- 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 REPORT AND ORDER

ISSUED: February 10, 2012

SYNOPSIS

The Commission enters this Order denying the motion for review and rehearing.

By The Commission:

I. INTRODUCTION

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, Cedar Ridge Distribution Company ("Cedar Ridge" or the "Company") seeks agency review and rehearing of the Commission Order issued December 16, 2011, on the basis that "new evidence" establishes that the sale of the water well, which Tremonton purchased from Cedar Ridge, included the value of the water rights then held by David Z. Thompson ("Mr. Thompson"), President of Cedar Ridge. Cedar Ridge further asserts that given this "new evidence," the $190,000 Mr. Thompson received purportedly for the sale of his water rights is his personal property and not the property of Cedar Ridge.

II. ISSUE AND STANDARD OF REVIEW

Cedar Ridge seeks review and rehearing of the Commission Order on the basis of "new evidence." Under the Utah Rules of Civil Procedure, a new trial (or in this matter review and rehearing) may be granted on the basis of "[n]ewly discovered evidence, material for the

party making the application, which [the applicant] could not, with reasonable diligence, have discovered and produced at the trial." Utah R. Civ. P. 59(a)(4); see also id. 60(b) (stating same for relief from judgment or order). The burden of establishing facts sufficient to meet the newly discovered evidence standard lies with the moving party. Cf. Kettner v. Snow, 13 Utah 2d 382, 375 P.2d 28, 384 (1962). Thus, the burden of supporting facts sufficient to grant its motion lies squarely with Cedar Ridge. See id.

III. SUMMARY OF THE CASE

1. From 1977 through 1981, Mr. Thompson began developing the Cedar Ridge Subdivision by improving 25 lots, each averaging 1.5 acres in size. See Division Final Recommendation at 2, filed November 14, 2011. Presently, Cedar Ridge serves 31 non-metered customers and 2 vacant lots on stand-by basis. See id. at 2. Cedar Ridge is authorized to operate a total of 33 connections. See id.

2. In 1976 and 1981, respectively, Mr. Thompson applied for two water rights identified as 29-2099 and 29-2768. The first water right, 29-2099, was applied for on September 3, 1976 for 25 acre feet of water for domestic use, 25 feet for irrigation use and 50 stock units for stock water. The second water right, 29-2768, was applied for on October 22, 1981 for 0.5 cubic second feet of water with a point of diversion at the second well. The purpose for the water was to provide for 325 connections. A quit claim deed was executed and recorded with Box Elder County on March 23, 1981 for 0.5 cubic second feet of water with the two diversion points for two inch wells to the Company. A conveyance report was completed on April 11, 2011 on water right 29-2099 to transfer ownership to the corporation. However,

this report was not filed with Box Elder County or the Division of Water Rights. A conveyance report has not been completed or filed for water right 29-2768. Water rights were held in Mr. Thompson's name, not in the name of the Company. See Division Final Recommendation at 2-3.

3. Between 1977 and 1981, Mr. Thompson drilled an eight (8) inch well, but that well did not succeed. A second eight (8) inch well was drilled high on the hill above the subdivision. Two 75,000 gallon concrete water storage tanks were constructed with a power line to the second well and pump house with pumping equipment. Distribution mains and transmission lines were laid connecting the subdivision lots to the storage tanks. Valves were installed throughout the system and at each lot connection. Four fire hydrants were installed to comply with county fire requirements. Upon completion of the system a bill of sale was executed on March 23, 1981 from Mr. & Mrs. Thompson to Cedar Ridge in consideration of $1 for the water system which cost $212,126.63. In effect the water system was contributed to the development. The cost of improvements was or should have been recovered in the sale of the improved lots. The value of the water system was verified by documents presented for review by the Division. See Division Final Recommendation at 2.

4. In 1986, problems with the second well arose and it was determined that a third well was necessary. At that time, 18 customers were using the water system. The actual cost of the third well with pumping equipment was $49,098 according to the company's general ledger and payments made to various vendors. This cost was financed by a private note of $20,000 and individual notes to each customer. The individual notes were in the amount of

$1,250 which included interest at the rate of 7% APR and a maturity date of 15 years from issuance. In 1996, the land that the well site is on was purchased by the Company for $9,000. See Division Final Recommendation at 3.

5. In 1996, on the second water right, 29-2768, an extension of time to provide beneficial use was applied for and granted until August 31, 2001. In 2001, another extension of time was granted to March 31, 2006. In 2006, another extension of time was granted until March 31, 2011. On March 31, 2011, another extension was requested, an additional point of diversion, that being the location of the third well, was added and the use was modified to 94.25 acre feet. In a letter dated March 31, 2011 to the Division of Water Rights, Mr. Thompson states "because of the current rules and requirements I felt that I need to clearly identify how much more development I could handle." The extension granted on August 3, 2011 provides that the uses for 260 homes and 133.75 acres of irrigation "are considered lapsed and not extended." The water right has two points of diversion which are the second and the third well site. See Division Final Recommendation at 3.

6. On or about March 5, 2010, Mr. Thompson and the Company entered into a Water Well Purchase Agreement ("Well Agreement") with Tremonton City. See Company's Exhibit C, Transcript of Hearing, dated November 22, 2011.

7. The Well Agreement states that for consideration of $190,000 the parties sold and transferred the third well to Tremonton City. See id. at 2.

8. The Water Well Agreement describes the property sold:

> 1.01 Water Well Purchase. Seller hereby agrees to sell, transfer and convey to Buyer free and clear any lien or 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.
>
> > A. Buyer's obligation to purchase the Water Well is expressly conditional upon Buyer's ability to obtain necessary and required permits from any governing state agency, Buyer's ability to procure all necessary easements to transport and pipe the water so produced to Buyer's water system at a delivery point defined in Exhibit "B" of this Agreement, 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. In the event that any such condition mentioned in Section 1.01(A) of this Agreement is not met, by July 31, 2010, upon Buyer's sole determination, the Agreement, in whole or in part, may be made void.

See id.

9. Mr. Thompson, Cedar Ridge, and Tremonton City each executed the Well Agreement. See id. at 8. Mr. Thompson, President, signed on behalf of Cedar Ridge. See id.

10. On October 4, 2010, several residents of Deweyville and customers of Cedar Ridge filed a formal complaint against Cedar Ridge. See Docket No. 10-2423-01.

11. The complaint was based, in part, on an alleged sale of a water well to Tremonton City from Mr. Thompson, individually and as president of Cedar Ridge, in exchange for $190,000. See Docket No. 10-2423-01, Exhibit H, Water Purchase Agreement.

12. The complaint also questioned a special assessment charged in August 2010 in the amount of $970, which some customers had paid and others had not. See Docket No. 10-2423-01.

13. On December 9, 2010, the Division of Public Utilities (the "Division") filed a petition for order to show cause, in part, to require Cedar Ridge to explain why it had been operating a culinary water system as a public utility without a certificate of public convenience and necessity ("CPCN"). See Docket No. 10-2423-02.

14. On April 21, 2011, Cedar Ridge filed for a CPCN and rate increase. See Docket No. 11-2423-01 and Exhibit C "Proposed System Expenses."

15. The Commission granted Cedar Ridge a CPCN on July 11, 2011. See Docket No. 11-2423-01, Report and Order.

16. The CPCN ordered Cedar Ridge to "ensure the necessary water rights are recorded so as to allow the Company to properly serve the needs of its system." See Docket No. 11-2423-01, Report and Order at 5. The CPCN requires that sufficient water rights be transferred to the Company. See Division Final Recommendation at 3, filed November 15, 2011.

17. The CPCN approved the following interim tariff rates:

Monthly water use (without meters)	$45 per month
Late fee per incident	$5.00
Reconnection fee	$75.00 per incident
Standby fee	$0.00

See Docket No. 11-2423-01, Report and Order at 3. Before the CPCN was granted, Cedar Ridge charged these same rates since 1989; the result being that for over three decades Cedar Ridge customers paid a flat fee of $45 per month for unmetered water.

18. The CPCN also approved a meter installation project in the amount of $49,507. See Docket No. 11-2423-01, Report and Order at 4.

19. The Commission received and granted several requests to intervene in this docket.[1]

20. On September 13, 2011, the Division filed its draft recommendation on the rate increase. See Division Memo, filed September 13, 2011. In part, the draft recommendation provides that "[t]he Division is recommending funds in the amount of $190,000 from the sale of the water to Tremonton City be deposited and recorded as property of the Corporation." Id. at 1. The draft recommendation further states regarding the "Sale of Assets":

> On March []5, 2010, Mr. Thompson, and Cedar Ridge Distribution entered in a Water Well Purchase Agreement with Tremonton City. Under the agreement, the Seller (Mr. Thompson), states that he "is the current owner of record of the 16" Cedar Ridge Water Well." Indirectly this statement is true. Mr. Thompson owns 100% of the Cedar Ridge Distribution Company. Records of the Corporation and Mr. Thompson state that the water well was an asset of the Corporation. Generally accepted accounting principles dictate that the proceeds of the sale of the corporate asset are to be recorded by the corporation. Mr. Thompson further states that the $190,000 was owed to him for "selling the water rights to Tremonton City." The agreement states "the Buyer (Tremonton City) will obtain the necessary water rights from the State of Utah." The Division recommends the Corporation properly record the sale of the water well on the Corporate records.

Id. at 3.

21. The draft recommendation also stated the following regarding the lack of reserve funds:

> The Division is concerned about the lack of financial reserves. Reserves are a necessary part of a sound financial management plan for an on-going effective water system. Setting aside reserves is critical to developing and maintaining financial stability and can mean the difference between a system that is

[1] See DW#205546, G#72789 (Bryce and Lori Wiser); DW#207345, G#73333 (Dee and Frances Doney); DW#207849 (Devin and Camille King); DW#207947 (Dorothy and Eugene Hogan); DW#207948 (Leonne Scott); #DW208004 (Frank and Traci Walker); #208003 (Doug and Dianne Adams); DW#210872 (Barbara and Keith Andersen).

> self-sustaining and one that may fall victim to disrepair or become financially unstable during even a relatively small emergency. Capital reserves are funded through rates and should be maintained in a restricted account and allowed to accumulate or be used for qualifying expenses as the need arises.

Id. at 4.

Based on the foregoing, the Division recommended the Commission order Cedar Ridge, among other things, 1) to record the sale of water well appropriately on its books, and 2) implement a capital reserve account as discussed. See id. at 8.

22. Cedar Ridge filed no response to the Division's draft recommendation.

23. On September 14, 2011, the presiding officer for the Commission conducted a technical conference at the Deweyville Town Hall. The technical conference was duly noticed on July 6, 2011.

24. The purpose of the technical conference was to allow the Division to present its "draft recommendation," to receive comments, and to discuss with those present the effects of that recommendation on the Company's proposed rate increase.

25. At the technical conference, Mr. Lee Kapaloski appeared on behalf of the Company, along with Mr. Thompson, and assistant attorney general Patricia Schmid appeared on behalf of the Division, along with utility analyst Shauna Benvegnu-Springer and manager Bill Duncan.

26. On November 15, 2011, the Division filed its final recommendation on the rate increase. See Division's Final Recommendation, filed November 15, 2011.

27. The Division's final recommendation continues to urge the Commission to order the funds in the amount of $190,000 from the sale of the water well to Tremonton City be

deposited and recorded as property of the Company. See id. at 1. The final recommendation further states regarding the "Sale of Assets":

> On March []5, 2010, Mr. Thompson[] and Cedar Ridge Distribution entered into a Water Well Purchase Agreement with Tremonton city. Records of the Corporation to include invoices and checks for payment to various vendors demonstrate the Corporation constructed, paid for and owned the water well[, and that it] was an asset of the Corporation. The well agreement states that for consideration of $190,000 the parties sold and transferred the well to Tremonton City. Generally accepted accounting principles dictate that the proceeds of the sale of a corporate asset are to be recorded by the corporation and deposited into the Corporation's cash (bank) account.
>
> The agreement does not state the water rights were sold or forfeited. The agreement states "the Buyer (Tremonton City) will obtain the necessary water rights from the State of Utah."
>
> The Division talked with Ken Jones, the State Engineer on November 8, 2011 to determine if water rights were transferred to Tremonton City under the arrangement. On February 22, 2010 Tremonton City applied for water right 29-4476 requesting 3.34 cubic feet per second with a point of diversion using a . . . 16" well. Water right 29-2768 was not separated, split, or transferred to provide excess water to Tremonton City.
>
> In discussions with Paul Fulgham, Tremonton City Utility Manager, Tremonton City only purchased "a hole in the ground[,]" meaning the sixteen inch (16") water well, related facilities, the land [the well] resides on, easements, and the pump (which was returned to Cedar Ridge with no salvage [value]).
>
> Based on the research completed by the Division, Tremonton did not purchase any water rights nor were any water rights included with the transfer, sale, or conveyance of the water well. There was not a sale of water rights.

Id. at 5-6.

28. The final recommendation also reiterated the Division's concern regarding the lack of reserve funds, see id. at 9-10, and reiterated the Division's recommendation that the Commission's order to Cedar Ridge include that 1) the sale of the water well be appropriately

recorded in its books and the $190,000 from the sale therefrom be deposited into its bank account, and 2) a capital reserve account be established as discussed. See id. at 12.

29. Cedar Ridge filed no response to the Division's final recommendation.

30. A hearing convened before the administrative law judge for the Commission on November 16, 2011 at the Deweyville Town Hall. The hearing was duly noticed on November 8, 2011.

31. At the November 16, 2011 hearing, the parties, intervenors, and customers agreed by consensus to engage in settlement discussions and thereafter to reconvene on November 22, 2011. Mr. Kapaloski appeared on behalf of the Company, along with Mr. Thompson, and assistant attorney general Patricia Schmid appeared on behalf of the Division, along with utility analyst Shauna Benvegnu-Springer and manager Bill Duncan.

32. A settlement was not reached by the parties after the November 16, 2011 hearing.

33. On November 18, 2011, the Division filed amended exhibits. See Division's Amended Exhibits, filed November 18, 2011.

34. On November 22, 2011, the Division filed a supplemental report on the rate increase. See November 22, 2011 Memo.

35. Cedar Ridge filed no response to the Division's supplemental recommendation.

36. The hearing reconvened before the administrative law judge for the Commission on November 22, 2011. The hearing was duly noticed on November 17, 2011. Mr. Kapaloski appeared on behalf of the Company, along with Mr. Thompson, and assistant attorney general

Patricia Schmid appeared on behalf of the Division, along with utility analyst Shauna Benvegnu-Springer ("Ms. Springer) and manager Bill Duncan.

37. At the November 22, 2011 hearing, Mr. Thompson testified that the $190,000 he received under the Well Agreement was in exchange for personal water rights. See Transcript of Hearing, dated November 22, 2011, at 26; lines 12-14. Elsewhere, Cedar Ridge asserted: "What Tremonton City secured is a well…. Tremonton City's interest is in capacities, beyond the reserved capacity was a very seriously negotiated quantity, and did require Mr. Thompson to relinquish the majority of his independently owned water rights." See Company's Exhibit A at 4, Transcript of Hearing, dated November 22, 2011.

38. Mr. Thompson asserted that the water rights were forfeited or surrendered under paragraphs 3.02 (Limitation of Use and Scope of Cedar Ridge Water Company) and 3.03 (Cedar Ridge Water Company Maximum Connections) of the Well Agreement. See Transcript of Hearing, dated November 22, 2011, at 43, lines 1-8.

39. The Division challenged Mr. Thompson's assertion that the water rights were forfeited or surrendered, and Mr. Thompson acknowledged that the paragraphs mentioned themselves may not directly address the issue of "forfeiture" or "surrender" of water rights but they nevertheless limit the number of customers and number of future connections the Company is allowed to serve, which Mr. Thompson believes supports his argument. See Transcript of Hearing, dated November 22, 2011, at 43, lines 1-8.

40. Mr. Thompson testified that he deposited the $190,000 from the purchase of the well in his personal bank account and the money remains there. See Transcript of Hearing, dated November 22, 2011, at 67; lines 8-25; 68; lines 1-19.

41. The Division countered Cedar Ridge's argument under the "four corners" rule of contract law, noting that the Well Agreement does not state that water rights were sold or forfeited. See Transcript of Hearing, dated November 22, 2011, at 82; lines 12-23.

42. The Division's position is that the "water well purchase agreement was only . . . for the hole in the ground." See Transcript of Hearing, dated November 22, 2011, at 84; lines 13-15.

43. The Division believes the Well Agreement contains a clear and unambiguous integration clause. The clause states:

> 8.10 Complete Agreement. This Agreement together with any addenda and attached exhibits constitute the entire Agreement between the parties and supersedes and replaces any and all prior negotiations, representations, warranties, understandings, contracts, or agreements between the parties. This Agreement cannot be changed except by the express written agreement of all parties.

Company's Exhibit C, Transcript of Hearing, dated November 22, 2011.

44. The Division also relied upon paragraph 8.10 of the Well Agreement and noted that Cedar Ridge is prohibited from varying the terms of the agreement by extrinsic evidence. See Transcript of Hearing, dated November 22, 2011, at 87; lines 4-17.

45. The Division spoke with the State Water Engineer. The State Water Engineer reported that on February 22, 2010, Tremonton City applied for water right 29-4476 requesting

3.34 cubic feet per second with a point of diversion using the well. See Division Final Recommendation at 6.

46. The Division also spoke with Tremonton City Utility Manager, Paul Fulgham ("Mr. Fulgham"). Mr. Fulgham reported that Tremonton City only purchased "a hole in the ground," meaning the well, related facilities, the land the well resides on, easements, and the pump (which was returned to Cedar Ridge). See id.

47. Mr. Fulgham provided direct testimony at the November 22, hearing. See Transcript of Hearing, dated November 22, 2011, at 91-103.

48. Mr. Fulgham testified that after approaching Mr. Thompson, testing, and videoing the well and finding it in was good condition and met the City's needs, the City proceeded to negotiate a deal with Mr. Thompson for the well. See Transcript of Hearing, dated November 22, 2011, at 95.

49. Mr. Fulgham further testified:

> …I wasn't buying the water rights. …[T]he water rights meant nothing to us.
>
> And you might say . . . why do water rights mean nothing to you? Well, [Mr. Thompson's] water rights for the Cedar Ridge Subdivision or Cedar Ridge Water Company was for .5 second foot of water. Point 5 second foot of water is equal to roughly 225 gallons a minute.
>
> Now, as a small water company that's a lot, but as a city that wasn't a lot of water rights.
>
> …So [Mr. Thompson's] water rights meant nothing to Tremonton City.

Transcript of Hearing, dated November 22, 2011, at 96, lines. 5-6; 7-8; 9-14; 15-16; 23-24.

50. On cross-examination, Mr. Fulgham added:

> And all we was [sic] buying was the casing which is the 16-inch piece of pipe, and the hole that went down to the water. In my mind. …
> …
> And at the end of the negotiations that's all we bought, was the hole in the ground. And probably the electrical transformer, maybe. …

Transcript of Hearing, dated November 22, 2011, at 108, lines 14-16; 18-20.

51. Mr. Fulgham also testified that before the Well Agreement was executed, Tremonton City filed for water rights for enough flow for 1,200 gallons per minute. Transcript of Hearing, dated November 22, 2011, at 113; lines 2-10.

52. Ms. Springer testified on behalf of the Division that it is the Division's position that the Well Agreement sold the well but not the water rights. Transcript of Hearing, dated November 22, 2011, at 122; lines 10-15.

53. Ms. Springer further testified that water rights can be transferred to other points of diversion, which Mr. Thompson had the opportunity to do before March 31, 2011. Transcript of Hearing, dated November 22, 2011, at 122; lines 15-19. As Ms. Springer explained, Mr. Thompson could have changed his point of diversion from the Tremonton well to another location and continued to use the water rights. See id. at 123; lines 4-7.

54. Ms. Springer also testified the total cost of the well to the Company was in excess of $96,000, not $45,000 as Mr. Thompson indicated. See Transcript of Hearing, dated November 22, 2011, at 126; lines 2-6.

55. Based on the Division's research, "Tremonton City did not purchase any water rights [and none] were included with the transfer, sale, or conveyance of the water well." See Division's Final Recommendation, dated November 14, 2011, at 6.

56. Based on the Division's investigation and testimony given, the Division recommended the funds in the amount of $190,000 from the sale of the water well to Tremonton City be deposited and recorded as property of the Company.

57. As of the November 22, 2011 hearing, Cedar Ridge had not sought clarification or legal recourse from Tremonton City regarding the issue of the sale of the well, despite the fact that the Division's and the Cedar Ridge's positions were opposed to one another on whether water rights were included in the sale of the well. See Transcript of Hearing, dated November 22, 2011, at 28; lines 4-14; at 29; lines 4-6.

58. Several individuals attended the meetings and hearings in this matter.

59. Several individuals filed sworn statements. The main issue on which customers commented was the $190,000 from the sale of the well. Some customers thought Mr. Thompson should be entitled to it as a retirement annuity. Others were sympathetic to Mr. Thompson's financial needs while pointing out the legal and factual distinctions involved when a corporation (i.e., Cedar Ridge), rather than an individual, sells an asset. These individuals felt the money should be returned to Cedar Ridge. Others spoke in favor of a partial settlement arrangement whereby some portion of the $190,000 would be returned to Cedar Ridge.

60. On December 16, 2011, the Commission entered a Report and order approving the rate increase recommended by the Division. See Report and Order, dated December 16, 2011.

61. The December 16, 2011 Report and Order ordered Cedar Ridge to return the $190,000 to its corporate bank account:

> The Company shall record the sale of the water well to Tremonton City appropriately in its books and deposit the $190,000 in the Company's corporate bank account. These transactions shall be completed within seven (7) calendar days of the date of this order, with confirmation to the Division thereafter.

Report and Order at 18, ¶ 2.

62. The December 16, 2011 Report and Order also ordered Cedar Ridge to use to proceeds of the well as follows:

> i) to repay the legitimate corporate loans with interest of 3.5%, ii) to pay the original cost of meters and meter installation, and iii) to refund assessment fees paid by customers in the amount of $13,210 with interest of 3.5%. The remaining balance of the $190,000 shall be placed in a capital reserve account for use in repairing and maintaining the water system in good operating condition.

Report and Order at 19, ¶ 8.

63. On January 17, 2012, Cedar Ridge filed for review and rehearing. See Request for Review and Rehearing of Report and Order, filed January 17, 2012.

64. No certificate of service was attached to Cedar Ridge's January 17, 2012 filing.

65. On February 1, 2012, Cedar Ridge filed its certificate of service. See Certificate of Service, filed February 1, 2012. The certificate of service states that service to opposing parties was accomplished on January 24, 2012. See id.

66. Cedar Ridge asserts that review and rehearing are appropriate on the basis of "new evidence of intent of Tremonton City and [Mr.] Thompson of the Water Well Purchase Agreement." See Request for Review and Rehearing of Report and Order at 1, filed January 17, 2012.

67. The "new evidence" cited by Cedar Ridge includes 1) an affidavit from Max Weese (Mr. Weese"), past Mayor of Tremonton City, 2) a memorandum of understanding entered into between Mr. Thompson and Tremonton City on January 31, 2009, and 3) draft proposals that included the water rights as part of the purchase agreement. See id. at 1-2. The affidavit from Mr. Weese is undated but notarized. See id.

68. On February 1, 2012, the Division filed a response to Cedar Ridge's request for review and rehearing. See Response of the Division of Public Utilities to Cedar Ridge Distribution Company's Request for Review and Rehearing of Report and Order, filed February 1, 2012.

69. On February 7, 2012, Mr. Thompson filed an *ex parte* affidavit of Mr. Fulgham. No certificate of service was attached to the affidavit. No motion or memorandum was attached expressing a basis for consideration of the affidavit after the close of hearings. The *ex parte* affidavit is not evidence and may not be considered.

70. Although Cedar Ridge filed its request for review and rehearing on January 17, 2012, it did not serve opposing parties until January 24, 2012. See Certificate of Service, filed February 1, 2012. In order to afford parties the statutory fifteen days in which to reply to the rehearing request, see Utah Code Ann. § 63G-4-301(2)(a) (2011), the Commission issues this

order within twenty days of the date on the certificate of service of the hearing request, rather than the earlier filing date.

IV. PERTINENT FINDINGS OF FACT

As noted in the Commission's December 16, 2011 order, on the issue of the sale of the third well, the Commission finds:

1. Prior to its sale to Tremonton City, the third well, purchased in part with funds borrowed from Cedar Ridge customers, was an asset of Cedar Ridge.

2. Cedar Ridge paid in excess of $96,000 to develop the third well.

3. It is not credible for Mr. Thompson to claim the entire proceeds for the sale was for water rights when Cedar Ridge had invested $96,000 to develop the well.

4. The sales contract for the third well did not address the disposition of water rights.

5. The sales contract for the third well did not require Mr. Thompson to forfeit or transfer his water rights.

6. The contract for the third well contains an integration clause which provides that the contract constitutes the entire agreement, supersedes all other negotiations or agreements, and cannot be amended except by express written agreement of all the parties.

7. The terms of the sales contract for the third well should be determined by relying on the document itself and without regard to extrinsic evidence.

8. The proceeds of the sale were for the water well itself (i.e., the hole in the ground) and not for water rights.

9. Generally accepted accounting principles dictate that the proceeds of the sale of a corporate asset are to be recorded by the corporation and deposited into the corporation's cash (bank) account.

10. Mr. Thompson treated all of the $190,000 received from Tremonton City for the sale of the third well as his personal property and deposited the entire amount in his personal bank account.

11. The proceeds from the sale of the third well are a corporate asset and should have been recorded by Cedar Ridge as a corporate asset.

12. The proceeds from the sale of the third well are not the personal property of Mr. Thompson

V. ANALYSIS

1. THE CONTRACT IS INTEGRATED

As outlined in the Commission's report and order, the contract contains a clear and unambiguous integration clause. The clause reads:

> 8.10 Complete Agreement. 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, understandings contracts, or agreements between the parties. This Agreement cannot be changed except by the express written agreement of all parties.

Company's Exhibit C, Transcript of Hearing, dated November 22, 2011. Based on the foregoing clause, extrinsic evidence is not allowed and the Commission is restricted to the "four corners" of the document.

2. THE PAROL-EVIDENCE RULE

As also outlined in the Commission's report and order, when a contract contains a clear and unambiguous integration clause, extrinsic evidence is inadmissible under the parol-evidence rule. The parol-evidence rule is "[t]he principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence that adds to, varies, or contradicts the writing." Black's Law Dictionary 1139 (7th ed. 1999). Accordingly, as a matter of law, the parol-evidence rule operates "to exclude [extrinsic] evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an integrated contract." Tangren Family Trust v. Tangren, 2008 UT 20, ¶ 11 (citation & emphasis omitted).

VI. CONCLUSIONS OF LAW

1. Paragraph 8.10 of the contract for the sale of the third well (i.e., the integration clause) precludes consideration of Mr. Thompson's assertions about contract terms not present or contrary to those in the contract.

2. The parol-evidence rule precludes evidence that modifies the contract between Cedar Ridge and Tremonton City because that contract is clear, unambiguous, and fully integrated.

3. No water rights were included in the sale of the third well.

4. The proceeds from the sale of the third well are a corporate asset and should have been recorded by Cedar Ridge as a corporate asset.

VII. REQUEST FOR REHEARING

The issue before the Commission is whether the "new evidence" offered by Cedar Ridge establishes a proper basis for rehearing.

A. THE CONTRACT IS CLEAR ON ITS FACE

The contract states:

> 1.01 Water Well Purchase. Seller hereby agrees to sell, transfer and convey to Buyer free and clear of any lien or 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 is more particularly and legally described in Exhibit "A" of this Agreement.

Company's Exhibit C, Transcript of Hearing, dated November 22, 2011. As already noted, this provision does not include any reference to the sale and purchase of water rights owned by Mr. Thompson. In fact, the purchase obligation is conditioned upon "Buyer's ability to obtain the necessary water rights of 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." Transcript of Hearing, dated November 22, 2011, at 122, 126. 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 well. See Transcript of Hearing, dated November 22, 2011, at 122, 126. See also Division Final Recommendation, at 6. 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.

Based on the foregoing, the contract is clear and unambiguous and, therefore, the Commission does not look to extrinsic "new evidence."

B. THE INTEGRATION CLAUSE

As explained above, the contract is fully integrated. Therefore, "new evidence" of additional contract terms is inadmissible and rehearing is unavailable.

C. PAROL-EVIDENCE RULE

As also explained above, the parol-evidence rule precludes the admission of extrinsic evidence. Because the "new evidence" Cedar Ridge offers is extrinsic evidence of the contract terms not present in the written agreement, the parol-evidence rule precludes its consideration. Therefore, there is no basis for rehearing.

Rehearing is also inappropriate because Cedar Ridge made no showing satisfying its burden of establishing the "new evidence" standard for post-hearing admission.

D. NEW EVIDENCE

As stated at the outset, the burden of establishing facts sufficient to meet the newly discovered evidence standard lies with Cedar Ridge. Cf. Kettner, 375 P.2d at 384. See also Utah R. Civ. P. 59(a)(4).

Cedar Ridge claims that review and rehearing are appropriate on the basis of new evidence. In particular, Cedar Ridge argues three pieces of new evidence justify review and rehearing: 1) an affidavit from Mr. Weese, former Mayor of Tremonton City, 2) a memorandum of understanding entered into between Mr. Thompson and Tremonton City on December 31, 2009, and 3) draft proposals that included the water rights as part of the purchase agreement.

1. Affidavit of Mr. Weese

Cedar Ridge submitted a signed but undated affidavit from Mr. Weese in which he asserts the following:

> It is my understanding and to the best of my knowledge in the negotiations and leading up to the Memorandum of Understanding and the final March 5, 2010 Water Well Purchase Agreement included a value for the elimination or relinquishment of water rights owned by Mr. Thompson in addition to the value for the well.

Exhibit C, Affidavit of Max Weese at 2. Cedar Ridge makes no effort to explain why it could not, with reasonable diligence, have discovered this evidence and produced it at the hearing. In addition, the fact that the affidavit is undated creates uncertainty regarding whether the affidavit itself existed prior to the hearing.

Cedar Ridge was aware as early as September 13, 2011 when the Division filed its draft recommendation that the Division was contesting how the funds from the water well transaction should be distributed. If Cedar Ridge intended to rely on Mr. Weese's testimony regarding the water rights, Cedar Ridge could have and indeed should have introduced that testimony at the hearing. Cf. State v. Jiron, 27 Utah 2d 21, 492 P.2d 983, 985 (Utah 1972) (affirming trial court's denial of motion for new trial based on new evidence where defendant could have discovered the facts he characterized as newly-discovered evidence if he had exercised reasonable diligence). Further, Cedar Ridge has provided no reason why it did not produce this evidence at the hearing. See Thorley v. Kolob Fish & Game Club, 13 Utah 2d 294, 373 P.2d 574, 577 (Utah 1962) (affirming trial court's denial of Rule 59 motion where, in part,

appellant showed no reason why evidence was not produced at trial). In addition to the foregoing, Mr. Weese's affidavit is inadmissible under the parol-evidence rule discussed above.

2. Memorandum of Understanding

Cedar Ridge also submitted a memorandum of understanding ("MOU") entered into between Mr. Thompson and Tremonton City on December 31, 2009 as evidence of the parties' intent to include the water rights in the Water Well Agreement. The MOU states: "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 [Mr.] Thompson." See MOU at 2. The MOU is signed by Max Weese, Mayor for Tremonton, Mr. Thompson, individually, and it is attested to by the Tremonton City Recorder, and bears the Tremonton City corporate seal.

As stated above, if Cedar Ridge intended to rely on this document, it could have and indeed should have produced it at the hearing. This is a public document that would have been readily available through a public document (i.e., "GRAMA") request.[2] As evidenced by its date of December 31, 2009, it has been in the Tremonton City Recorder files since 2009, and therefore could have and indeed should have been produced at the hearing. Yet, Cedar Ridge fails to offer any reason for its failure to present this alleged new evidence at the hearing; therefore, the Commission declines to consider it. See ProMax Dev. Corp. v. Mattson, 943 P.2d 247, 254 n.3 (Utah Ct. App. 1997) (holding party failed to satisfy due diligence requirement for newly discovered evidence where party failed to suggest why, with due diligence, testimony could not have been offered and presented in a cogent manner at trial). The contract's

[2] The Commission takes administrative notice that this document is also posted on the Internet. See

integration clause makes clear it completely supersedes any earlier expression of the parties' understanding as to the terms of the transaction. Furthermore, as stated above, the MOU is, in any case, inadmissible under the parol-evidence rule.

3. Draft Agreement

Cedar Ridge next relies on an unsigned and undated "draft" water well purchase agreement as evidence of the parties' alleged intent to include the water rights in the sale of the well. As already noted, the final agreement's integration clause forecloses consideration of this document. It is likewise inadmissible under the parol-evidence rule discussed above.

The Utah Supreme Court's statement in *Hydraulic Cement Block Co. v. Christensen*, 38 Utah 525, 114 P. 524, 531 (1911), is illustrative of what occurred in this case:

> there appears an absolute want of diligence on the part of the appellant to obtain the alleged new discovered evidence at the trial. The record in this regard presents a case where, after trial, a defeated party begins to look up the evidence to sustain the allegations contained in his pleading. Courts cannot grant new trials merely because a defeated party, after an adverse decision, makes a showing that upon a second trial he can produce additional evidence in support of his contentions which will probably turn the decision in his favor. He must use due diligence to produce his evidence when the case comes on for trial, and, unless he does so, the court is powerless to help him. In this case there is no showing whatever that the [appellant] used any diligence to produce the alleged newly discovered evidence at trial. The . . . motion [was, on that basis, correctly overruled].

(Emphasis added). As explained, Cedar Ridge has not met its burden of supporting facts sufficient to support its request for rehearing.

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http://www.psc.state.ut.us/utilities/water/10docs/10242301/68911Exhibit%20B%20-%20Memorandum%20of%20Understanding.PDF.

VIII. *EX PARTE* AFFIDAVIT OF MR. FULGHAM

Mr. Thompson filed what purports to be an affidavit of Mr. Fulgham on February 7, 2012. No explanation or justification for the Commission's consideration of this *ex parte* communication is offered, and no foundation is offered for its admissibility. Except in exceptional circumstances not present here, the Commission does not consider *ex parte* communication and, in fact, such communication is prohibited under Utah Code Ann. § 54-7-1.5 (2010). Mr. Fulgham's affidavit is also untimely under Utah Code Ann. § 63G-4-301 and cannot be considered on that basis as well.[3]

ORDER

Cedar Ridge has failed to establish any basis for rehearing and to satisfy its burden to establish facts justifying the Commission's consideration now of "new evidence" which could have been presented at the hearing. The request for review and hearing of the Commission's report and order is denied. The Commission's order dated December 16, 2011 is affirmed.

DATED at Salt Lake City, Utah this 10th day of February, 2012.

/s/ Melanie A. Reif
Administrative Law Judge

[3] Mr. Fulgham's affidavit provides a somewhat different version of his previously sworn testimony that Tremonton City only purchased "a hole in the ground." See Affidavit of Paul C. Fulgham at 1. No foundation is laid for Mr. Fulgham's affidavit. No explanation is given as to when and why Mr. Fulgham decided to change his testimony.

Approved and confirmed this 10th day of February, 2012, as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
D#215513

Notice of Opportunity for Judicial Review

Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 2012, a true and correct copy of the foregoing was served upon the following as indicated below:

By U.S. Mail:

David Z. Thompson
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By E-Mail:

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By Hand-Delivery:

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_____
Administrative Assistant