at the time the Commission receives 20 percent or more of the members’ petitions.

23 Even assuming, *in arguendo*, that Staff’s letter could be read as not asserting jurisdiction,
24 the Commission cannot be estopped from following the legal requirement so ORS 757.063. See
25 Staff Opening Brief at 3-4; see also *Wilkinson v. PERB*, 188, Or App 97, 102-3 (2003); *State of*
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1 *Oregon v. Hewett Professional Group*, 321 Or 118, 126 (1995) (To establish reasonable reliance,
2 one must show that the representations made by the state agency were within its lawful powers to
3 make). Therefore, the Commission must apply ORS 757.063 according to its unambiguous,
4 plain terms, which means that jurisdiction was created upon the receipt of a sufficient number of
5 petitions and does not involve the issuance of a “final” order.

6 3. The Company’s attempts to dodge Commission regulation also fail for numerous other
7 reasons.

8 While the plain language of ORS 757.063 is unambiguous in that jurisdiction is created
9 when the Commission receives a sufficient number of petitions, such an interpretation also
10 makes the most practical and policy sense. If jurisdiction did not attach until a final order were
11 issued, it would only create opportunities for gaming the statutory framework to avoid regulation
12 that a sufficient number of members have requested.

13 In fact, a preponderance of the evidence suggests that the Company is attempting to avoid
14 regulation by a last minute attempt to change to a cooperative for no other purpose than to avoid
15 Commission regulation. In a colloquy with ALJ Grant, Mr. Rooks details how the Company has
16 taken no action to amend its articles or bylaws since the Commission’s last investigation where it
17 advised the Company to do so. *See* Tr.¹ at 69-70. Instead and after the Commission had
18 received more than 20 percent of the petitions, the Company has attempted to change its articles
19 and bylaws in a charade that can be for no other reason than to avoid Commission regulation.

20 As outlined in Staff’s testimony and filed pleadings, once Commission regulation
21 attached when a sufficient number of petitions were received the Company would need
22 Commission approval for a change of organizational status. *See* Staff/200, Dougherty/3-6; Staff
23 Opening Brief at 4-5; *see also* ORS 757.480. Finally, the evidence also establishes that the
24 Company’s attempt to change to a cooperative was ineffective. *See* Staff Trial Brief at 4-5; *see*

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¹ As used herein, “Tr.” means the official transcript of the evidentiary hearing held on August 8, 2006.

1 also Tr. at 61 (no election of a new board); Tr. at 64-65 (no evidence of adequate meeting notice
2 or summary plan of dissolution).

3 4. The record establishes that the Commission received a sufficient number of petitions.

4 The testimony of Ms. Kathy Miller establishes that the Commission received petitions for
5 well over 20 percent of the members of the Company. See Staff/100, Miller/4-8; Staff/101,
6 Attachment B. While the Company alleged that a handful of the signatures “appeared” forged,
7 they offered no credible evidence to support its contention. In fact, Ms. Miller testified on
8 redirect that several of those signatures the Company had claimed to be forgeries were in fact
9 confirmed by her. See Tr. at 95-97.

10 The Company also argues that the petitions are “illegal” under unrelated Oregon laws and
11 the Commission Oregon Administrative Laws. As pointed out previously in Staff pleadings, the
12 Company did not produce any evidence for its claim that the Secretary of State would not accept
13 the petitions in the proceeding. More importantly, the issue is irrelevant as the petition process
14 for Commission regulation of water associations is established in ORS 757.063 and related
15 administrative rules. The statutes cited to by the Company are simply not statutes and rules that
16 are applicable to this proceeding. See Staff Opening Brief at 5.

17 The Company also contends that the petitions are “illegal” because they do not include
18 telephone numbers. While telephone numbers are requested in the applicable Commission rule,
19 it is to help Staff confirm the petitions. In this case, Staff was able to confirm the petitions and,
20 in fact, find many of the telephone numbers. See Tr. at 13. Regardless, the Commission has the
21 authority, if necessary, to waive a technical requirement of its own rules. See Staff Opening
22 Brief at 5.

23 5. The Legislative decision incorporated in ORS 757.063 is not unconstitutional.

24 The Company has made vague and apparently facial challenges to the constitutionality of
25 ORS 757.063. In fact, the claims are so vague that it is not even clear whether the challenges are
26 under the United States Constitution, Oregon Constitution, or both. Aside from the fact that state

1 agencies should generally presume acts of the Oregon Legislature constitutional, the Company
2 fails to offer any meritorious argument on how ORS 757.063 is unconstitutional. Instead of
3 regurgitating Staff's previous constitutional arguments, it simply incorporates them. See Staff
4 Prehearing Brief at 6; Staff's Opening Brief at 6.

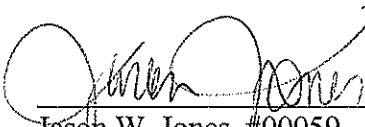
5 **CONCLUSION**

6 For the foregoing reasons, Staff respectfully urges that the Commission confirm that the
7 petitions have been validated and order the Company to file tariffs.

8 DATED this 3rd day of October, 2006.

9 Respectfully submitted,

10 HARDY MYERS
11 Attorney General

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13 _____
14 Jason W. Jones, #00059
15 Assistant Attorney General
16 Of Attorneys for staff of the Public Utility
17 Commission of Oregon

1 **CERTIFICATE OF SERVICE**

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3 I certify that on October 3, 2006, I served the foregoing upon all parties of record in this
4 proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid
5 first class mail or by hand delivery/shuttle mail to the parties accepting paper service.
6

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