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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 Response of the Division of Public Utilities to Cedar Ridge Distribution Company's Request for Review and Rehearing of Report and Order
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Pursuant to Utah Code Ann. § 54-7-15 and Utah Administrative Code R746-100-11.F, the Utah Division of Public Utilities (Division) responds to Cedar Ridge Distribution Company's (Cedar Ridge or Company) Request for Review and Rehearing of Report and Order (Request) filed on January 17, 2012. The Request states it pertains only to the issue of the Water Well Purchase Agreement (Agreement) executed by between Mr. David L. Thompson, Cedar Ridge Distribution Company, and Tremonton City on March 5, 2010.¹ As explained in more detail and for the reasons set forth below, the Utah Public Service Commission (Commission) should deny the Request.

¹ Agreement p. 1.

I. The Rehearing Request Should Be Denied Because the Agreement Is Unambiguous and Therefore Parole Evidence May Not Be Introduced.

The Company's Request argues that it has new parole evidence "supporting the clear intent of the parties to include the value of the water rights then held by Mr. Thompson in the transaction."² The Agreement falls within the scope of contracts subject to the jurisdiction of the Commission because of the nature and purpose of the assets being conveyed.³ Under Utah law, a contract must be found to be ambiguous before evidence outside the four corners of the contract is considered.⁴ Because the Agreement is unambiguous, there is no cause to examine the evidence discussed in the Request, and the Request therefore should be denied.

A relatively recent Utah Supreme Court case provided the court "the opportunity to discuss the standard for determining contractual ambiguity"⁵ and to discuss the application of the so-called "Ward rule." Utah law requires that facial ambiguity must be shown in the contract before parole evidence of intent can be introduced.⁶ Facial ambiguity must be "reasonably supported by the language of the contract."⁷ Ambiguity is checked against the contract's plain language, and the court "did not intend that the? judge allow surrounding circumstances to create ambiguity where the language of a contract would not otherwise permit."⁸ Indeed, "there can be no ambiguity where evidence is offered in an attempt to obscure

² Request at p. 2.

³ See *Garkane Power Association v. Public Service Commission of Utah*, 691 P.2d 1196 (Utah 1984).

⁴ For a discussion of contract interpretation, see, e.g., *Tangren Family Trust v. Tangren*, 182 P.3d 326 (Utah 2008) (*Tangren*).

⁵ *Daines v. Vincent*, 190 P.3d 1269 (Utah 2009), ¶ 24.

⁶ *Id.* at ¶ 37.

⁷ *Id.* at ¶ 31 (internal citations omitted).

⁸ *Id.* at ¶ 27.

otherwise plain contractual terms.”⁹ If there is no facial ambiguity, “the parties’ intentions must be determined solely from the language of the contract.”¹⁰

When the Agreement’s subject language is assessed using the criteria and standards set forth above, it is apparent that no facial ambiguity is present in the Agreement. In pertinent part, the Agreement states:

1.01 Water Well Purchase. Seller [David Z. Thompson] hereby agrees to sell, transfer and convey to Buyer [Tremonton City], free and clear of any encumbrance, and Buyer hereby agrees to purchase the Sixteen Inch (16”) Water Well (Hereinafter “Water Well”), related facilities, and the exclusive operational rights to the Water Well of Seller, which Water Well is more particularly and legally described in Exhibit “A” of this Agreement.¹¹

Note that the description of the assets to be purchased does not include any reference to the sale and purchase of water rights owned by Mr. Thompson. Additionally, the purchase obligation is conditioned upon “Buyer’s ability to obtain the necessary water rights from the State of Utah and any other currently foreseeable conditions which would inhibit Buyer’s ability to use the Water Well for its intended purpose of providing culinary water to the residents of Tremonton City.”¹² Ample water rights were available from the State of Utah to meet the Buyer’s needs and Mr. Thompson’s water rights were not needed to provide water to Tremonton City at the Water Well.¹³ Tremonton City filed its own application for water rights at the diversion point of the well on February 22, 2010 under water right # 29-4476 prior to the execution of the Water Well Agreement.

⁹ Id. at ¶ 31.

¹⁰ Id. at ¶ 37 (internal citations omitted).

¹¹ Agreement p. 1.

¹² Agreement p. 1.

¹³ See testimony of Division witness Ms. Shauna Benvegna-Springer, Transcript, November 22, 2011 (Transcript), at, e.g., pp. 122 and 126. See also Division’s final recommendation, November 14, 2011, at p. 6.

Further, although the Agreement's section entitled "ARTICLE III TERMS ASSOCIATED WITH WATER SERVICE TO CEDAR RIDGE WATER COMPANY" does contain a limitation upon the maximum connections Cedar Ridge Water Company may have,¹⁴ the Agreement does not mandate that Mr. Thompson relinquish his other water rights associated with the well. Utah law permits diversion points for water rights to be changed under certain conditions, conditions that Mr. Thompson could have met, so it was unnecessary, and unrequested, that Mr. Thompson forfeit his water rights.¹⁵ The provision giving complete control of the Water Well to Buyer also does not require Mr. Thompson to forfeit his water rights. Forfeiting his water rights was a choice made by Mr. Thompson and was not required, nor rewarded, by the terms of the Agreement.

In addition, a clear provision in the Agreement by its terms prohibits consideration of drafts, the memorandum of understanding, the affidavit, and other evidence championed by the Request.

Section 8.10 of the Agreement entitled Complete Agreement states:

This Agreement together with any addenda and attached exhibits constitutes the entire Agreement between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understanding, contracts, or agreements between the parties. This Agreement cannot be changed except by the express written agreement of all parties.¹⁶

¹⁴ Agreement p. 4.

¹⁵ See Swenson, Robert W., Primer of Utah Water Law, Part I, 5 Journal of Energy Law & Policy, 165 (1984), and Part II, 6 Journal of Energy Law & Policy 1, (1985) wherein changes to point of diversion is discussed. See also the testimony of Division witness Ms. Shauna Benvegna-Springer that water rights may still be applied for in the Weber basin – the basin is not closed to applications for water rights. See footnote 13, supra.

¹⁶ Agreement at p. 7.

The issue of an integration clause was examined recently in *Tangren*.¹⁷ Specifically, the Utah Supreme Court stated, “To argue that the lease is not the complete agreement of the parties is to argue in direct contradiction to the clear integration clause. Thus we will not allow extrinsic evidence of a separate agreement to be considered on the question of integration in the face of a clear integration clause.”¹⁸ The Request’s argument can be construed similar to an argument that there is a second agreement between the parties – one that provides consideration for water rights and supersedes the Agreement. Therefore, consideration of the Request’s recitation of the negotiations prior to the execution of the Agreement, and documents pertinent thereto, and the accompanying affidavit from the prior Mayor of Tremonton City is precluded by the Agreement’s own terms and rehearing is not warranted.

II. Sufficient Evidence Supports the Order

Sufficient evidence exists to support the Order and to deny the Request. Division witness Ms. Shauna Benvegna-Springer testified regarding the ability of Mr. Thompson to seek a change of the point of diversion for his water rights in the well exceeding the amount of water rights necessary to serve the customers of Cedar Ridge Water Company. Indeed, the testimony of Mr. Thompson himself highlights that the surrender of his water rights was not required by the Agreement.¹⁹

¹⁷ 182 P.2d 326 (Utah 2008).

¹⁸ *Id.* at ¶ 16.

¹⁹ See Transcript at p. 43.

III. Conclusion

Therefore, for the reasons set forth above, the Commission should deny the Company's Request. The Request is unsupported by Utah law and the Agreement itself because the Agreement is not only unambiguous and but also its own terms, particularly the Complete Agreement clause, prevent consideration of the Company's offered extrinsic evidence pertaining to negotiations and activities prior to the execution of the Agreement.

RESPECTFULLY SUBMITTED this _____ day of February 2012.

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