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**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

UM 857/UW 54

In the Matter of	)	
	)	
FIRST HILL WATER, INC.,	)	ORDER
	)	
Claim on Surplus Funds.	)	

DISPOSITION: CLAIM DENIED

On June 25, 1997, the Public Utility Commission of Oregon (Commission) issued Order No. 97-240, which specified interim operating instructions for continued water service to First Hill Water, Inc.'s (First Hill) customers pending a more permanent resolution. The water service issues were resolved in October 2000, when the City of Bend began providing First Hill customers water service, ending the need for the interim operating agreement. The revenue collected while the interim operating agreement was in place generated surplus funds. Pursuant to Order No. 01-151, these funds are now held in trust by the Commission and are deposited in an interest-bearing account pending disbursement.

In correspondence dated December 24, 2001, the Commission notified parties, interested persons, and former customers of First Hill, that Staff had developed a disbursement schedule based upon the total amount paid per customer between June 1997 and October 2000. Any persons who disagreed with Staff's surplus funds disbursement proposal and believed they had a valid claim to the funds was instructed to file a claim form and supporting documentation by February 23, 2002. Darrell and Vicki Lee, the owners of First Hill, filed the only claim form received by the Commission. In it, the Lees allege that they are entitled to receive \$125,000 from surplus funds generated during the time period the Commission contracted for the operation and administration of the water system under an Interim Operating Agreement (IOA). The Lees did not provide any supporting documentation with their claim.<sup>1</sup>

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<sup>1</sup> It should also be noted that \$125,000 is a significantly lesser amount than the \$300,000 previously claimed by the Lees in conversations with Staff, and significantly more than the \$4,950 claimed by the Lees as a Capital Recovery Fee. (June 30, 1997 Contract for Recovery of Capital Expenditures between Darrell and Vicki Lee and Derek Angus Lee.) First Hill failed to provide any supporting documentation despite numerous Staff requests, formal and informal, and Commission Orders, including Order No. 02-416. Finally, it is worth noting that the only time the system operated with a surplus was while it was operating under the IOA.

On June 24, 2002, the Commission issued Order No. 02-416, which notified Darrell and Vicki Lee to provide substantive documentation supporting their claim for surplus funds associated with the Interim Operating Agreement for First Hill within 30 days. The Commission subsequently received a three-page letter from Darrell and Vicki Lee, dated July 22, 2002 setting forth the Lees' contentions as to why they are entitled to the surplus funds. The Lees did not provide supporting documentation.

On July 31, 2002, Assistant Attorney General Paul Graham, on behalf of the Commission, wrote to the Lees advising them that their letter dated July 22, 2002, would be considered as argument in this matter.

### **SUBSTANTIATION FOR THE CLAIM TO SURPLUS REVENUES**

The Commission finds the Lees failed to substantiate their claim that "[o]ver the years we spent more than \$125,000 building and extending the system." The Commission notes Staff requested this information from the Lees since 1996. The Commission further notes that when Staff asked the Lees, in September 1996, for a copy of the First Hill depreciation schedule or tax records for all utility plant from the time of construction, the Lees responded "not charging for capital . . . Nothing to depreciate."<sup>2</sup> The Lees failed to provide such documentation and information even though ordered to do so in Order No. 02-416. The Lees have not demonstrated any financial loss as a result of the Interim Operating Agreement, and PUC's oversight of the same.

The Lees have failed to provide any substantiation in support of their claim that Income and Property Taxes were not paid. The Lees failed to respond to Staff's numerous requests for information supporting the Lees' claim that Income and Property taxes needed to be paid by the Commission.<sup>3</sup> The Lees also failed to provide such information in response to Order No. 02-416. The Lees have not demonstrated any financial loss regarding tax liabilities.

Accordingly, the Lees are not entitled to any of the surplus funds.

### **OTHER ISSUES RAISED BY THE LEES**

#### **Connection Fee and Other Charges**

The Lees' contend they were told by Staff and counsel that the connection fee could not exceed \$50. There is no support for this contention. The tariffed connection fee for First Hill is \$300. This is the approved tariff rate pursuant to First

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<sup>2</sup> First Hill Water, Inc.'s Data Response dated October 12, 1996 to Question No. 4.

<sup>3</sup> After earlier requests for information went unanswered, and in response to Mr. Lee's letter dated February 27, 1999, Staff requested copies of tax documents so PUC could take appropriate action. When its March 19, 1999 letter went unanswered, Staff resent the letter by certified mail. The Lees failed to respond to the request, despite receiving the certified letter on April 7, 1999.

Hill's Miscellaneous Charges, Schedule No. 2, Original Tariffs Sheet No. 4, and the rate charged while the Interim Operating Agreement was in place. The Lees previously have been advised that connection fees are cost based, and cannot include a premium for the right or privilege to access the water. Indeed, as early as October 6, 1992, the Lees were advised of the Commission's jurisdiction and First Hill's obligation to follow statutes and rules relating to regulation of water companies.<sup>4</sup> The Lees, however, disregarded rules and statutes by charging excessive fees and providing inadequate service.

The Lees have demonstrated a history of conscious disregard for State rules and statutes, and a complete abandonment of their obligations to First Hill's customers. In her December 26, 1996 letter Vicki Lee told customers that the Lees have had "problems with compliance with Oregon Public Utility Commission rules and regulations," and that "[PUC Staff] have sent us a 500 page manual for FHW operations which we have not and will not read." Vicki Lee concluded, "Don't call us when the water stops. There is nothing we can do about it."

The Lees' blatant disregard for applicable statutes and rules is most telling, as is their charging customers excessive rates and billing for unauthorized charges. Such actions do not entitle the Lees to a portion of the surplus funds, nor is such conduct condoned by the Commission. By Order No. 98-526, the Commission approved and ordered refunds to customers for unauthorized charges billed and collected by the Lees and First Hill for repair assessments, hookup fees, and work the utility required customers to contract and pay for which was the responsibility of the utility. These unauthorized charges occurred prior to the Interim Operating Agreement. The evidence establishes that the system was better maintained and operated during the IOA than at any other point in its history.

### **Treatment Like a Public Utility**

The Lees contend they "were treated like a public utility that had tax payers (sic) money to build systems at tax payers (sic) expense." The Lees are mistaken. ORS 757.005(1)(b), 758.300(3) and 758.320(4) specifically exempt municipalities and districts from the definition of "public utility." Municipalities and districts are the entities that are built by money collected through taxes.

The Lees also claim the Commission wanted accounting records and programs to justify every revenue, expense and rate. The Lees assert it is beyond their ability to produce such documents and would cost thousands of dollars. The Lees complain, "Those forms are fine for a municipal water company, but completely over the top for a small utility serving 20 or so neighbors." It was the Lees' perception that if they "did not jump through the bureaucratic hoops and spend hundred hours (sic) and

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<sup>4</sup> By letter dated October 8, 1992, Staff provided the Lees with statutes and rules relating to PUC water regulation as well as discussing costs and rates.

thousands of dollars to comply, the system would be seized by the Oregon PUC and we [the Lees] would be fined.”

The Commission notes there currently are six rate-regulated water utilities serving 25 or fewer customers. On at least one occasion, the same information has been requested from each of these utilities, and each utility has been through at least one rate case. In all such occasions, the requested information was provided.

The Commission also notes that if the requests were oppressive or overly burdensome, First Hill could have sought relief from the Administrative Law Judge, a fact of which Staff made the Lees aware. The Lees failed to seek such relief nor have they attempted to substantiate their claims of impossibility and cost.

Finally, the Commission notes it did not “seize” First Hill, nor does it have the authority to do so. Rather, the Commission was forced to step in and develop an interim operating agreement after the Lees failed to respond to numerous requests from the Commission, failed to adjust rates, failed to operate the system without outages, and effectively abandoned the system. By the end of 1996, Mr. Lee was advising customers, “Don’t call us when the water stops. There is nothing we can do about it.” (Letter dated December 26, 1996.) This attitude continued through 1997 culminating in Mr. Lee’s November 15, 1997 response to Order No. 97-432 wherein he states, “We want nothing further to do with this water system other than be repaid for our capital expenditures to rebuild the system.”<sup>5</sup>

### **Change of First Hill Water, Inc. to a Cooperative**

The Lees believe they properly converted First Hill to a cooperative. The Lees are mistaken. The Lees and First Hill failed to follow the legal requirements for converting a privately owned system into a cooperative, notwithstanding Mr. Lee’s July 8, 1997 unilateral attempt to convert the system into a cooperative. The statutes and regulations the Lees failed to follow include ORS 757.480, OAR 860-036-0710 and 860-036-0715. No cooperative was established.

Staff, after being advised by the Department of Justice, explained this fact to the Lees in its letter dated July 23, 1997. The Lees were advised that First Hill must apply to the Commission for approval of a transfer of property, and that First Hill cannot

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<sup>5</sup> The Lees’ own statements demonstrate the failures of First Hill and their abandonment of the same. By letter dated December 26, 1996, Vicki Lee told the customers, “As you know, we are experiencing some problems with the supply and delivery of water to you, some problems with the management and finance of First Hill Water, Inc. (FHW), and problems with compliance with Oregon Public Utility Commission rules and regulations.” She continued, “Repairs \* \* \* will cost in excess of \$1,000. FHW does not have \$1,000. \* \* \* [W]e are certainly not going to loan personal money to the system again.” In a July 8, 1997, letter, Darrell Lee informed the customers that “[l]ike it or not, you are now in charge of your own destiny, at least as far as water service is involved.”

avoid its legal obligation to provide water service simply by declaring the utility to be a cooperative. The Lees and the First Hill customers were advised that the customers could form a cooperative if they so chose, but the Lees could not unilaterally form a cooperative on the customers' behalf and compel customers to become members.

### **Payment of Income and Property Taxes**

The Commission finds that any failure to pay income or property taxes for First Hill during the Interim Operating Agreement is attributable to the Lees, and their failure to cooperate with the Commission. Staff requested the relevant tax information from the Lees on numerous occasions so the Commission could take appropriate action. Staff's last request prior to Order No. 02-416—a March 19, 1999 request sent via certified mail – went unanswered, as did all its earlier requests.<sup>6</sup> The Commission notes the Lees have not provided such information to the Commission as ordered in Order No. 02-416. Given the Lees' failure to substantiate their claims regarding taxes, despite repeated Commission requests, the Commission has no alternative but to deny the claims.

### **Issue of Being an Exclusive Provider**

The Lees erroneously believe that First Hill had an exclusive territory and is entitled to compensation for the City of Bend providing service to First Hill's customers. The exclusive territory legislation for water companies was not enacted until 1999 (*see* ORS 758.305), and First Hill never filed a service territory application as required by OAR 860-036-0900 *et seq.* No statute or regulation prevented First Hill's customers from doing what they ultimately did, requesting the City of Bend to provide them with water service. No statute or regulation prevented the City of Bend from agreeing to provide water service to the then-customers of First Hill.

### **Ownership of Physical Assets**

First Hill did and still does own its physical assets. No one disputes First Hill's ownership. Rather, the Lees argue they should be compensated for the loss in value of these assets since the City of Bend began providing water service in the area. Since First Hill did not have an exclusive territory, there is no statute or regulation requiring such. The Lees also cannot be heard to complain about the maintenance and upkeep of the physical assets while the Interim Operating Agreement was in place. The facts show the assets were better maintained during such period than while the Lees operated the system. It is clear that the Lees refused to provide service and their failure to comply with PUC statutes and regulations directly led to its customers requesting water service from the City of Bend. The Lees are not entitled to any compensation.

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<sup>6</sup> *See* Note No. 3.

## Notice

The Lees complain that they were never given notice of hearing dates “so we [the Lees] have never been able to be present and be heard.” The facts clearly establish that notice was provided to the parties, including the Lees.<sup>7</sup> However, despite being advised of the various hearing dates, the Lees chose not to attend the hearings, with the exception of the October 17, 1996, Prehearing Conference. Moreover, the Lees failed to attend the numerous informal meetings arranged by Staff, meetings of which the Lees were provided notice.<sup>8</sup> The Lees have and will continue to receive notice of any hearings or orders in this matter.

## CONCLUSION

The Lees insist on compensation and entitlement to the surplus funds even though they have failed to provide any substantive documentation in support of their claim. The facts show the Lees abandoned their customers and refused to provide water service to them. The evidence further establishes the Lees have demonstrated conscious disregard and disdain of applicable statutes and regulations, and the Commission. The Lees’ complete refusal to respond to, or comply with, orders of the Commission, and their complete failure to provide substantiation of their claims requires a finding that the claims are meritless.

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<sup>7</sup> See, e.g., Service Lists for various hearings including September 25, 1996 Notice of Prehearing Conference, May 8, 1997 Notice of Hearing, as well as notices to informal meetings and workshops.

<sup>8</sup> See Preceding Note.

**ORDER**

IT IS ORDERED that the surplus funds currently held in an interest bearing account immediately shall be distributed to the former customers of First Hill according to the disbursement schedule developed by Staff and referenced in the Commission's December 24, 2001 notice to all parties, interested persons, and former customers of First Hill.

Made, entered and effective \_\_\_\_\_.

\_\_\_\_\_  
**Roy Hemmingway**  
Chairman

\_\_\_\_\_  
**Lee Beyer**  
Commissioner

\_\_\_\_\_  
**Joan H. Smith**  
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements of OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.