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David L. Bradshaw v. Wilkinson Water Company and the Public Serviec Commission of Utah : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

DAVID L. BRADSHAW, Petitioner, vs. WILKINSON WATER COMPANY, and the PUBLIC SERVICE COMMISSION OF UTAH, Respondents.	)	**PETITIONER'S REPLY BRIEF** Supreme Court Case No. 20020233-SC Public Service Commission Docket No. 00-019-01

Petition for Review of an Order
of the Public Service Commission of Utah

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I. THE COMMISSION ERRED WHEN IT CONCLUDED THAT THE TARIFF PERMITTED ANY CHARGES ABOVE THE CONNECTION FEE

In their responsive briefs, Wilkinson Water Company (Wilkinson Water) and the Public Service Commission (hereinafter referred to as Commission or PSC) spend the majority of their argument discussing the application of "a decades old policy of looking to the real estate developer to pay costs for the installation of water plant facilities needed to serve his subdivision." (Brief of Respondent Public Service Commisson (PSC Brief) 11; Brief of Respondent Wilkinson Water Company (Wilkinson Water Brief) 9 (characterizing the application of the rule as application of "an interpretive guideline").) However, no such policy exists, and, even if it did, it would not be applicable to Mr. Bradshaw's circumstances.

A. The Tariff Language Is Plain. Before the PSC could even consider the application of this purported policy, it was required to conclude that the tariff did not address the question brought before it by Mr. Bradshaw. However, the tariff addresses the precise question at issue.

The proceedings before the Commission began when Mr. Bradshaw asserted that Wilkinson Water was unjustifiably refusing to provide service to Mr. Bradshaw's proposed subdivision. (R. at 2.) During the course of the proceedings Mr. Bradshaw contended that Wilkinson Water was violating the terms of its own tariff by requiring Mr. Bradshaw to pay more than the costs provided for in the tariff, a practice that is prohibited by Utah Code Ann.

§§ 54-3-2, -3, -7. (*See* R. at 37, 10-12; R. at 96, 3; R. at 97, 9-13; R. at 171, 5-9; R. at 227, 6-8.)

Thus, the threshold question before the Commission in Mr. Bradshaw's claim against Wilkinson Water was whether Wilkinson Water was violating the terms of its tariff. In its brief, Wilkinson Water concedes that "[t]ariffs function much like statutes" and that they "constitute the 'rates, rules and regulations' by which a utility must operate." (Wilkinson Water Brief 19.) Additionally, neither the Commission nor Wilkinson Water dispute that in order to determine whether Wilkinson Water was violating its tariff the Commission was required to follow the well-settled rule in Utah public utility law that requires tariffs to be strictly construed against the utility:

> With respect to those tariffs, these observations are pertinent. They are filed by the utilities themselves and thus **mainly serve their own interests**. They should be **construed strictly against the utility**; and the **utility should be required to strictly comply with them**; and they must be fair, reasonable and lawful.

Josephson v. Mountain Bell, 576 P.2d 850, 852 (Utah 1978) (emphasis added). Additionally, there is no question that the Commission is not entitled to deference on its interpretation of the tariff provisions at issue. "[T]he rule has traditionally been that an agency's interpretation of 'contracts and certificates' presents a question of law, reviewed nondeferentially for correctness, at least so long as ambiguous or technical terms are not involved. . . . [W]e are aware of no decision calling this familiar concept into question. . . ." *Magnesium Corp. v. Air Quality Board*, 941 P.2d 653, 657-58 (Utah Ct. App. 1997).

In this case, the tariff requires a customer to pay a one-time connection charge of $1,500 for "3/4" service to property line, where service fronts property line, including meter and materials." (R. at 275. A copy of the Tariff is appended to this Reply Brief as Exhibit 1. Hereinafter referred to as App. Ex. 1.) In addition, the "*Facility Extension Policy*" in the tariff provides in full:

> 1. Extensions. An extension is any continuation of, or branch from, the nearest available existing line of the Company, including any increase in capacity of an existing line to meet the customer's requirement.
> 2. Costs. The total cost of extensions, including engineering, labor and material shall be paid by the applicants. Where more than one applicant is involved in an extension, the costs shall be prorated on the basis of the street frontage distances involved. Sufficient valves and fire hydrants shall be included with every installation.
> 3. Construction Standards. Minimum standards of the Company shall be met, which standards shall also comply with the standards of the Utah State Bureau of the Environmental Health. Pipe sizes shall be designed by the Company, but the size shall never be smaller than 4".
> 4. Ownership. Completed facilities shall be owned, operated, and maintained by the Company including and through the meters, as detailed in the Tariff Rules and Regulations.
> 5. Water Storage and Supply. All costs for providing needed water supply and storage shall be paid by the Company. This cost shall include the installation and operation of pumps as required for proper pressure regulation of the system.
> 6. Temporary Service. The customer will pay the total cost for the installation and removal of any extensions for service to a venture of a temporary or speculative permanency. The Company will receive the estimated cost from the customer before beginning work on the extension.

(*See* App. Ex. 1; R. at 280.)

The facility extension policy defines extension to include "any continuation of, or branch from, the nearest available existing line of the Company." It then provides the

relative burdens of the applicant and the water company. The total cost of the extensions is to be paid by the applicant. However, the costs for providing the water supply and storage is to be paid by Wilkinson Water, including the installation and operation of pumps as required for proper pressure regulation of the system.[1] There is no ambiguity in the language.

In this instance, Mr. Bradshaw requested connection for his 21-lot subdivision. Mr. Bradshaw was ready, willing, and able to pay for the internal infrastructure of the subdivision,[2] the connection fees, and the tariffed charges, as required by the tariff. However, rather than apply the tariff provisions as written, Wilkinson Water demanded that he pay the connection fee, the internal infrastructure, the other tariffed charges, plus untariffed amounts for additional water storage and water supply. This was a clear violation of the tariff. Wayne Wilkinson, the manager of Wilkinson Water, specifically testified that he understood that Wilkinson Water was violating the tariff when it asked for payment for water storage and supply.

> Q Okay, let's go down to paragraph five, water storage and supply, says: "All costs for providing needed water supply and storage shall be paid by the company." Do you abide by that part of your tariff?

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[1] Wilkinson Water collects a $1,500 connection fee under the tariff. Presumably, this fee is used for source and storage capacity.

[2] Strangely, Wilkinson Water seems to contend that Mr. Bradshaw disputed his duty to pay for the infrastructure internal to the subdivision. (*See* Wilkinson Water Brief 11.) However, Wilkinson Water well knows that there has never been any doubt in Mr. Bradshaw's mind that he would be required to pay for that infrastructure. The only issues before the Commission were the issues identified in the hearing, i.e., whether the costs for storage and supply of water were justifiably charged to Mr. Bradshaw as part of the infrastructure costs.

A Used to.

. . . .

Q Read paragraph five again. Can you read paragraph five, tell me where that gives you the right to charge storage and source to Mr. Bradshaw? It prohibits that, doesn't it?

A Yes.

(R. at 227, 163-164.)

Both the Commission and Wilkinson Water accuse Mr. Bradshaw of asking this Court to read paragraph 5 in isolation. Wilkinson Water argues that "the extension policy refers expressly to a 'customer,'" and that "Bradshaw (the developer, as opposed to a homeowner) is not a customer."[3] (Wilkinson Water Brief at 20.) Further, it argues that Mr. Bradshaw is required to pay for the "'total costs of extension, including engineering, labor and material.'" (*Id.*)

As is obvious from this argument, Wilkinson Water is actually the one asking this Court to read the language of paragraph five of the tariff in isolation. First, it points to the use of the term "customer" in the tariff language to bolster its contention that the extension policy was not meant to apply to "developers," such as Mr. Bradshaw. However, Wilkinson Water never explains how using the word customer excludes a developer from being a customer. In fact, the term "customer" is quite clearly being used to describe any person who

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[3] As discussed in Mr. Bradshaw's opening brief, this attempt to distinguish a homeowner from a developer, who would sell lots to homeowners, is discriminatory. Whether one developer or 21 homeowners seek connection is immaterial. Utah Code Ann. § 54-3-8 demands that they be treated the same.

applies for an extension of an existing line of the Company.[4] Moreover, when explaining what costs are to be borne by the respective parties, the tariff refers to the person seeking the extension as an "applicant." (*See id.*, ¶ 2.) Of course, an applicant is a person who applies for a "service connection . . . to any part of the waterworks system." (*See* Ex. 1, R. at 276, ¶ 2.)

Additionally, the argument that paragraph two of the Facility Extension Policy requires Mr. Bradshaw to pay for the water and storage supply beyond the $1,500 connection fee also clearly violates basic rules of contract and statutory interpretation. Utah courts adhere to the rule that they will "avoid interpretations that will render portions of a statute superfluous or inoperative. Consequently, when two statutory provisions conflict in their operation, the provision more specific in application governs over the more general provision." *Hall v. Utah State Dep't Corrections*, 2001 UT 34, ¶ 15, 24 P.2d 958; *see also Big Cottonwood Tanner Ditch Co. v. Salt Lake City*, 740 P.2d 1357, 1360 n.2, 1361 n.5 (Utah Ct. App. 1987) (citing the maxims "a contract should be interpreted so as to harmonize all of its provisions" and the secondary rule of contract interpretation of "favoring specific provisions over general"); Restatement (Second) of Contracts § 203(c) ("Specific terms and exact terms are given greater weight than general language."). In this case, although the tariff does require Mr. Bradshaw to pay for the costs of extension, it specifically states that

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[4] The term "customer" is not defined in the tariff. Presumably, if Wilkinson Water desired to define "customer" to exclude a developer it could and should have done so.

Wilkinson Water is responsible for "[a]ll costs for providing needed water supply and storage . . ., includ[ing] the installation and operation of pumps as required for proper pressure regulation of the system." Given that the specific language of the facility extension policy requires Wilkinson Water to bear the total costs for providing the needed water supply and storage, it is, at best, disingenuous for Wilkinson Water to argue that the tariff, contrary to its plain language, provides for Mr. Bradshaw to pay all of the water storage and supply costs. Additionally, such a construction would render paragraph 5 superfluous.

In its brief, the Commission addresses the tariff provisions in a cursory fashion, never acknowledging that it was required to interpret the tariff's provisions strictly against the utility. Rather, it argues that Mr. Bradshaw has failed to consider "whether his interpretation makes overall sense with the rest of the tariff's provisions." (*See* PSC Brief 21).[5] It further explains in a footnote that Mr. Bradshaw's interpretation would require the Commission "to treat him as 21 individual customers, requesting 21 individual service extensions, paying $1,500 per connection." (*See id.* 21 n.4.) It then states that this would require Mr. Bradshaw to "be treated as 21 individual customers for other tariff provisions," arguing as if Mr. Bradshaw had not taken that position before. (*See id.*) However, that is exactly what Mr. Bradshaw has always proposed and has always stated he was willing to do.

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[5] The Commission also argues that Mr. Bradshaw failed to consider the potential impact of "his interpretation" on other customers and the Commission's purported policy regarding real estate developers. Each of these points will be treated separately below.

This argument again points out the irrationality of the Commission's position. The footnote claims that treating Mr. Bradshaw as 21 different customers somehow makes his request unmanageable. However, under the tariff's provisions, Mr. Bradshaw is required to design, engineer, and place the infrastructure for all 21 lots. Mr. Bradshaw has always been ready, willing, and able to do so. Considering that the 21 lots would be serving 21 different customers, Mr. Bradshaw has always recognized that 21 separate shut-off valves, meters, and meter boxes would be required and 21 separate accounts would be maintained upon connection. Apparently, the Commission is claiming that Mr. Bradshaw would be required to place the meter, meter boxes, shut-off valves, etc., at the time of application. However, no one, including new applicants, would be required to do so. The only thing new applicants are required to do is apply, pay the connection fee, and understand that they must provide the infrastructure required by the tariff. New non-developer applicants requesting connection to the system are in exactly the same position as Mr. Bradshaw.

Based upon the foregoing, the Commission incorrectly concluded that the tariff provisions did not apply to Mr. Bradshaw. Given that the tariff language unambiguously provides that Mr. Bradshaw is required to pay for the internal infrastructure for connection of his subdivision, the Commission erred when it required that Mr. Bradshaw "participate in bearing the risks and costs of expanding a utility system to meet his project's needs." (Order on Reconsideration, R. at 216, 8. A copy of the Order on Reconsideration is appended to this brief as Exhibit 2. Hereinafter referred to as App. Ex. 2.)

B. No Decades-Old Policy Exists . Not only have Wilkinson Water and the Commission ignored the plain language of the tariff in their briefs to this Court, but they have improperly relied on what the Commission terms "a decades old policy of looking to the real estate developer to pay costs for the installation of water plant facilities needed to serve his subdivision." (PSC Brief 11; *see also* Wilkinson Water Brief 9.)

First, there is no such policy that the Commission can identify. In both the January 4, 2001, Report and Order and the February 26, 2002, Order on Reconsideration, although the Commission referenced such a "policy" it cited no statute, rule, regulation, internal departmental manual, or previous Commission Ruling or Order from which this policy derived. (*See* Report and Order 3-4; R. at 29, 3-4. A copy of the Report and Order is appended to this brief as Exhibit 3. Hereinafter referred to as App. Ex. 3.*See also* App. Ex. 2, R. at 216, 5-6.) For the first time in its brief, however, the Commission identified the sole written source of what it contends established this policy—Utah Admin. Code R746-330-6. Rule R746-330-6 provides in its entirety the following: "*There is a rebuttable presumption that the value of original utility plant and assets has been recovered in the sale of lots in a development to be served by a developer-owned water or utility system.*"

What is most obviously problematic about this claim is that this administrative rule does not provide any basis for the so-called "decades old policy." It says simply that the Commission is to presume that the cost of the original utility plant and assets have been

entirely recovered if (1) a developer owns the water system serving the lots and (2) the lots have been sold.

The rule obviously does not apply here. First, the Wilkinson Water Company is not a developer-owned water system. Second, even if Wilkinson Water were a developer-owned water system, the Wilkinson Water Company has not sold any lots in Mr. Bradshaw's subdivision. Obviously, this rule was meant to apply against a water utility owned by the developer of the lots served by the utility to prevent the developer-owned utility from recovering the costs of its utility plant and assets both from the sale of lots and from its ratebase. One need look only at the caption of the rule—"Ratebase Treatment of Developer-owned Water or Sewer Company Assets - Presumption of Recovery"—to discover this as the intent of the regulation. *See* Utah Admin. Code RR746-330-6.

If anything, this rule supports Mr. Bradshaw's position. The rule states that a developer-owned utility is presumed to have recovered the costs of its plant and assets from the sale of lots. In this case, Mr. Bradshaw has had no opportunity to recover for utility plant and assets twice—he does not own the utility. Thus, the rule must apply to the only entity that would be in a position to recover those costs twice—Wilkinson Water.

Applying the rule to Wilkinson Water shows that when the presumption is properly applied it helps, not hurts, David Bradshaw. Either Wilkinson Water is presumed to have (1) recovered the costs of its original plant and assets when it sold any lots it may have originally owned that it intended the Water Company to exclusively serve or (2) it planned the water

company facilities to be large enough to cover other developments in its service area. In the former instance, since the sale of the lots presumably paid for the original plant and assets, the additional tariffed charges must presumably have been for the impact any future connection would place on the original water system so as to fairly assess the portion of expansion that would be attributable to expansion caused by future connections. Thus, in this instance, the tariffed facility extension policy treats the connection fees and tariffed charges as sufficient to allow for expansion of the system—explicitly identifying the costs to be borne by each party. In the latter instance, the tariffed fees and charges must have been set so as to allow the recovery of the original costs. In either event, the presumption is against Wilkinson Water's position: either (1) Wilkinson Water must overcome the presumption that the tariffed charges were sufficient to cover anticipated growth, or (2) it must overcome the presumption that the tariffed charges were intended to recover the costs of the original plant and assets and, thus, included an implicit assumption that the tariffed charges were sufficient to allow for expansion.

This Court has often held that it will only "uphold an agency's interpretation of its own rules" if "that interpretation is 'reasonable and rational.'" *R.O.A. General, Inc. v. Utah Dep't of Transportation*, 966 P.2d 840, 842 (Utah 1997). Further, this Court has stated that an interpretation which "ignores specific language" is "unreasonable." *Id.* The above discussion highlights the irrationality of the Commission's position regarding this purported policy. First, the Commission never explicitly identified the "policy" upon which it was

relying in either of its orders. Second, the Commission ignored the specific language of the rule it finally identified as the "decades old policy" upon which it was relying. Third, the rule cited actually supports Mr. Bradshaw's position. Accordingly, this Court should reject the Commission's interpretation of the only rule that it contends supports its decision.

C. Conclusion to Point I. As discussed above, Wilkinson Water and the Commission contend that the application of "a decades old policy of looking to the real estate developer to pay costs for the installation of water plant facilities needed to serve his subdivision" supports the Commission decision in this case. (PSC Brief 11; *see also* Wilkinson Water Brief 9 (characterizing the application of the rule as application of "an interpretive guideline").) No such policy exists. The single rule cited and relied upon by the Commission does not even apply to Mr. Bradshaw's situation.

Moreover, before the Commission could ever consider the application of this policy, it was first required to conclude that the tariff did not apply to this situation. The Commission erred when it failed to strictly construe the tariff language and concluded that it did not apply in this case. Additionally, the Commission erred when it irrationally interpreted R746-330-6 as requiring a real estate developer to pay costs for the installation of water plant facilities need to serve his subdivision despite the tariff language.

II. PUBLIC POLICY DOES NOT SUPPORT THE COMMISSION DECISION

Finally, even if this Court were to conclude that the tariff language was not clear and that the public policy could be inferred from the rule cited by the Commission, the

Commission's assertion of the public policy in this case is irrational. Although the Commission continues to contend that the risk to a utility from a will-serve letter given to a developer owner is greater than from a will-serve letter to a non-developer owner, neither the logic, as discussed in the Petitioner's Brief, nor the facts of this case supports that contention.

First, the fact that Mr. Bradshaw, after connecting and dedicating the water delivery system for his developed subdivision, would sell to a third-party should make no difference at all to the water company. When Mr. Bradshaw connects his development to the system he will be required to pay the connection fee. If he then later sells any lot, there is no increased burden because the connection fee has already been paid. This situation is no different from a prospective non-developer customer paying a connection fee and then selling his or her property after he has lived in it.

Second, that Mr. Bradshaw would make no additional contribution to the Company's cost beyond dedicating the infrastructure is simply wrong. Any person who connects to the system is required to pay the connection fee and the other tariffed charges.[6] Thus, the Commission's statement that Mr. Bradshaw would not be making any additional contribution to the Company's cost is impossible---if a lot owner wants to connect to the Wilkinson Water system, somebody has to pay the connection fee and the other tariffed costs. Further, whether Mr. Bradshaw or a third-party pays the connection fee is irrelevant---the connection

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[6] The purposes and use of the $1,500 connection fee in the tariff have never been disclosed by Wilkinson Water. Accordingly, it must be assumed that source and storage requirements are addressed in that fee.

fee will have been paid, and, under the Commission's interpretation of the tariff, that connection fee and the other tariffed charges will offset the costs of providing water storage and supply.

The underlying premise of the argument really seems to be that, because the developer may or may not sell lots in his or her subdivision, somehow the developer's risk of selling lots increases the cost to the water company. This simply does not follow. If the connection fee and the other tariffed costs are sufficient to cover the increased costs of providing water storage and supply in the non-developer situation, it should be sufficient to cover the increased costs of providing water storage and supply in the developer situation. The only difference in the two situations is the status of the original owner; the economics simply do not change. Moreover, if it is fair to impose the risk on the water company in the non-developer owner situation, which the Commission explicitly concluded, it is fair to impose the risk on the water company in the developer owner situation. There is no more "vagary" in the approval process for a subdivision than in the approval process for individual lots.

In fact, the evidence in the hearing undermines the Commission's position and support Mr. Bradshaw's. In the hearing, Wayne Wilkinson testified that Wilkinson Water has given will-serve commitments of up to eight non-developer owners who have not developed their properties after several years—some more than ten years. (*See* R. at 227, 176-177, 178, 180, 190-91). Further, there is evidence that Wilkinson Water has committed to subdivisions in the past for the supply of water. In all but two instances, Wilkinson Water required no more

than the connection fee. (*See* R. at 227, 171, 174-80, 190-91.) If the addition of developer owners was truly a great economic drain on the water company it would seem that Wilkinson Water would have been treating the developer owners differently through its entire history. Additionally, Wilkinson Water would have provided evidence to show that the developers caused a greater drain on the company. The fact is that Wilkinson Water never has claimed that developer owners should be treated differently than regular owners. Even in the hearing, Wayne Wilkinson testified that the only reason for Mr. Bradshaw's different treatment was that he believed that serving Mr. Bradshaw would cause Wilkinson Water to exceed its supply and storage capacity. (R. at 227, 180; *see also id.* at 171, 174-80, 190-91.)

Moreover, Wilkinson Water did not demand that Mr. Bradshaw merely pay his "fair share" of the purportedly increased demand that his development placed on the system as seemingly argued by the Respondents. The evidence at the hearing demonstrated that Wilkinson Water demanded that Mr. Bradshaw provide a 100,000 gallon water storage tank, a 200 gallon per minute well, and other infrastructure. (*See* R. at 227, 14; Hearing Ex. 2.) The demand for the storage tank required Mr. Bradshaw to provide approximately 700% more storage than the demand placed on the system. The demand for the well required Mr. Bradshaw to provide approximately 1100% of the demand his subdivision would place on the system.[7] Given the clearly excessive demand placed on Mr. Bradshaw, it would seem

[7] Given the unreasonable demands that Wilkinson Water has continually made to Mr. Bradshaw throughout the history of this case, it seems most strange that the Respondents would complain that Mr. Bradshaw is not requesting that this Court determine what "his fair

that public policy would support the position that a public utility be required to assess only what it has been permitted to charge in its tariffs, even if the person seeking services is a developer. Otherwise, those seeking services from a utility are subject to the extortionate power of the utility to demand costs without justification or leaving the person requesting service without recourse.

Based upon the foregoing, the Commission's enunciation of a policy is unreasonable and irrational. Further, the policy unfairly and unreasonably discriminates against Mr. Bradshaw in violation of Utah Code Ann. § 54-3-8, which expressly prohibits such discrimination.

III. THE COMMISSION CLEARLY ERRED WHEN IT FOUND THAT WILKINSON WATER'S SOURCE AND STORAGE CAPACITY MIGHT BE EXCEEDED IF MR. BRADSHAW'S DEVELOPMENT WAS SERVED

In an attempt to respond to the arguments raised by Mr. Bradshaw regarding the

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share" is. (*See* Wilkinson Water Brief 11.) It is not true that Mr. Bradshaw is not interested in fairness as seemingly suggested. Further, it is not true that Mr. Bradshaw presented only "vague evidence as to what that 'fair share' should be." There was substantial evidence that Wilkinson Water had already placed a value on its illegal exactions: $100 per lot for source and $400 per lot for storage. (*See* R. at 227, 106).

More importantly, however, Wilkinson Water failed to produce any evidence in the hearing that justified its departure from its historic practice of (1) assessing only tariffed charges and/or (2) requiring that developers pay only connection fees. Further, it provided no evidence that supported its only claimed basis for making its illegal demands—that Wilkinson Water did not have sufficient water storage or supply to service Mr. Bradshaw's development. Given Wilkinson Water's failure to show even one piece of evidence supporting its demand for payment of charges outside of the tariff, it should come as no surprise that Mr. Bradshaw has not presented the issue of the Commission's failure to properly assess Mr. Bradshaw's proportionate share to this Court.

Commission's clearly erroneous factual findings, Wilkinson Water and the Commission make several arguments. First, both the Commission and Wilkinson Water contend that, because the Commission has independent authority under Title 54 of the Utah Code to establish each utility's compliance with their duty to provide adequate, efficient, just, and reasonable services, the evidence regarding sufficient source and storage capacity was largely irrelevant and could be ignored. (*See* PSC Brief 7-8; Wilkinson Water Brief 5-6). Second, they argue that substantial evidence did support the Commission's findings that Mr. Bradshaw's development would overtax Wilkinson Water's system. (PSC Brief 22-28; Wilkinson Water 16-19.) Each of these arguments is fatally flawed.

A. The Evidence Regarding Source and Storage Was Not Irrelevant. As stated above, the Commission and Wilkinson Water assert that given the Commission's duty to assess the reasonableness of Wilkinson Water's conduct, evidence regarding Wilkinson Water's source and storage capacity was largely irrelevant. This argument, however, belies the Commission's order and the parties' arguments in this case.

The Commission's brief begins with the statement that, because "Mr. Bradshaw desire[d] to develop part of his property" and asked "Wilkinson Water . . . to be prepared to provide . . . service," the request would "require the construction of additional utility plant." (PSC Brief 5.) Additionally, Wilkinson Water contends in its brief that its system "'is at or

near capacity for both source and storage resources.[8]'" (Wilkinson Water Brief 2.) They, therefore, have contended that Bradshaw's development was required to provide a "tank, a well, and other infrastructure to serve his project." (Wilkinson Water Brief 4.)[9] In fact, Wayne Wilkinson, President of Wilkinson Water, testified that the only reason he was demanding that Mr. Bradshaw pay for source and storage above the tariffed charges was because they no longer had source and storage capacity.[10]

In coming to its decision, the Commission found that "future demand from individuals

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[8] It bears noting that, although Wilkinson Water and the Commission point to the fact that storage capacity has been exceeded in their briefs, they ignore the testimony of Wayne Wilkinson. He stated: "Well, the storage is not really out technically, because we have got it there if we need to have it, but it belongs to a private individual [Wilkinson family members], and we don't have any objection to using it. It has been used in the past. We have not purchased it back from the water company, but when it's been necessary to use in these high times, we just let it go." (R. at 227, 173-74.)

[9] This description of the demand largely understates the enormity of the conditions originally placed on Mr. Bradshaw. The evidence at the hearing demonstrated that Wilkinson Water demanded that Mr. Bradshaw provide a 100,000 gallon water storage tank, a 200 gallon per minute well, and other infrastructure. (*See* R. at 227, 14.) The demand for the storage tank required Mr. Bradshaw to provide approximately 700% more storage than the demand placed on the system. The demand for the well required Mr. Bradshaw to provide approximately 1100% of the demand his subdivision would place on the system.

[10] Wayne Wilkinson testified:

> Q. How about providing any source or storage?
>
> A. None of those people in the first couple of subdivisions did that. The water company built and designed the first one in part because some of the subdivisions was going on, we designed the building. So we didn't require at that time that they provide the source or storage because we already had it available. Just like the same thing with Silver Stone, when Mike come in there we had source and had storage, didn't require him to buy source and storage because we had it available but we don't anymore.

(R. at 227, 180; *see also id.* at 171, 174-80, 190-91.)

who may locate in Mr. Bradshaw's proposed subdivision make the Company's existing capacities appear to be inadequate." (App. Ex. 2; R. at 216, 8.) Accordingly, the Commission concluded that Mr. Bradshaw would be required to

> pay for the proportionate share of water plant costs that are reasonably attributable to provide water service to his proposed subdivision. These costs include the physical water plant, which include water source (new wells or upgrades for increased water production from existing wells), water storage tanks, water distribution facilities and equipment, and the costs incurred in planning for such plant and its construction and installation. . . . The proportion should be based upon the capability or capacity of the plan installed and the capability or capacity reasonably needed to provide service to Mr. Bradshaw's proposed development. Wilkinson Water will bear the costs associated with water plant [sic] that is planned or put in place that exceeds the needs of Mr. Bradshaw's proposed development.

(*Id.*; R. at 216, 10.)

Given this evidence and the explicit findings and conclusions of the Commission, it is disingenuous for the Commission to claim that capacity of Wilkinson Water's system was not significant to the Commission's decision. It was the most important factual issue at the hearing. If Wilkinson Water had sufficient source and storage capacity, then its claimed basis for assessing the costs on Mr. Bradshaw disappear.

B. No Evidence Supported the Commission's Findings

1. Stipulated Facts. Given that the evidence regarding source and storage capacity was relevant, the next issue raised is whether the evidence presented supported the Commission's findings that Wilkinson Water was required to fund additional plant and asset development because of Mr. Bradshaw's development. The Commission and Wilkinson

Water argue that sufficient evidence existed to support the Commission's findings. In doing so, they claim that permitting evidence of source and storage capacity offered outside of the parties' stipulations was permissible.

As discussed in Mr. Bradshaw's first brief, on July 20, 2001, pursuant to a Scheduling Notice entered by the Commission, the parties filed with the Commission stipulated facts and issues for rehearing. (*See* Issue and Fact List for Rehearing; R. at 96. A copy of the Issue and Fact List for Rehearing is appended as Exhibit 4. Hereinafter referred to as App. Ex. 4.) In the section entitled "Stipulated Facts", the parties stipulated as follows:

> Petitioner and Respondent hereby stipulate to the following facts:
>
> 5. The Utah Administrative Code, R309-203, Table 203-1 titled "Source Demand for Community Water Systems (Indoor Use)," provide that peak day demand for residential connections is 800 gpd or .56 gpm per lot. Accordingly, the amount of source capacity for indoor use for Petitioner's subdivision is 11.76 gpm [gallons per minute] (.56 x 21 lots).
> 6. The Utah Administrative Code, R309-[203-7(3)], titled "Estimated Outdoor Use," provides the appropriate calculation necessary for outdoor water use for residential property. The section provides that to determine irrigable acreage, start with "gross acreage, then subtract out any area of roadway, driveway, sidewalk or patio pavement along with housing foundation footprints that can be reasonably expected for lots within a new subdivision."
> 7. The Utah Administrative Code, Table 203-4 requires 400 gallons storage for indoor use for each lot. Hence, Petitioner's proposed development would require a storage capacity of 8,400 gallons for indoor use (21 lots x 400 gallons).
> 8. Utah Admin. Code R309-203(8)(2)(c)) requires 1,873 gallons per irrigable acre of storage capacity.

(*Id.*; R. at 96, 2-3.) Additionally, the parties identified in the disputed fact section the following:

> Petitioner and Respondent state that the following facts are disputed and must be resolved:
> 1. The amount of infrastructure cost within the subdivision that David L. Bradshaw will be required to pay to connect residences to the existing water system.
> 2. The total amount of source capacity that Wilkinson Water Company has.
> 3. The total amount of storage capacity that Wilkinson Water Company has.
> 4. What the average irrigable acreage of each .46 acre lot in the Petitioner's proposed subdivision is.
> 5. The amount of residential connections that Wilkinson Water Company currently has and the number of committed connections.

(*Id.*; R. at 96, 3.)

As is evident from these stipulations, the parties stipulated as to the figures the Commission should use to determine the amount of demand that each connection placed on the system. In other words, the parties stipulated that no other water data would be presented to vary from the assumptions and that the figures used in the regulations would be stipulated to as accurate.[11] For example, for each residential connection, the parties stipulated that the

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[11] This argument points out the problem with the Wilkinson Water and Commission arguments that Mr. Bradshaw is contending that the Commission is bound to follow the regulations of another agency. Nothing is further from the truth.

The stipulations merely referenced the regulations to demonstrate the basis for the parties stipulations. In other words, the parties agreed that the source and storage capacity requirements were properly set forth in the regulation and firm data did not exist to contradict those numbers. The parties were not stipulating that the Commission was bound to follow the regulations but were stipulating that the standards set forth in the regulations would be relied upon by the parties and the Commission.

There are additional problems with the Commission's arguments. The Commission seems to be contending that it knows better how to determine source and storage capacity requirements of a water system than the regulatory agency explicitly granted discretion to regulate that issue. It seems to say that despite the fact that the Drinking Water Board has

demand for indoor use placed on the system for source capacity was 11.76 gpm and for storage capacity was 8,400 gallons. Additionally, the demand for outdoor use placed on the system for storage capacity was 1,873 gallons for each irrigable acre served per connection. Finally, the demand for outdoor use placed on the system for source capacity was to be calculated using Table 203-3 found in Utah Admin. Code R309-203-7(3). Additionally, the parties stipulated that the only disputed facts were the average irrigable acreage of each lot, the amount of residential connections, and the source and storage capacity for each lot.

Despite these stipulations, Wilkinson Water presented evidence that the source and storage capacities may differ from the numbers stipulated to by the parties. (*See* R. at 227, 56-59, 60-62, 89-92, 205-209, 246-250.) When Mr. Bradshaw objected to the presentation of evidence outside of the stipulated issues and facts, the Commission overruled the objection. (R. at 227, 62.) Neither the Commission or Wilkinson Water deny that this is so nor do they deny that the Commission considered this objected-to evidence in making its determination.

Instead, they respond by creating and responding to an argument never advanced by Mr. Bradshaw. They contend that by requiring the parties to abide by their stipulations, Mr.

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fixed presumptive standards that can be varied only by "firm water use data," *see* Utah Admin. Code R309-203-7(2); R309-203-7(3), the Commission can ignore those standards on the basis of the vaguest of water use data simply because the Commission has some general regulatory mandate to govern utilities. One would think the Commission would give the regulations of the agency regulating all drinking water in the state of Utah more than a passing notice.

Bradshaw has attempted to restrain the Commission's authority and discretion. (*See* Wilkinson Water Brief 14; PSC Brief 8.) Further, they contend that Mr. Bradshaw is requiring the Commission to be bound by the parties stipulations as to "points of law." (Wilkinson Water Brief 15; PSC Brief 8.) Apparently, this argument is based upon the fact that Wilkinson Water and Mr. Bradshaw referenced the Division of Drinking Water regulations when asserting the stipulations.

Nothing can be further from Mr. Bradshaw's argument. Mr. Bradshaw has contended only that the parties stipulated to the use of the presumptive water consumption figures found in the regulations—which, as described above, is exactly what they did. Accordingly, Wilkinson Water is bound by the rules regarding stipulations, which have been adopted explicitly by the Commission. *See* Utah Admin. Code R746-100-10(F)(4). "Parties are bound by their stipulations unless relieved therefrom by the court, which has the power to set aside a stipulation entered into inadvertently or for justifiable cause." *First of Denver Mortgage Investors v. C.N. Zundel Assocs.*, 600 P.2d 521, 527 (Utah 1979).

The reason for this rule is obvious. Parties who have stipulated to facts should be bound by them. Otherwise, one party relying on the stipulation will be disadvantaged at the time of trial or hearing. In this case, Mr. Bradshaw went to the Commission prepared to present evidence relative to the disputed facts and issues stipulated to by the parties. He was not prepared to present any water use data as to consumption because the parties had stipulated that the administrative regulations' presumptions would control and that the only

issues in dispute were those identified in the Issue and Fact List for Rehearing. To allow the Commission's behavior in this case would seriously prejudice Mr. Bradshaw.

2. The Commission's Finding Is Not Supported by Substantial Facts. Although Wilkinson Water and the Commission attempt to support the findings of the Commission, it is clear that there was not sufficient evidence presented to support the Commission's findings. The only competent and relevant evidence, as extensively detailed in pages 24 to 38 of the Petitioner's Brief, shows that even under the worst case scenarios there is sufficient source and storage capacity for Wilkinson Water to serve Mr. Bradshaw's development. Given that Wilkinson Water's only claimed basis for charging Mr. Bradshaw rates higher than the tariffed rates was that Mr. Bradshaw would cause a demand on the system which would require Wilkinson Water to expand its source and storage facilities, it was clearly erroneous for the Commission to require Mr. Bradshaw to pay more than the tariffed rates.

CONCLUSION

The Commission acted unreasonably when it failed to interpret the tariff strictly against Wilkinson Water and interpreted the tariff in a discriminatory manner. Because it gave the tariff a broad construction, it concluded that Wilkinson Water was permitted to charge fees contrary to the explicit terms of the tariff, which state that the utility is responsible for all water source and storage costs. Accordingly, Mr. Bradshaw requests that

this Court reverse the Commission's decision and hold that Wilkinson Water cannot charge more than the $1,500 connection fee provided for in the tariff.

If the Court concludes, however, that the Commission acted reasonably in construing the Wilkinson Water tariff to permit charges for water source and storage, the Commission did not have substantial evidence to find that Wilkinson Water would exceed capacity in the event that Mr. Bradshaw's development were served by it. The evidence overwhelming shows that Wilkinson Water had sufficient capacity to serve Mr. Bradshaw's development. Accordingly, Mr. Bradshaw respectfully requests that this Court reverse the Commission finding regarding Wilkinson Water's capacity and hold that Mr. Bradshaw is not required to pay anything above the connection fee and other tariffed charges.

DATED this 19th day of December, 2002.

SMITH HARTVIGSEN, PLLC.

J. Craig Smith
D. Scott Crook
Attorneys for Petitioner, David Bradshaw

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of December, 2002, I did cause two true and correct copies of the foregoing **PETITIONER'S REPLY BRIEF** to be mailed, United States mails, postage prepaid, addressed to the following:

William N. White, Esq.
WHITE & MABEY
265 East 100 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Respondent Wilkinson Water Company

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Public Service Commission
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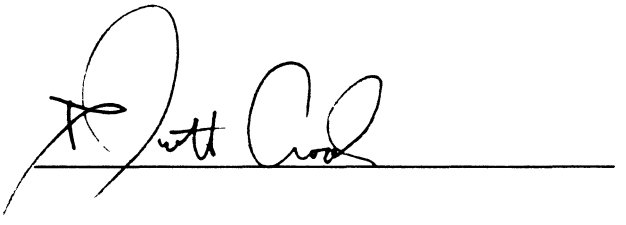

Exhibits

ADDENDUM

1. Wilkinson Water Company Tariff
2. Public Service Commission Order on Reconsideration (February 26, 2002)
3. Public Service Commission Report and Order (January 4, 2001)
4. Issues and Fact List for Rehearing (July 20, 2001)

Exhibit 1

Wilkinson Water Company
Morgan, Utah

Original Sheet No. 1
P. S. C. Utah No. 1

SCHEDULE OF RATES
RULES AND REGULATIONS

TARIFF NO. 3

Issued on not less than five days' notice to the Commission and the Public by authority of the Public Service Commission of Utah, Order in Case No. 95-019-01 dated December 22, 1995.

Issued December 22, 1995

Effective December 22, 1995

W I L K I N S O N W A T E R C O M P A N Y

Notice to Water Users,

On December 22, 1995, the Public Service of Utah approved the Company's application for a rate increase and a change in the rate structure. Effective January 1, 1996, the new rates applicable to all water users in the Company's service area are as follows:

First 6,000 gallons at $15.00 minimum charge;

Over 6,000 gallons at $1.15 per 1,000 gallons, or part thereof.

The new rate structure is designed to provide ample water for your reasonable needs, but also to encourage conservation by making water use which is well in excess of the State standards for household water consumption more expensive. The January 1, 1996 water bill for the month of December, 1995, was figured on the old rates.

Wilkinson Water Company

I N D E X

Wilkinson Water Company
Morgan, Utah

First Revised Sheet No. 3
P. S. C. Utah No. 1

WATER SERVICE RATE SCHEDULE

Applicability

Applicable in entire service area to water service for culinary and domestic purposes at one point of delivery for use at a single dwelling unit, and for commercial purposes at a single business connection.

Rate

The following rate is for the period of one month:

Usage	Charges
First 6,000 gallons	$ 20.00 Fixed Charge
Over 6,000 gallons	1.65 per 1,000 gallons

Service Connection Charges

3/4" service to property line, where service fronts property line, including meter and materials. One time charge for each service requiring new meter installation.	$1,500.00
Turn-on service where meter is already in place	$ 50.00
Turn-off service	$ 50.00

Issued: June 12, 1998 Effective: June 13, 1998

RULES AND REGULATIONS

1. Connections. No unauthorized person shall tap any water main or distribution pipe of the Company or insert fixture or appliance, or alter or disturb any service pipe, meter, or any other attachment, being part of the waterworks system and attached thereto. No person shall install any water service pipe or connect or disconnect any such service pipe with or from the mains or distribution pipes of said waterworks system, nor with or from any other service pipe now or hereafter connected with said system, nor make any repairs, additions to, or alternations of any such service pipe, tap, stop cock, or any other fixture or attachments connected with any such service pipe, without first procuring a permit from the Company.

2. Application for Permit. Before any service connection shall be made to any part of the waterworks system, or any work performed upon old or new connections, a permit shall be obtained from the Company. Such permit shall be issued upon written application on forms obtainable from the Company. Applicants for water service shall furnish and lay and install all the portion of the service not provided by the Company, at their own expense, subject, however, to the supervision and inspection of the Company.

3. Metering of Service. All water delivered by the Company to its customers shall be metered through water meters. Meters may be checked, inspected, or adjusted at the discretion of the Company and shall not be opened or adjusted except by authorized representatives of the Company. Meter boxes shall not be opened for the purpose of turning on or off water except by authorized representative of the Company, unless special permission is given, or except in case of emergency. Unauthorized entry into the water box may result in loss of service.

4. Meter Adjustments. If the meter fails to register at any time, the water delivered during such a period shall be estimated on the basis of previous consumption. In the event a meter is found to be recording less than 97 percent or more than 103 percent of accuracy, the Company may make such adjustments in the customer's previous bill as are just and fair under the circumstances.

RULES AND REGULATIONS (Continued)

5. Service Connections. Any party desiring to obtain a supply of water from the Company shall make application in writing. The service connection charges shown in this Tariff include a meter, meter box, a cover, and a valved service line to the property line. The meter and meter box will be located as directed by the Company. All materials furnished by the Company shall remain the property thereof. Excavation and installation shall be made by the Company from the main line connection in the road to three feet beyond the meter.

6. Service Line. All service line materials and installation shall be provided by the applicant. Installation shall be inspected and approved by the Company before the service line trench is backfilled. A shutoff valve shall be provided by the applicant on each service line, in an accessible location, separate from the water meter box.

7. Water Use Restrictions. The owner or occupant of any building or premises entitled to the use of water from the Company shall not supply water to any other building or premises, except upon written permission of the Company.

8. Service Turn-on and Turn-off. No unauthorized person shall turn the water from any main or distribution pipe into any service pipe. Service may be turned off by the Company when so requested by the applicant or when the applicant fails to abide by these regulations. Whenever the water is turned off from any premise, it shall not be turned on again until the applicable charge shown in the rate scheduled has been paid.

9. Disruption Liability. The Company shall use reasonable diligence to provide continuous water service to its customers, and shall make a reasonable effort to furnish them with a clean, pure supply of water, free from injurious substance. The Company shall not be held liable for damages to any water user by reason of any stoppage or interruption of his water supply caused by scarcity of water, accidents to works or water main alterations, additional repair, acts of God, or other unavoidable causes.

RULES AND REGULATIONS (Continued)

10. Damage to Facilities. Water meter may be installed upon any premises supplied with water, and any damage to said meter, or other facilities of the Company, resulting from the failure of the owner, agent, or tenant to properly protect same shall be assessed against such owner, agent, or tenant. Water consumers shall not tamper with or remove the meter, or interfere with the reading thereof.

11. Reading of Meters. All meters will be read by the Company each month, excepting November, December, January, February and March. The monthly charges for the months when meters are read shall be based upon the meter readings, except as provided for in Paragraph 4 herein above. The monthly charge for the months the meters are not read will be a rate of $15.00 per month.

12. Billing and Payments. Bills covering the charges shall be rendered monthly and shall be due fifteen (15) days after being rendered. If any customer neglects, fails, or refuses to pay water service bill or any other obligation due to the Company within thirty (30) days from the date of said bill, the Company's employees shall have the right to go upon the premises and make such excavation or do such work as may be necessary to disconnect the water service. Before the service is renewed, the delinquent bill or bills shall be paid in full, or arrangements made for payment that are satisfactory to the Company, and the established Tariff charge for re-connection shall be paid by the delinquent customer. Late fee in the amount of 1-1/2% per month of the unpaid balance may be assessed against past due accounts.

'. Credit Deposit. The Company may, at its option and in
'u of established credit, require a deposit from the
tomer to assure payment of bills as they mature; such
sits shall be a minimum of 90 days estimated bill or
'0. Deposits may be refunded when credit has been
'ished. Deposits held over 12 months shall earn
st from the Company at the rate of 12% per annum.
t will be credited to the account of the consumer

RULES AND REGULATIONS (Continued)

14. Regulated Usage. Whenever the Company shall determine that the amount of water available to its distribution system has reached such a volume that, unless restricted, the public health, safety, and general welfare is likely to be endangered, it may prescribe rules and regulations to conserve the water supply during such emergency. Likewise, the use of water for sprinkling lawns and gardens, and the hours for such use, may be prescribed by regulations adopted for the governing of said water system.

15. Changes and Amendments. The right is reserved to amend or add to these Rules and Regulations as experience may show it to be necessary and as such changes are approved by the Utah Public Service Commission.

FACILITY EXTENSION POLICY

1. Extensions. An extension is any continuation of, or branch from, the nearest available existing line of the Company, including any increase in capacity of an existing line to meet the customer's requirement.

2. Costs. The total cost of extensions, including engineering, labor and material shall be paid by the applicants. Where more than one applicant is involved in an extension, the costs shall be prorated on the basis of the street frontage distances involved. Sufficient valves and fire hydrants shall be included with every installation.

3. Construction Standards. Minimum standards of the Company shall be met, which standards shall also comply with the standards of the Utah State Bureau of the Environmental Health. Pipe sizes shall be designed by the Company, but the size shall never be smaller than 4".

4. Ownership. Completed facilities shall be owned, operated, and maintained by the Company including and through the meters, as detailed in the Tariff Rules and Regulations.

5. Water Storage and Supply. All costs for providing needed water supply and storage shall be paid by the Company. This cost shall include the installation and operation of pumps as required for proper pressure regulation of the system.

6. Temporary Service. The customer will pay the total cost for the installation and removal of any extensions for service to a venture of a temporary or speculative permanency. The Company will receive the estimated cost from the customer before beginning work on the extension.

Exhibit 2

DOCKETED

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of David L. Bradshaw	)	
	)	DOCKET NO. 00-019-01
vs.	)	
	)	
Wilkinson Water Developer's Request for Commission Intervention	)	ORDER ON RECONSIDERATION

ISSUED: February 26, 2002

By the Commission:

The Commission originally adopted an Administrative Law Judge Recommended Order in this Docket on January 4, 2001. The Order dismissed Mr. David Bradshaw's complaint, determining that he had "failed to prove violations of [Wilkinson Water Company's] tariffs, or of Commission rules, or other applicable law." January 4, 2001, Order, page 4. Thereafter, Mr. Bradshaw petitioned for reconsideration. The Commission granted reconsideration on March 14, 2001. After numerous, unsuccessful efforts by the parties to mutually resolve their dispute after the grant of reconsideration, the parties informed the Commission that they were unable to resolve the matter through mutual agreement and that the Commission should proceed with reconsideration. Discussion with counsel for the parties indicated that the parties had factual disputes on matters which they claimed were relevant to resolution of the dispute and continued to have disputes concerning the application of the factual record previously developed in this matter. After the parties' requested extensions, a second hearing was held January 8, 2002. At that hearing, Mr. Bradshaw was represented by J. Craig Cook and Scott Crook,

of the law firm of Nielsen & Senior, Wilkinson Water Company (Wilkinson Water or the Company) was represented by David Wright and William N White, of the law firm of White & Mabey, and the Division of Public Utilities (DPU) was represented by Kent Walgren, Assistant Attorney General

At the January 8, 2002, hearing, the parties introduced evidence through the following witnesses Mr Bradshaw, William Birkes, a representative of the Utah Division of Drinking Water, Department of Environmental Quality, Mike Babcock, a real estate developer, Barry Golding, an employee of the DPU, and Wayne Wilkinson, manager of Wilkinson Water. The evidence introduced at the January 8, 2002, hearing did not vary much from the evidence introduced at the prior hearing held October 3, 2000 Although the January 8, 2002, evidence replicates the prior evidence, it does provide greater detail or depth on the circumstances facing Mr Bradshaw and Wilkinson Water It also highlights the ultimate underlying dispute between the parties and clarifies that the Commission's prior order, although correct on the issue(s) that it addressed, did not resolve this dispute. The fundamental dispute between the parties concerns the just and reasonable terms, conditions and charges by which Wilkinson Water would serve in Mr Bradshaw's proposed real estate development, including customers who subsequently move into the development

At the second evidentiary hearing, the parties presented evidence reflecting their respective views of how to calculate the demand for water utility services, from Wilkinson Water's existing customers and those that may locate in Mr Bradshaw's

proposed development, relative to Division of Drinking Water recommendations for water source (gallons per minute production capability) and water storage amounts. The parties have conflicting views on how to determine the irrigable area of lots of existing customers and possible future customers of the Company. This calculation has bearing on determining the gallons per minute that the Division of Drinking Water's recommendations suggest the Company's wells should be able to produce. Mr. Bradshaw's calculation results in a lower number, which on an average basis, appears to be within the Company's wells' current capacity. Wilkinson Water's calculation produces a higher number, which would appear to exceed the current capacity.

Although the Commission believes that consideration of well production capacity has relevance in this matter, it does not believe that the absolute numbers resulting from the competing calculations should be directly applied in the fashion advocated by the parties. Whether the Company's wells appear to have production capacity that falls short of or exceeds the gallons per minute recommendations of the Division of Drinking Water, is not singularly dispositive of determining the terms and conditions by which Wilkinson Water would prepare to serve possible, future customers in Mr. Bradshaw's proposed development. As Mr. Birkes, a representative of the Division of Drinking Water, testified, the recommendations are just that, recommendations. A water company's actual well production capability may vary from the numerical value suggested in an application of the recommendations to the company and still be an approved system. Mr. Birkes' testimony established that a system's

evaluation is made on a number of factors. A company could have well capacity below or above the recommended gallons per minute and still receive either an approved or unapproved classification. Similar to the obligation our utility law imposes for "adequate service," see, U.C.A. § 54-3-1, the Division of Drinking Water's evaluation attempts to make a determination of the overall adequacy of a system's service. Absolute compliance with a water production recommendation is not necessary.

Such evidence has less direct relationship in resolving the actual dispute between the parties. Were the dispute about Wilkinson Water's current adequacy of service to Mr. Bradshaw, as a water service consumer, or to other existing customers, we would place greater weight on such evidence. But the parties' dispute deals with who bears the costs, and the recovery of such costs, of preparing to meet anticipated, future water service demands of consumers who may move into Mr. Bradshaw's proposed development. As will be discussed below, the Commission believes this evidence has some relevance to our consideration, but not in a 'straight by the numbers' application presented by the parties.

The parties' varying irrigable acreage assumptions and calculations also have an impact on comparing Wilkinson Water's water storage capacity to the level suggested by the Division of Drinking Water's recommendations. Again, Mr. Bradshaw's calculation results in a value below Wilkinson Water's current storage capacity; compared to the Company's calculation, which exceeds current capacity. In this instance, however, in addition to their opposing views of what constitutes the irrigable acreage,

Mr. Bradshaw also includes a smaller value (60,000 gallons as opposed to 120,000 gallons) for storage levels for fire flow needs. Mr. Birkes' testimony established that the higher value is correct. When Mr. Bradshaw's calculation is corrected for this error, even his calculations show that the Company's existing storage capacity is less than that suggested by the recommendations. The testimony did establish that Wilkinson Water, in its usual operations, is using water storage capacity it does not own. Because the water storage capacity owned by the Wilkinson family is not physically segregated from the Company's storage capacity, the Company has routinely used the Wilkinson family's available capacity to meet the water service needs of the Company's customers. There was no evidence that the Company is paying the Wilkinson family any compensation for the Company's use of this additional storage capacity. As in well production capability, we believe information on water storage capacities is relevant, but not in as direct a fashion as advocated by the parties.

Mr. Bradshaw reargues his contention that Wilkinson Water's Facility Extension Policy, included in its tariffs, has application in resolving the dispute. As we originally held, we disagree. As the Commission construes those provisions, they are not applicable to Mr. Bradshaw's situation. The Commission continues to construe the Facility Extension Policy as applicable to a customer or prospective customer who requires an extension of the Company's facilities in order to begin his own consumption of water services offered by the Company. As such, the tariff's overall provisions make sense, relative to a utility's cash flows and investments. The Company may be required to

extend its facilities, but the customer is required to bear the costs of extending distribution facilities and any necessary upgrades. Although the Facility Extension Policy's provisions state that the Company bears the costs of providing water storage and supply in this situation, the Company also receives revenues from charging the customer the service connection charge set out in its tariff and receives ongoing monthly revenues from the customer's monthly fixed charge and water consumption charges included in the tariff.

This is not Mr. Bradshaw's situation. Mr. Bradshaw would require Wilkinson Water to expand and upgrade facilities, not to meet Mr. Bradshaw's own water service consumption, but to be prepared to serve possible, future customers in his proposed development. But Mr. Bradshaw would make no additional contributions to the Company's costs beyond dedicating the distribution system which Mr. Bradshaw would ultimately install within the proposed development upon completion of the subdivison. The evidence introduced in this record shows that Mr. Bradshaw's efforts to actually develop the proposed subdivision have been intermittent. A number of years passed between the time Mr. Bradshaw first sought commitment from Wilkinson Water to provide water services to the proposed development and when he subsequently approached the Company for a written commitment from the Company. [1]

[1] The written commitment is needed for Mr. Bradshaw to obtain preliminary approval for the proposed development from local government and zoning authorities

With Mr. Bradshaw's proposed multi-lot development, Wilkinson Water faces the prospect of incurring costs to be prepared to serve possible, future customers, in Mr. Bradshaw's multiple lot development. While the Company incurs such expansion costs in the near term, it would be left to the vagaries of the approval process for the subdivision, development of the real property, placement of the subdivision's infrastructure, individual lot marketing, sale, and development, and Mr. Bradshaw's diligence in performing these activities. Thereafter, the Company would have an opportunity to begin receiving revenues to help defray the costs incurred to be able to provide service to an ultimate customer who eventually receives water service in the proposed subdivision. While numerous utilities have tariff provisions that attempt to address the costs and risks, and allocation of the costs and risks, associated with a utility's for possible future service in a developer's proposed development, Wilkinson Water does not have such provisions in its tariff. It is precisely this lack of pre-existing tariff terms and conditions that precipitated the parties' dispute. The Commission's prior Order discusses relevant considerations the Commission has made in the past, when addressing the reasonableness of the terms and conditions a developer and utility[2] face in this type of situation, but did not provide any resolution of the dispute in this particular case where Wilkinson Water has no applicable tariff provisions. In this regard, Wilkinson

[2] The consideration is not limited to the impacts upon the developer and the utility. We must also consider the impact the terms and conditions may have on the existing and future customers of the utility. See, U.C.A.§54-3-1 Costs and risks not allocated to the developer or utility owners end up being shouldered by the utility's customers.

Water's existing water production and water storage capacities have some relevance. Where possible, future demand from individuals who may locate in Mr. Bradshaw's proposed subdivision make the Company's existing capacities appear to be inadequate, expansion may be reasonable. But the Company, and its existing customers, could be saddled with expanded plant, ready to provide service in Mr. Bradshaw's proposed development that may be slow to materialize, or never materialize, depending on Mr. Bradshaw's pace of activities and success. Mr. Bradshaw's request that the Company prepare to serve his multi-lot subdivision represents an increase of over ten percent in the Company's customer base and likely the same or greater increase in services demanded by this single project. The Commission believes that this scale is sufficiently significant for a small water utility and its existing customers to require the proposed subdivision's developer to participate in bearing the risks and costs of expanding a utility system to meet his project's needs.

Having reviewed the January 4, 2000, Order on reconsideration, the Commission concludes that there is no need to alter the previous findings or discussion. The Commission recognizes, however, the need to address and provide guidance on the specific dispute between the parties, i.e., what constitutes just and reasonable terms and conditions by which Wilkinson Water would be prepared to provide future service to customers who may locate in Mr. Bradshaw's proposed subdivision, when the Company has no applicable tariff provisions.

The record does not develop a reason to depart from the Commission's past practice of placing the financial responsibility upon the real estate developer, with the concomitant developer opportunity to recover these costs in the sale of the developed property lots. In resolving this dispute, one must consider the direct costs of additional facilities and equipment and costs of their construction or installation; the costs incurred in the temporal disparities from the timing of preparation to provide utility service and the time transpiring in real estate development, from concept to actual customer occupancy on developed land; and the allocation of these costs and risks associated with their incurrence and recovery. As indicated in the prior Order, the Commission has concluded that it is just and reasonable to have the real estate developer shoulder the financial burden and risks associated with his own development. Otherwise, a small water utility's customers must be exposed to the detritus of the developer's possible failure or lack of profitable success. Nothing in the existing record supports a departure when dealing with Mr. Bradshaw's proposed development.

This is not to say that the real estate developer must pay for any water plant facility conceived by the utility. The Commission places upon the developer the burden of his own development, but no more than what is reasonably attributable to providing service to his proposed development. The record developed in this case suggests that Wilkinson Water attempted to follow this approach in preparing to provide service to a real estate development undertaken by Mr. Babcock. Mr. Babcock was required to pay for the proportionate share of water plant that was installed in connection

with the Company's preparation to serve Mr. Babcock's proposed subdivision. The Commission concludes that it is reasonable to require Wilkinson Water and Mr. Bradshaw (and any other multi-lot real estate subdivision developer) to follow the same course, until Wilkinson Water has Commission approved tariff provisions which address this type of land development situation.

Mr. Bradshaw will be required to pay for the proportionate share of water plant costs that are reasonably attributable to provide water service to his proposed subdivision. These costs include the physical water plant, which includes water source (new wells or upgrades for increased water production from existing wells), water storage tanks, water distribution facilities and equipment, and the costs incurred in planning for such plant and its construction and installation. We recognize that utility plant development is not necessarily sized, engineered or built to provide service solely to one development. Deployment of utility plant takes into consideration the current and future uses of existing customers, potential customers that might locate in the proposed subdivision and potential customers that may locate elsewhere in the utility's service territory. As long as the overall deployment of additional water plant is reasonable in relation to the Company's reasonable operations, Mr. Bradshaw should provide for the recovery of a proportionate amount of the costs. The proportion should be based upon the capability or capacity of the plant installed and the capability or capacity reasonably needed to provide service to Mr. Bradshaw's proposed development. Wilkinson Water

will bear the costs associated with water plant that is planned or put in place that exceeds the needs of Mr. Bradshaw's proposed development.

The Commission hopes that the parties can reach agreement on what constitutes reasonable plant deployment, reasonable costs to deploy such plant and Mr. Bradshaw's reasonable proportion of such plant and costs. Because of the parties' past intractability in reaching a mutually acceptable resolution, that hope may prove futile. While it would be helpful to provide greater detail in this order, the record does not provide support for many detailed instructions. The parties begin with widely varying views on even the initial aspects of determining the water service demand for the proposed subdivision. From the record testimony, it appears reasonable to assume that the irrigable acreage of a lot is sixty to seventy percent of its total size. However, Mr. Bradshaw has significant control over the calculation of the irrigable acreage, based upon the restrictive covenants he may impose upon the lots he intends to develop. The record also reflects that calculations of water needs based upon Division of Drinking Water recommendations and assumed water consumption does not mirror actual use for individual consumers. Mr. Bradshaw's own prolific water consumption, as a current customer of Wilkinson Water, is notable in comparison to the consumption of other customers.

Wilkinson Water complained that Mr. Bradshaw had not provided detailed engineering plans for the plant that is necessary to provide service to the proposed subdivision. It is not clear if these missing plans are for the distribution facilities (e.g.,

pipes) to be located in the proposed subdivision, or if they are for other types of plant, located inside or outside of the subdivision, needed, in conjunction with existing Company plant, to be able to provide service to the proposed subdivision (e.g., storage tanks). In the first instance, it is reasonable to have Mr. Bradshaw provide plans for the distribution facilities to be placed in the proposed subdivision. If the later case, however, we would be surprised if Mr. Bradshaw has access to needed information on the location, design and capacity of the Company's existing plant, in order to prepare plans for the integration of existing and new plant that even he thought was reasonably needed to provide service to his proposed subdivision. The Commission believes it more likely that Wilkinson Water would study and prepare plans to integrate Mr. Bradshaw's proposed subdivision into the Company's water system. Wilkinson Water did introduce estimates of costs for plant that it could install, but did not present sufficient or credible evidence that the specified equipment and other items are reasonably necessary to prepare to provide service in Mr. Bradshaw's proposed subdivision and what Mr. Bradshaw's reasonable portion might be.

Wherefore, based upon the record, our January 4, 2001, Order and the discussion herein, the Commission orders as follows:

1. Should David Bradshaw desire to proceed with his proposed development and obtain Wilkinson Water Company's commitment to provide water utility service in the proposed subdivision, he shall be required to provide for a proportionate share of reasonable costs of reasonably necessary water

plant installed or required to provide utility service to the proposed subdivision.

2. This order represents our final order on reconsideration. We recognize that the parties may have future disputes in implementing this order. We direct the Division of Public Utilities to act as a mediator to facilitate resolution of future disputes between the parties.

3. To the extent that the parties are unable to reach mutually acceptable resolution of future issues, further proceedings may be conducted by the Commission. Parties will be required to submit an itemization of the aspects of an issue that continues to be disputed and pre-file evidence necessary to resolve the dispute. Scheduling of further proceedings will be set as needed.

Dated at Salt Lake City, Utah, this 26th day of February, 2002.

Sandy Mooy,
Hearing Officer

Approved and Confirmed this 26th day of February, 2002, as the Report and Order of the Public Service Commission of Utah.

Stephen F. Mecham, Chairman

Constance B. White, Commissioner

Richard M. Campbell, Commissioner

Attest:

Julie P. Orchard
Commission Secretary
Gr#28221

I hereby certify that on day, Tuesday, February 26, 2002, I served a true copy of the ORDER ON RECONSIDERATION hereto attached on the persons whose names are set forth below by mailing such copy on said date in a post office in Salt Lake City, Utah, properly enclosed in a sealed envelope with postage prepaid thereon, legibly addressed to the addresses shown:

* See attached Mailing Lists and "E" Mailing Lists

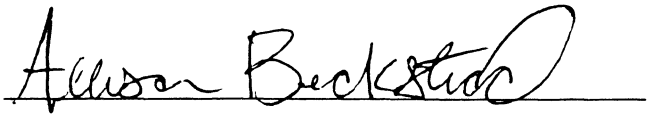

Exhibit 3

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint of DAVID L. BRADSHAW, Complainant	)	DOCKET NO. 00-019-01
	)	REPORT AND ORDER
vs.	)	
WILKINSON WATER COMPANY, Respondent	)	

Issued: January 4, 2001

SYNOPSIS

Complainant having failed to show any violation of Respondent's published tariffs or of the applicable statutes and Commission rules, we dismiss.

Appearances:

David L. Bradshaw — *In Propria Persona*

William White — For WILKINSON WATER COMPANY

By the Commission:

PROCEDURAL HISTORY

Pursuant to notice duly served, the above-captioned matter came on regularly for hearing the third day of October, 2000, before A. Robert Thurman, Administrative Law Judge, at the Commission Offices, Heber Wells Building, Salt lake City, Utah. Evidence was offered and received, and the Administrative Law Judge, having been fully advised in the premises, now enters the following Report, containing proposed findings of fact, conclusions of law, and the Order based thereon.

FINDINGS OF FACT

1. Complainant is a real estate developer wishing to market a subdivision located in the certificated area of Respondent, a certificated water corporation. Respondent is owned by the Wilkinson family, which also owns real estate in the area. The family has plans to develop its property, but nothing concrete or imminent.

2. Respondent has indicated willingness to serve Complainant's subdivision, but only on condition that Complainant finance the costs of increased water source and storage capacity, which Respondent alleges is necessary to serve the project.

3. Complainant contends that under Respondent's service extension tariff, he is not obliged to finance Respondent's infrastructure costs.

4. At present, Respondent's system, according to Utah Division of Drinking Water (DDW) standards, is at or near capacity for both source and storage resources. In fact, as to storage, the company is in deficit, since part of the existing tank is owned by the Wilkinson family, which purchased an interest from the Respondent. The purchase was made at the urging of the Division of Public Utilities, Utah Department of Commerce (DPU) as a means of reducing rate base to the benefit of ratepayers. The purchase was made on the basis of an erroneous understanding of DDW requirements. The Wilkinson family has represented it is amenable to a resale of the storage capacity back to Respondent.

5. For a previous subdivision in the area (Fox Hollow), the developer financed system improvements to the extent of approximately $100 per lot for enhanced source and $500 per lot for increased storage – a total of approximately $100,000. Respondent estimates it would require a similar amount to upgrade the system to serve Complainant's subdivision.

6. Respondent is currently $130,000 in debt, mostly to the Wilkinson family, and has no borrowing capability from outside sources.

7. Respondent has, on one occasion, extended service to a small (four or five lot) subdivision without requiring the developer to finance improvements to the system. However, apparently that project did not entail any system improvements by way of source or storage.

DISCUSSION

Complainant's claim to service without the necessity of financial participation in system improvements is based on Respondent's tariff PSC Utah No. 1, Sheet 8, which provides in paragraph 5 that "All costs for providing needed water supply and storage shall be paid by . . . .[Respondent]"

However, the quoted paragraph must be read in conjunction with paragraph 1 which provides:

> An extension is any continuation of, or branch from, the nearest available existing line of the Company, including any increase in capacity of an existing line to the *customer's* requirement. (Emphasis added.)

We believe the term "customer" in this context must mean a ratepayer of the utility, as opposed to a developer whose own customer will hook on to the system, but not the developer as such. Read together, then Paragraphs 1 and 5 obligate Respondent to extend service, with no charge for source or storage, to a party wishing to hook onto the system for the immediate delivery of water, not the developer of a speculative subdivision.

A contrary construction would leave the utility at the mercy of a developer of a project of any size, with the concomitant potentiality of either bankrupting Respondent or imposing prohibitive rates on existing ratepayers to finance system improvements. This is clearly an unreasonable result.

The Commission has a longstanding policy, extending back 20 years or more, of

requiring that real estate developers pay all costs of privately-owned water systems up front and recover their costs for such improvements in the price of lots. For rate making purposes, the costs of such improvements are allocated to a "Contribution in Aid of Construction" account which is *not* part of the Utility's rate base on which it is allowed to earn.

In the vast majority of cases, the water system is owned by the developer which makes the implementation of the policy simple. The instant case presents a novel feature in that the developer is not the owner. However, in principle we see no reason why we should create an exception. The same hazards exist as to the interests of existing and future ratepayers as well as system integrity and viability. The developer has the same opportunity to set his lot prices so as to recover his costs. And the developer, if the project is viable at all, has better financing resources than the utility. In short, we do not believe existing ratepayers should be made unwilling participants in Complainant's speculation.[1]

We believe it is in the public interest that Complainant defray the costs of system improvements necessary to procure the necessary governmental approvals for, and service to, his project.

CONCLUSIONS OF LAW

The Commission has party and subject-matter jurisdiction. Complainant has failed to prove violations of Respondents tariffs, or of Commission rules, or other applicable law. Accordingly, the Complaint should be dismissed.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that:

- the complaint of DAVID L. BRADSHAW against WILKINSON WATER COMPANY, be, and the same hereby is, dismissed.

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[1]Nor do we have jurisdiction to require the owners to increase their investment in the utility.

- If DAVID L. BRADSHAW wishes to proceed further, DAVID L. BRADSHAW may file a written petition for review within 20 days of the date of this Order. Failure so to do will forfeit the right to appeal to the Utah Supreme Court.

Dated at Salt Lake City, Utah, this 4th day of January, 2001.

A. Robert Thurman
Administrative Law Judge

Approved and Confirmed this 4th day of January, 2001, as the Report and Order of the Public Service Commission of Utah.

Stephen F. Mecham, Chairman

Constance B. White, Commissioner

Clark D. Jones, Commissioner

Attest:

Julie Orchard
Commission Secretary

I hereby certify that on Thursday, January 4, 2001, I served a true copy of the hereto attached REPORT AND ORDER on the persons whose names are set forth below by mailing such copy of said date in a post office in Salt Lake City, Utah, properly enclosed in a sealed envelope with postage prepaid thereon, legibly addressed to the addresses shown

*See attached mailing Lists and "E" Mailing lists

Kristina Anderson

Kristina Anderson

Exhibit 4

J. Craig Smith (4143)
D. Scott Crook (7495)
NIELSEN & SENIOR, P.C.
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Facsimile: (801) 532-1913
Submitted July 20, 2001

Attorneys for Petitioner David L. Bradshaw

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of the Complaint of DAVID L. BRADSHAW.	:	DOCKET NO. 00-019-01
Complainant.	:	**ISSUES AND FACT LIST FOR REHEARING**
vs.	:	
WILKINSON WATER COMPANY.	:	
Respondent.	:	

Pursuant to the Commission's Scheduling Notice dated June 6, 2001, Petitioner, David L. Bradshaw, by and through his undersigned counsel, and Respondent, Wilkinson Water Company, by and through its undersigned counsel, hereby submit the following Issues and Fact List for Rehearing:

STIPULATED FACTS

Petitioner and Respondent hereby stipulate to the following facts:

1. Petitioner, David L. Bradshaw, is a real estate developer who owns real property in Morgan County, Utah (the "**Subject Property**") within the certificated area of Wilkinson Water

Company for which he has been granted both Concept and Preliminary approval by the Morgan County Planning Commission for a 21-lot residential subdivision called the Cottonwood Creek Subdivision

2 Respondent, Wilkinson Water Company, is a certificated water utility subject to Commission jurisdiction which provides culinary water to several residents and businesses in Morgan County, Utah

3 Petitioner and Respondent have been engaged in ongoing discussions and negotiations to reach an agreement regarding the just and reasonable charge to connect the Subject Property to the culinary water utility of Respondent

4 Petitioner is waiting for an updated "Will Serve" letter from the Respondent in order to receive Final Approval from the Morgan County Planning Commission for the Cottonwood Creek Subdivision

5. The Utah Administrative Code R309-203, Table 203-1 titled "Source Demand for Community Water Systems (Indoor Use)," provides that peak day demand for residential connections is 800 gpd or .56 gpm per lot Accordingly, the amount of source capacity for indoor use for Petitioner's subdivision is 11 76 gpm (56 gpm x 21 lots).

6. The Utah Administrative Code, R309-207(b), titled "Estimated Outdoor Use." provides the appropriate calculation necessary for outdoor water use for residential property The section provides that to detemine irrigable acreage, start with "gross acreage, then subtract out any area of roadway, driveway, sidewalk or patio pavements along with housing foundation footprints that can be reasonably expected for lots within a new subdivision "

7. The Utah Administrative Code, Table 203-4 requires 400 gallons storage for indoor use for each lot. Hence, Petitioner's proposed development would require a storage capacity of 8,400 gallons for indoor use (21 lots x 400 gallons)

8. Utah Admin Code R309-203(8)(2)(c) requires 1,873 gallons per irrigable acre of storage capacity.

DISPUTED FACTS

Petitioner and Respondent state that the following facts are disputed and must be resolved:

1. The amount of infrastructure cost within the subdivision that David L Bradshaw will be required to pay to connect residences to the existing water system.

2. The total amount of source capacity that Wilkinson Water Company has.

3. The total amount of storage capacity that the Wilkinson Water Company has.

4 What the average irrigable acreage of each .46 acre lot in the Petitioner's proposed subdivision is.

5 The amount of residential connections that Wilkinson Water Company currently has and the number of committed connections.

ISSUES TO BE RESOLVED

Petitioner and Respondent agree that the following issues are the issues to be resolved:

1. Whether Wilkinson Water Company's tariff prohibits Wilkinson Water Company from requiring Mr Bradshaw to pay for improvements other than extensions to his property?

2. What the reasonable and just charge for connecting to the utility is?

DISPUTED ISSUES TO BE RESOLVED

Petitioner and Respondent state that there is a dispute as to whether the following issue has been raised and whether it should be resolved:

1. Whether Wilkinson Water Company's demand that Mr. Bradshaw pay infrastructure costs in excess of those necessary to serve his subdivision violates Utah law?

DATED this 19th day of July, 2001.

J. Craig Smith
D. Scott Crook
NIELSEN & SENIOR, P.C.
Attorneys for Petitioner David L. Bradshaw

DATED this 19th day of July, 2001.

William N. White
WHITE & MABEY
Attorneys for Wilkinson Water Company

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2001, a true and correct copy of the foregoing **STIPULATED FACTS** was mailed via first class United States mail, postage pre-paid, to the following:

William N. White, Esq.
WHITE & MABEY
265 East 100 South, Suite 300
Salt Lake City, Utah 84111
Attorneys for Respondent

Kent L. Walgren, Esq.
Assistant Utah Attorney General
160 East 300 South, Fifth Floor
Salt Lake City, Utah 84114
Attorney for Division of Public Utilities