

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Cedar Ridge
Distribution Company for an Increase in Rates

DOCKET NO. 11-2423-02

**REQUEST FOR REVIEW AND
REHEARING OF REPORT AND ORDER**

(Melanie A. Reif, Administrative Law Judge)

This Request for Review and Rehearing (“Request”) is respectfully filed by Cedar Ridge Distribution Company and is specifically limited to only the issue of the Water Well Purchase Agreement between Tremonton City and David L. Thompson.

This Request is filed with new evidence of the intent of Tremonton City and David L. Thompson of the Water Well Purchase Agreement.

The following are documents and facts, including an affidavit from Max Weese, prior Mayor of Tremonton City, supporting the clear intent of the parties to include the value of the water rights then held by Mr. Thompson in the transaction.

As stated in the Report and Order, the Division of Public Utilities and the Commission relied heavily upon Mr. Paul Fulgham, Tremonton Public Works Director, and his sworn statements made regarding the intent of the agreement entered into on March 5, 2010 (“Water Well Purchase Agreement”). In his sworn statements, he made comments that the City was buying only the water well itself and not the value of the water rights or the water rights which had been approved for use in the well and owned by Mr. Thompson which were acknowledged to exist at the time of the proposed transaction.¹ In Mr. Fulgham’s own testimony, under cross-examination, he stated that the water rights were a part of the negotiation.²

¹ See Report and Order, pages 9-10.

² See page 110, Transcript of Hearing Proceedings, lines 19-22.

Specifically, Mr. Fulgham was asked the following question:

“So ... and my question is, was not water rights ... these water rights part of the negotiation or can you testify to that?”

Mr. Fulgham’s response was:

“Well, the nonuse of them I guess were.”

To indicate the intent of the City by the Mayor, Mr. Max Weese, who at the time was the primary negotiator between Mr. Thompson and the City on the acquisition of the well and the water rights, there was a Memorandum of Understanding entered into between Mr. Thompson and Tremont City on January 31, 2009, attached and incorporated hereto as Exhibit A. In that Memorandum of Understanding, it is clear that the City understood and then had contemplated the inclusion of water rights as well as the purchase of the well itself in the transaction. In Section 5(b) of the Memorandum of Understanding, it explicitly says that “The City shall receive full ownership and water rights, excepting those owned by Cedar Ridge Water Company, to the agreed-upon water well currently owned by Thompson.” Further, there were draft proposals by the City Attorney to Mr. Thompson which clearly included the water rights to be a part of the purchase and the payment. In the draft agreement from the City Attorney dated September 2, 2009, attached and incorporated hereto as Exhibit B, it is clearly stated that it was the intent and objective of the City to include the value of the water rights in the water purchase agreement. In Paragraph 1.02, titled “Delivery of Water Well Title and Accompanying Water Rights,” it is stated that at Closing, Seller (Thompson) “shall deliver to Buyer clean and unencumbered title to the water well and all water rights associated with the subject water well.” (Emphasis added.) This draft was presented to Mr. Thompson by email on September 2, 2009, which included deliveries to Mr. Warnocki, Steven Bench, Paul Fulgham as the first revision of Water Well Agreement. Subsequent to the Memorandum of Understanding that was entered into on

December 31, 2009, there were discussions between the City and Mr. Thompson about the most efficient way to have the water rights transferred or relinquished by Mr. Thompson. It was concluded between the parties at that time that rather than transfer the then valid water rights owned by Mr. Thompson, the City would limit Mr. Thompson and not transfer but rather have him relinquish any and all claims to any future water rights in the well beyond the water rights dedicated to the Cedar Ridge Distribution Company and reservation of certain water rights for associated lands to be developed. It is clear by the affidavit of Mr. Max Weese, attached hereto as Exhibit C, that the intent of the City throughout the transaction was to include as a part of the purchase price the value of the water rights which Mr. Thompson held in the well and the negotiations centered primarily on how much water would be reserved by Mr. Thompson and the Cedar Ridge Distribution Company and how much water would be either relinquished or transferred to the City to eliminate any competing use of the well.

Notwithstanding the arguments of the Division of Public Utilities, the intent of the parties involved in the transaction, including the prior Mayor of Tremonton City, contemplated, as stated in his affidavit, that the value of the water rights was an included amount of the purchase price of \$190,000. In cross-examination, Mr. Fulgham responded to questions about the water rights and the intent of the City to eliminate the potential exercise of Mr. Thompson's rights by responding "We (the City) just said it (the water rights) couldn't come out of this well."³ As affirmed by Mr. Fulgham in testimony cited herein above, the actual value of the water rights to the City was to eliminate the ability of Mr. Thompson to take water as a senior priority water right holder and interfere with the ability of the City to utilize the well fully for all water beyond the amount committed in the March 5, 2010 Water Well Purchase Agreement. The fact that the

³ See Page 114, Transcript of Hearing Proceedings, lines 4-15.

water rights which were relinquished by Mr. Thompson as stated in the documents presented at the hearing were not transferred to the City does not take away from the intent of the Water Well Purchase Agreement to have included in the \$190,000 the value of his relinquishment of those water rights in the well. The fact that there was not an actual transfer which had been contemplated in the prior draft agreement (Exhibit B) and Memorandum of Understanding (Exhibit A) and a conclusion to have those water rights totally relinquished does not take away from the intent of the City and the parties who negotiated and executed the Water Well Purchase Agreement, including the officials who were negotiating the transaction, that included in the purchase price was a value for the removal of the water rights from the well which Mr. Thompson owned.

It has already been presented at hearing by Cedar Ridge Distribution Company and Mr. Thompson that the value of the water rights does not include the contribution of the Cedar Ridge Distribution Company customers of money for their contribution to the actual physical well and the physical facilities. Mr. Thompson and the Cedar Ridge Distribution Company has already stipulated to the Commission at the hearing that the amount of money paid by the customers would be reimbursed to the customers from the revenues from the sale in the Water Well Purchase Agreement. This reimbursement does make the customers of the water company whole and reimbursed for all value contributed by the customers to the well costs. In addition, as stated at the hearing, Tremonton City has improved and upgraded the water delivery system to the singular benefit of the water users and the customers of Cedar Ridge Distribution Company.

This request for rehearing is to reexamine what was the clear intent of the parties entering into the Water Well Purchase Agreement based not only on the words of the agreement but the evidence of the actual parties who negotiated on behalf of the City. As stated above, the

Memorandum of Understanding clearly says that there was an inclusion in anticipation of Mr. Thompson either transferring or, in this case, relinquishing his water rights in the well. The fact that there is an ability of people to proceed to drill water wells based on water rights in other areas and other points of diversion is not a part of the negotiations. The substance of the negotiations, as stated in the affidavit of Mr. Weese, was to give the City access to a proven, reliable water source and to limit any access to that water source by Mr. Thompson beyond that reserved therein. This limitation is clearly stated in the final agreement, which limits and totally restricts Mr. Thompson or any entity, including Cedar Ridge Distribution Company, from taking any more water out of that well or interfering with or claiming to have any interest in a water right which would prohibit or raise questions relative to the intent of the City to secure more water from the well.

It is clear in the agreement and clear throughout the transaction that there was a value attached to having Mr. Thompson either transfer or relinquish his interest in having water rights delivered from the well.

Cedar Ridge Water Distribution Company is prepared to present testimony from Mr. Weese and other staff of Tremonton City, including additional affidavits if necessary at a limited rehearing as discussed herein.

This Request for Review and Rehearing of Report and Order is respectfully submitted to the Public Service Commission the 17th day of January, 2012.

Lee Kapaloski
Counsel for
Cedar Ridge Water Distribution Company