

Art. XI Sec. 6 Constitutional Amendment Committee: Fifth Meeting

August 22, 2018

1:30-3:30

Clyde Snow & Sessions

Attendance:

Laura Briefer: Director, Salt Lake City Division of Public Utilities - Laura.Briefer@slcgov.com
Rusty Vetter: Deputy City Attorney, Salt Lake City Attorney's Office - Rusty.Vetter@slcgov.com
Boyd Clayton: Division of Water Rights boydclayton@utah.gov (phone)
Paul Ashton: White City Water Improvement District - PaulAshton@wcid.org
Mark Stratford: Ogden City - MarkStratford@ogdencity.com
John Mabey: Mabey, Wright & James - jmabey@mwjlaw.com
John Hiskey: Utah League of Cities and Towns - jhiskey@comcast.net
Scott Martin: Snow, Christensen & Martineau - SHM@scmlaw.com
Craig Peterson: craigapeterson@comcast.net (phone)
Ryan Peterson: ryanpeterson@comcast.net
Dave Peterson: david.L.peterson1@gmail.com
Tom Ward: Sandy City - tward@SANDY.UTAH.GOV (phone)
Shawn Guzman: St. George City - shawn.guzman@sgcity.org
Steve Clyde: Clyde Snow & Sessions - sec@clydesnow.com
Steve Mecham: Town of Alta - sfmecham@gmail.com
Emily E. Lewis: Clyde Snow & Sessions - sec@clydesnow.com

Meeting Summary:

The Committee met to finalize the Utah League of Cities and Towns' suggestions to the August 6, 2018 Art. XI Sec. 6 draft amendment language. While the League cannot officially endorse language until it passes a resolution at its September 14, 2018, Board meeting, the League is generally supportive of the language. The Committee made minor modifications to the draft language.

Assignments:

Committee Chair Steve Clyde and Craig Peterson will meet with Representative Stratton to present the Committee's recommended language for his review and comment.

Mark Stratford is to make recommended changes to his Utah Code Title 10 Surplus Sales proposed language.

Paul Ashton is to report back to Representative Coleman on proposed Surplus Sales language and changes to Utah Code Title 10.

Next Meeting:

No next meeting was set.

The group will continue to monitor progress of the Surplus Sales Committee.

MINUTES: These minutes are taken contemporaneously as a courtesy record of the group's conversation. Please excuse any inadvertent attributions, accidental misstatements, omissions, or errors.	MAIN THEMES/USEFUL TOOLS:
Steve Clyde: Welcome and introductions	Constitutional Changes: Limited Constitutional changes

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<p>August 6th Draft Language: League accepted the prior revisions and added several small additional changes.</p> <p>John Hiskey:</p> <ul style="list-style-type: none">- League of Cities and Towns Report - August Board meeting had very positive input on proposed language but waiting for official resolution to be passed at September business meeting to endorse language <p>Steve Clyde:</p> <ul style="list-style-type: none">- August 6th Draft: the League accepted the prior revisions and added a couple other changes- Line 38; added contractually committing the “commodity of water”- Line 40-41: replaced selling with supplying water and added at “reasonable rates as established by ordinance” - which conforms with surplus sales Draft Legislation for Title 10 <p>Lines 38-44: a, b, c discussion</p> <ul style="list-style-type: none">- Steve Clyde: Line 38: a) should commodity continue to be in the bill because its dealing with the sale of water and not necessarily a service (i.e. it is more like wholesale and not retain sale)?- Group: take out commodity- Group: what is retail service v. wholesale service- Steve Clyde: it’s the pipes and the infrastructure that make it retail service. A wholesale sale is allowing others to use your water by contract but the contract holder is using their facilities to supply the retail service- Laura Briefer: the key distinction between a and b is the contract element- Scott Martin: this was the key issue during the legislative session and distinguishing between contractual wholesale issues and retail sales- Boyd: There might be some issues with this – Salt Lake City is allowing people to file Change Applications on City water rights to allow them to use it through their system whereas other cities are providing water through retail service (?)- Laura Briefer: that is not correct – the City does not allow individuals to file Change Applications on their water rights- Scott Martin: I like the (already accepted)change in C regarding exchanges – “sources of water supply of equal value in meeting a municipality’s needs” it limits what a city can	<p>– made conforming changes regarding the word sale v. supply and removed the word commodity from Line 38.</p> <p>Waterworks: It was determined to remove the prohibition on the alienation of waterworks and place it under statute. New proposed language for Utah Code Ann. § 10-7-14(8) precludes municipalities from selling or conveying waterworks unless it is to a public entity defined under Utah Code Ann. § 73-1-4(1)(a).</p> <p>SURPLUS SALES DISCUSSION: Contract Retail Sales Outside of Designated Service Area: The group discussed whether cities should have the ability to have retail sales by contract to customers who are outside a city’s designated service area.</p> <p>Some individuals expressed concerns that allowing for contract retail sales outside the designated service area would undermine the goal of having all individuals receiving retail service being treated equally. If a city wants to provide retail sales outside the designated service area they should amend their service area by ordinance to include those areas.</p> <p>Others pressed back stating that they didn’t want to create situations that compel cities to</p>
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<p>exchange do and will avoid law suits</p> <p>Waterworks: should alienation on waterworks remain?</p> <p>Steve Clyde:</p> <ul style="list-style-type: none">- only issue is the Doug Short 'Fair Value' issue – we may want to include it in the language <p>John Hiskey:</p> <ul style="list-style-type: none">- We run into that in the RDA context <p>Shawn Guzman:</p> <ul style="list-style-type: none">- I would be ok with leaving it alone because we may not have a monetary exchange and need to calculate fair value in other ways – easier if not an implication that the statute reads explicitly as needing a monetary exchange <p>Craig Peterson:</p> <ul style="list-style-type: none">- Have to run language by Rep. Stratton or Legislative Council- I talked to Sen. Okerland as a Senate sponsor and he is supportive- Make a recommendation to have Chair and small subgroup meet with Representative Stratton to preview language and get feedback- Best to get the language finalized so it can get in line – already 700 bills filed <p>John Mabey:</p> <ul style="list-style-type: none">- This is a critical point considering interim comments that he appreciated the work but there may be changes <p>Paul Ashton:</p> <ul style="list-style-type: none">- He is most likely reserving his right to be the final say on the language as the legislator <p>Shawn Guzman:</p> <ul style="list-style-type: none">- We will want to stress that this is the foundational language and all other language in the surplus group stems from this. Unraveling this language will implicate that work as well. <p>Group:</p> <ul style="list-style-type: none">- Important to stress this language is the consensus of the water community <p>Changes to Title 10- Surplus Sales:</p> <p>Mark Stratford:</p> <ul style="list-style-type: none">- Companion language to support constitutional amendment- This language has not yet been presented to the Surplus Group but 4 of the 5 members are here. Seems a good time to begin the discussion	<p>provide retail service and want to retain the ability to contract for retail services when sensible. For example, if a city has extra capacity a term contract for retail services is a better tool to temporarily serve adjacent developing areas waiting for their own water system to come on line. Including those connections as part of that city's designated service area may be read as obliging the city to serve those connections until a suitable replacement is found, regardless of internal growth needs or the ability of the adjacent area to develop their system.</p> <p>Similarly, if it is sensible for a city with excess capacity to serve specific connections outside its designated service area a retail contract would limit the ability of adjacent, nearby, or "infill" areas to claim the designated service area should be expanded based on their proximity to the serve area.</p> <p>Ultimately it was determined best not to limit the ability of a municipality to enter contracts for retail sales outside its designated service area.</p> <p>Terms of Service for Retail Customers: Suggestions were made for modifying proposed language to 10-7-14(5) regarding terms of service so that service for all retail</p>
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<p>Utah Code Ann. 10-8-14:</p> <ul style="list-style-type: none">- Added a small change to identify water is governed by 10-7-14, and 10-8-22 <p>Utah Code Ann. 10-7-14:</p> <ul style="list-style-type: none">- 10-7-14(1)(a): definition of waterworks<ul style="list-style-type: none">o This was created to not sell the water right when you sell the water workso Paul Ashton: did you look at section 59? Yes- 10-7-14(8): prohibition on sale of waterworks<ul style="list-style-type: none">o We have removed constitutional prohibition on alienating waterworks but brought it into the statute to prevent the sale of waterworks unless pursuant to this sectiono Sale must be to political subdivision of the State of Utah or an agency of the federal government – the goal is to keep out of private hands- Scott Martin:<ul style="list-style-type: none">o Must not interrupt service with the transfer of a facilityo can this include language that is “same services or improved”- Steve Clyde:<ul style="list-style-type: none">o This precludes any sale to a private water entity - such use should be by contract- Shawn Guzman:<ul style="list-style-type: none">o We want some flexibility because we don’t know what the future holds- Steve Clyde:<ul style="list-style-type: none">o Do we want to have it to be to public water suppliers under 73-1-4- Laura Briefer:<ul style="list-style-type: none">o can we just keep it broad?- Paul Ashton:<ul style="list-style-type: none">o perhaps we can keep it to “public entities” under 73-1-4(1)(a)- Mark Stratford:<ul style="list-style-type: none">o we will then just need one section and eliminate 8(b) which was taken from the district statute regarding when a district changes its boundaries- Paul Ashton:	<p>customers was to be <i>equitable</i> but not equal.</p> <p>Rate Making Criteria: The discussion did not come to a consensus on whether it was preferred to list grounds for rate making under 10-8-22.</p> <p>City Legislative Acts: There was much discussion on whether proposed language needed to include a specific reference to City deference in rate making and other water service decisions. Some members of the group preferred to include statutory language granting deference to the city in these matters, other felt it was implied by listing city decisions as “legislative” acts.</p> <p>Coterminous Designated Service Area/Anticipated Service Area for 40 Year Planning Needs under UCA § 73-1-4: It was determined that is was not beneficial to cities to have the designated service area be coterminous with the anticipated service area under 73-1-4.</p>
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- as a public entity are they covered by other statutes?
- Mark Stratford:
 - Fair value is covered by 10-8-2

10-7-14(1(b): definition of retail customer

- includes those inside and outside your designated service area
- Scott Martin:
 - Are we going to have retail customers outside of the designated service area? Isn't the goal of our efforts to limit retail service to designated service area by ordinance
- Shawn Guzman:
 - We will have some folks who will be getting retail service outside our designated retail service area (Shivwitz Tribe)
- Scott Martin:
 - For all intents and purposes the designated service areas should be where your pipes go
- Group:
 - Is not this whole exercise to create equity for everyone in the designated area so that there are not classes of users
- Craig Peterson:
 - It needs to be that everyone in service area is the same
- Mark Stratford:
 - No I don't want municipalities to have obligations to provide water to "in-fill" between current retail customers
- Paul Ashton:
 - For those people who are the infill folks they can receive retail water service through contract
- Laura Briefer:
 - We don't want to compel the city to have to provide water or lose control of ability to choose how it manages its water solely because of the map
- Craig Peterson: see Mark's concerns and change my position
- ----unintelligible
- Group: let us not limit the ability of the municipality to enter contracts for retail sales outside its designated service area

10-4-14(5): terms of service

Laura Briefer

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- 5(a) had concerns about providing the “same” service and replaced with “equitable service” to retail customers
- (5)(b) equitable solutions in times of restrictions
- (5)(c): operations, emergency, and maintenance “escape hatch”

Scott Martin:

- What is equitable? We may need to have some more language in there to have a deference to city decision making– we need that demand to the Judge by statute

Mark Stratford:

- This is the most important part of the statute – it addresses the issue of cities cutting off people arbitrarily

Rusty Vetter:

- What does the case law say on this? I’d like to have us more than just case law but a specific presumption

Scott Martin:

- If we don’t include it could be read as expressly leaving it out
- Personal view: not willing to roll the dice on a fact matter and we have written statutes in the past that include a presumption

Mark Stratford:

- Best to provide some language for us to work from

Mark Stratford:

- I included initiation and termination of service because it’s the hot button issues

Laura Briefer:

- probably ok with that back as long as its modified by equitable

Paul Ashton:

- Service can include much more than just initiation and termination of service – can be pressure or other matters

Utah Code Ann. 10-8-22 Water Rates

Laura Briefer:

- Want to address rates
- Want to understand (5)(a) sub parts and make sure we are not too narrowly limiting making rates solely on a fact a particular class is outside and inside the city – worried because we make determinations on this because those outside the city are not investors

Mark Stratford:

- That’s why I added “ other factors” justification

Laura Briefer:

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- Want to make sure this is not just based on location but classes based on service needs, elevation, etc.

Scott Martin:

- Case law reference for the deference
- We need to help future judges make the decision in favor of the city and not worry about the judiciary overturning city decisions based on a lack of direction and a bad case

Mark Stratford:

- But do we need this if there is deference built into legislative acts?

Craig Peterson:

- The worry with a list for factors in 5(q) is that there is one left out and is there a more generic way to say this

Paul Ashton:

- But including a list shows that there are many reasons for making a rate

Scott Martin:

- (3) Water Rates set by *ordinance* and legislative act
 - o One item not discussed is that providing water is proprietary function and not a legislative act – rate setting is determine how much water
- Group: need to have the ability for those outside the city boundary to participate through the public process and public hearing – needs to be legislative

Utah Code Ann. 10-7-14: other provisions not discussed yet

Mark Stratford:

- (3)(a) Do we need a map – this was included to address concerns from last year
- (3)(b) adopt by ordinance policies applicable to its designated water service area and to retail customers
- (3)(c) Adopt by ordinance as to those areas outside of the municipal boundaries

Group:

- can it just be designated service area? Do we need to state outside boundaries?

Paul Ashton:

- What about those cities who do not serve outside their boundary –do they have to do this?

Steve Clyde:

- should we reference rate making and cross reference 10-4-22

Mark Stratford:

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- (4)(a) - designated service area would be coterminous with the anticipated service area for 40 year planning efforts

EE Lewis:

- This gives me concern because we have clients that are anticipating serving adjacent areas in the future but do not currently serve those areas (because they don't know what they are or how they are going to grow) and would not want to include those areas in their designated service area. We need to be able to protect water for those new growth areas and not limit protections to water currently used in designated service area.
- Group: is this needed?– would it unnecessarily limit planning and protection of water under public water supplier by tying anticipated service area to designated service areas - take out

10-8-22: Rate Making Advisory Board

- (1) Large municipal drinking water system means a municipally owned and operated drinking water system serving a population of 10,000
- Mark Stratford: the only issue this is applicable for is an advisory board
- (4) within its decision water service area, a municipality shall – establish rates by ordinance, treat people equally
- (6) Advisory Board: have to serve 10,000 people or more and have 10% of the connections outside of the city -
- (a) list of items from Rep. Coleman's bill and
- (b) create a board with representation for non-citizen
- (c) Board make up to make sure those connections outside the municipal boundary are equally represented
- (d) input and recommendation

Steve Clyde:

- establish an advisory board but make it clear they are not the decision makers – Ripper Clause

Craig Peterson:

- need to make sure the powers of the city remain with the city and that no "super board" is created

NEXT MEETING:

No next meeting was set.