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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of QUESTAR GAS COMPANY for Approval of a Natural Gas Processing Agreement	:	Docket No. 98-057-12
In the Matter of the Application of QUESTAR GAS COMPANY for a General Increase in Rates and Charges	:	Docket No. 99-057-20
In the Matter of the Application of QUESTAR GAS COMPANY to Adjust Rates for Natural Gas Service in Utah	:	Docket No. 01-057-14
In the Matter of the Application of QUESTAR GAS COMPANY to Adjust Rates for Natural Gas Service in Utah	:	Docket No 03-057-05

BRIEF OF QUESTAR GAS ON JURISDICTIONAL AND REFUND ISSUES

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I. INTRODUCTION

Questar Gas Company ("Questar Gas" or "Company"), pursuant to the Scheduling Order issued in these dockets on August 26, 2003, submits this brief addressing the Commission's jurisdiction to conduct further proceedings to determine whether costs incurred to remove carbon dioxide ("CO_2") from natural gas coming onto the Company's southern system ("CO_2 processing costs") may be included in rates. This question arises because of the decision of the Utah Supreme Court in *Committee of Consumer Services v. Public Service Comm'n of Utah*, 2003 UT 29; 75 P.3d 481 ("*Decision*"). This brief also addresses whether the *Decision* requires the Commission to order refunds of amounts previously included in the Company's rates and to reduce rates going forward. On the latter point, this brief supplements the Company's "Response to Petition of Committee" filed on September 8, 2003 in response to the "Petition to Adjust Questar Gas Company's 191 Pass-Through Account" ("Petition") filed August 8, 2003 by the Committee of Consumer Services ("Committee") in Docket No. 03-057-05.

During the Company's 1999 general rate case, Docket No. 99-057-20, the Company and the Division of Public Utilities ("Division") entered into a stipulation ("CO_2 Stipulation"),[1] in which they agreed that $5 million (approximately 68 percent) of CO_2 processing costs would be included in rates set in that case and that up to $5 million could be included in rates each year for five years, subject to further regulatory review of the reasonableness of the costs. They further agreed that if Questar Gas wished recovery of CO_2 processing costs after May of 2004 it would be required to seek further regulatory approval. The Commission approved the CO_2 Stipulation

[1] The CO_2 Stipulation was originally entered into between Questar Gas and the Division. It was filed in Docket No. 99-057-20 on June 2, 2000. After additional parties agreed to the Allocation and Rate Design Stipulation ("Rate Design Stipulation") that was filed on June 6, 2000, all parties that filed testimony opposing recovery of CO_2 processing costs, except the Committee, withdrew their opposition.

in an order issued in August 2000 ("*Order*"),[2] and the Company's general rates included $5 million in CO_2 processing costs following the *Order*. The Commission did not, however, rule on the prudence of the Carbon Dioxide Extraction Agreement ("CO_2 Processing Agreement") between the Company and its affiliate Questar Transportation Services Company ("Questar Transportation Services").

The Committee appealed the *Order*, and, on August 1, 2003, the Utah Supreme Court issued the *Decision* reversing the *Order* insofar as it approved the CO_2 Stipulation and rejecting that portion of the rate increase granted in the Company's 1999 general rate case. The *Decision* held that the Commission erred in approving the CO_2 Stipulation without finding that the costs incurred under the CO_2 Processing Agreement were prudent. The Court did not expressly remand the case to the Commission.

Based on the *Decision*, the Committee filed the Petition requesting that the Company's rates be immediately reduced by $5 million and that a refund of the entire amount of CO_2 processing costs included in rates to date be implemented through the Company's Gas Balancing Account, Account 191. At the scheduling hearing in these dockets on August 18, 2003, the Committee expressed the view that the *Decision* forecloses any attempt by the Commission to correct the error in the *Order*. This brief demonstrates that the Committee's position is incorrect.

Ratemaking is a legislative function delegated to the Commission, not the court. Based on binding precedent, the Commission has exclusive jurisdiction to set rates and must now proceed to do so consistent with the court's holding. Reversal of the *Order* approving the CO_2 Stipulation places the case before the Commission in the posture it was in immediately prior to approval of that Stipulation. The case must now be concluded by the Commission making a finding whether expenses under the CO_2 Processing Agreement were prudently. This is not an

[2] Report and Order, *In the Matter of the Application of Questar Gas Company for a General Increase in Rates and Charges*, Docket No. 99-057-20 (Utah P.S.C. August 11, 2000).

all-or-nothing determination. As it has consistently done in the past, the Commission may determine that all or some portion of the costs were prudently incurred. In this context, the fact that the court did not expressly order a remand or provide explicit instructions on remand is of no consequence.

In making its decision on prudence, the Commission is entitled to consider additional evidence and is required to afford the parties due process of law in presenting their complete cases on prudence. Failure of the Commission to make a decision on prudence, a decision it previously believed it was not required to make in light of the CO_2 Stipulation, would undermine the policy favoring settlement of issues, would be highly inequitable and would deny Questar Gas due process of law.

Contrary to the assertions in the Committee's Petition, it is not necessary for the Commission to reduce rates or order a refund at this time. Because the Commission has authority to determine correct rates, it is premature to seek any rate change or refund. Furthermore, current inclusion of CO_2 processing costs in rates through Account 191 is interim. Therefore, customers will not be harmed by maintaining the status quo. Alternatively, even if the Commission declines to conduct further proceedings and correct its error, a position that is contrary to binding precedent, most of the amounts collected since the Commission issued the *Order* are not subject to refund. For all of these reasons, the Commission should leave the current level of recovery of CO_2 processing costs in rates pending its ultimate decision in this proceeding.

II. FACTUAL BACKGROUND

Historically, the heat content of natural gas delivered to Utah customers of Questar Gas has been higher than gas reaching other local distribution companies ("LDCs") in the region and

nationally.[3] As far back as anyone can remember, the Company's Utah tariff specified an unusually high heat content operating range of 1020 to 1320 Btu/cf. Customers' appliances are supposed to be set to accommodate gas within the specified range, which is an important standard for customers, appliance dealers, installers and repair technicians because if appliances are improperly set potentially serious safety problems arise. These include a condition known as flame liftoff. In moderate liftoff conditions, elevated levels of the deadly gas, carbon monoxide, are present. In severe liftoff conditions, the flame burns above the burner surface or is extinguished entirely. If the burner is extinguished, asphyxiation or explosions can occur. In recognition of these problems, Commission rules require Questar Gas to regulate the chemical composition and specific gravity of gas delivered to its customers within the heating value established in its tariffs.[4]

Beginning in the early 1990s, the heat content of the gas delivered to Questar Gas through the interstate pipeline system gradually began to decline. One factor in this decline was the discovery and development of natural gas produced from coal seams in Emery County.[5]

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[3] In this brief, the term heat content is often used as a shorthand reference for a more complex set of issues. This set of issues involves, among other things, heat content, specific gravity, Wobbe index and recommended appliance set points. These issues are important because there are serious safety issues involved with burning natural gas in appliances. The heat content and specific gravity of natural gas is affected by the mix of hydrocarbons (*e.g.*, methane, propane, butane and ethane) and inert gases (*e.g.*, CO_2 and nitrogen) in the gas stream. Heat content is measured in British thermal units ("Btu") per volume of gas, *e.g.*, cubic feet ("cf") at specified pressure. One Btu is the quantity of heat required to raise the temperature of one pound of water one degree at sea level. Unless otherwise noted in this brief, heat content will be specified in Btu/cf and will be based on a pressure of 14.73 pounds per square inch. Specific gravity is the ratio of the mass of a given volume of gas to the mass of the same volume of air. The Wobbe index is an index used to determine the burning characteristics of gas. It is the heat content divided by the square root of the specific gravity. Depending on the Wobbe index of a gas stream, LDCs such as Questar Gas provide recommended appliance settings to dealers, installers and repair technicians. These set points vary not only depending on the Wobbe index, but on pressure that is different at different elevations.

[4] Utah Admin. Code R746-320-2.B.2 ("Utilities shall maintain the heating value established in their tariffs and in so doing shall regulate the chemical composition and specific gravity of the gas so as to maintain satisfactory combustion in customers' appliances without repeated adjustment of the burners.")

[5] The coal-seam gas is produced by third parties, unaffiliated with Questar Gas.

Because coal-seam gas as delivered to the interstate pipeline system is nearly pure methane, it has a lower Btu content than many other gas supplies in the region. Nonetheless, the coal-seam gas, naturally or as processed in the field by producers, complies with the gas quality requirements in Questar Pipeline Company's ("Questar Pipeline") Federal Energy Regulatory Commission ("FERC") tariff and the tariffs of most other interstate pipelines. Thus, as an open-access pipeline, Questar Pipeline is required to accept, transport and deliver the gas.[6] Because Questar Pipeline is part of the national interstate pipeline grid, it accepts gas from, and makes deliveries of gas to, the grid. Introduction of this gas onto Questar Pipeline's southern system contributed to the declining heat content of gas delivered to Questar Gas.

Until 1998, Questar Gas was able to manage the declining heat content without requiring a change in the heat content specified in its tariff. As conditions continued to decline in 1998, Questar Pipeline worked with Questar Gas to address heat content issues by arranging for additional facilities to accommodate blending of higher and lower Btu gas. In addition, Questar Gas arranged larger takes of higher Btu gas on Overthrust Pipeline Company through backhaul arrangements and amended its service-area determination approved by the FERC under section 7(f) of the Natural Gas Act.

From 1993 to 1996, production of coal-seam gas increased slowly and the blended stream of gas delivered to Questar Gas was still well within the heat content specified in the Company's tariff. However, starting around 1997, production of this gas began to increase at a much faster rate than previously seen. By the end of 1997, it became apparent that by mid-1999 Questar Gas would no longer be able to rely on the blended gas stream to deliver gas to its customers from

[6] Although it has a lower Btu content, coal-seam gas is actually desirable because it is "dry." Dry gas does not contain hydrocarbons that condense at normal operating temperatures and is preferred by most interstate pipelines. Interstate pipelines typically have strict "dew point" requirements in their tariffs designed to restrict "wet" gas from entering their systems.

Payson gate[7] that would conform to the tariffed heat content and could be burned safely in customers' appliances. Questar Gas informed the Commission, Division and Committee of this changing Btu issue in January 1998 and continued to review the status of the issue with them throughout 1998.

Recognizing that it was perhaps the only LDC with such a high heat content in its tariff and that the decline in heat content was a system issue, Questar Gas concluded, and all regulators and the Committee concurred, that the long-term solution to declining heat content was to lower the heat content in the Utah tariff and change the recommended appliance set points communicated to dealers, installers and repair technicians. Following consultation with the Commission, Division and Committee, the Company's Utah tariff was amended effective May 1, 1998 to reduce the heat content to an operating range of 980 to 1170 Btu/cf. The Division supported this change in its memorandum filed on April 30, 1998. No one disputed the need to make the change. However, Questar Gas also recognized that customers would not have sufficient time before mid-1999 to inspect and adjust their appliances to the new set points associated with the new heat content operating range specified in the tariff. Questar Gas is not responsible for customer appliance adjustments that may be necessary to accommodate the change in tariff-specified heat content. However, even if it had assumed responsibility to assist customers at tremendous expense, appliances could not have been adjusted in time.

In February or March 1998, Questar Gas determined that it could process the coal-seam gas by extracting CO_2 and that this processed gas would burn safely in customer appliances adjusted for either the new or old heat content. With this knowledge, Questar Gas determined that it could provide a longer transition period for customers to adjust their appliances to the new set points. This solution hinged on the design and construction of a CO_2 processing plant by

[7] The main point of delivery of gas from Questar Pipeline to Questar Gas on Questar Pipeline's southern main pipeline is near Payson and is known as Payson gate.

mid-1999. Questar Gas determined that such a plant was feasible and that this was less expensive and more reliable than other alternatives to manage the heat content of gas delivered to Payson gate.[8] In addition to their higher cost, the Company determined that other options likely could not have been completed within the available time and that, in some cases, it was unlikely they would have achieved the desired result.[9] Therefore, Questar Gas requested its affiliate Questar Transportation Services to build and operate a CO_2 processing plant located between the coal-seam gas fields in Emery County and Questar Pipeline's southern main line. The CO_2 Processing Agreement specified that the processing would be provided for an initial term of ten years. Given the expected life of furnaces and water heaters and the appropriate timing of regular maintenance of older appliances, ten years was a reasonable term for customers to implement the change from a 1080 Btu/cf to a 1020 Btu/cf average heat content without incurring unreasonable costs or taking extraordinary measures.

Questar Transportation Services is an unregulated subsidiary of Questar Pipeline. Questar Gas structured the transaction with Questar Transportation Services as the owner-operator because this permitted Questar Transportation Services to provide service to Questar Gas at cost-of-service prices based on Utah ratemaking standards. Questar Transportation

[8] Questar Gas and Questar Pipeline considered a variety of options, including injecting higher Btu hydrocarbons into the gas stream at Payson gate and installing additional pipeline facilities to reduce the coal-seam gas introduced into Questar Pipeline's pipeline providing deliveries to Payson gate or to transport higher Btu content gas to Payson gate for blending.

[9] In addition to the options mentioned in the foregoing footnote, other options included seeking an amendment to Questar Pipeline's FERC tariff to require Questar Pipeline to restrict its takes of coal-seam gas unless producers further processed it. Questar Gas and Questar Pipeline believe that it was and is highly unlikely that the FERC would permit Questar Pipeline to amend its tariff in this manner for the benefit of Questar Gas and to the detriment of the producers and other shippers. Indeed, the success of this option requires the FERC to take the very approach that the Committee wrongly accuses Questar Gas of taking—favoring an affiliate over other customers. If Questar Gas had pursued this FERC option when the heat content problem became critical, it would have been unable to address the problem through other means by mid-1999. The failure to pursue this option was cited by Division witnesses as a basis for their view that they could not determine whether Questar Gas acted prudently in entering into the CO_2 Processing Agreement. It was also the basis for former Chairman Mecham's dissent from the portion of the *Order* approving the CO_2 Stipulation.

Services obtained bids for design and construction of the plant from unrelated third parties. Questar Gas presented uncontroverted evidence in Docket Nos. 98-057-12 and 99-057-20 that the cost of CO_2 processing through this arrangement is as low as or lower than would be expected had the plant been owned and operated by Questar Gas or an unrelated third party. Furthermore, given the structure of the transaction, the Commission is able to examine the reasonableness of Questar Gas's expenditures for CO_2 processing at anytime.

The relationship between Questar Gas and Questar Transportation Services with respect to the plant was documented in the CO_2 Processing Agreement on November 25, 1998. Construction of the plant was completed and the plant went into operation in June 1999. Operation of the plant since that time has enabled Questar Gas to deliver gas to its customers that is interchangeable with the heating values in the prior and current tariff and which thus may be safely burned during the ten-year transition period.[10]

III. PRIOR PROCEEDINGS

The CO_2 Processing Agreement and recovery of CO_2 processing costs in rates have been addressed in several Commission proceedings.

A. APPLICATION TO APPROVE CO_2 PROCESSING AGREEMENT AND RECOVER COSTS IN ACCOUNT 191 – DOCKET NO. 98-057-12

On November 25, 1998, Questar Gas filed an application, assigned Docket No. 98-057-12, seeking approval of the CO_2 Processing Agreement and recovery of the costs incurred pursuant to the agreement in Account 191. The Division and Committee opposed the application. They argued that it was not necessary for the Commission to approve the agreement because the processing costs were not properly included in Account 191. On December 3, 1999, the Commission issued its order finding that the costs could not be recovered through

[10] Attachment 1 provides a timeline of relevant events from 1990 through September 4, 2003. It also includes the prior proceedings discussed in Section III, below.

Account 191 because they were not eligible for treatment under the "pass-through statute."[11] The Commission did not make a finding on the prudence of the CO_2 Processing Agreement,[12] and did not authorize recovery of any CO_2 processing costs in rates.

Questar Gas appealed the order. The court reversed the order on October 23, 2001.[13] The court held that Account 191 was a separate rate-changing mechanism not tied to the pass-through statute and that the Commission was required to consider the Company's application according to previously established Account 191 procedures.

B. 1999 GENERAL RATE CASE – DOCKET NO. 99-057-20

On December 17, 1999, Questar Gas filed a general rate case, assigned Docket No. 99-057-20, that included a request for recovery of CO_2 processing costs. Questar Gas also filed an emergency motion seeking interim relief. The Commission granted the request for interim relief on January 25, 2000, effective January 1, 2000.

The Commission issued the *Order* in the general rate case on August 11, 2000. The Commission approved two stipulations that resolved the revenue requirement and rate spread associated with the CO_2 processing costs. The CO_2 Stipulation permitted Questar Gas the opportunity to recover $5 million through general rates set in the rate case and up to $5 million each year thereafter for a total period of five years, starting June 1, 1999 and ending May 31, 2004. Eventually, the only party that presented testimony at the hearing challenging the CO_2 Stipulation was the Committee. The costs were spread to customers pursuant to another

[11] Utah Code Ann. § 54-7-12(3)(d).

[12] *See* Report and Order, *In the Matter of the Application of Questar Gas Company for Approval of a Natural Gas Processing Agreement*, Docket No. 98-057-12 (Utah P.S.C. Dec 3, 1999) at 8 ("We do not intend, by this Order, to make any judgment on the issues of whether QGC's decision to enter into the agreement with [QTS] was prudent ... . The prudence and reasonableness issues are purposely not resolved by this Order.").

[13] *Questar Gas Co. v. Public Service Comm'n*, 2001 UT 93, ¶ 5, 34 P.3d 218, 220.

stipulation, the Rate Design Stipulation. The Committee appealed the portion of the *Order* approving the CO_2 Stipulation, and that appeal led to the *Decision*.

On August 1, 2003, the court issued the *Decision*. The *Decision* "reverse[d] the Commission's order and reject[ed] the rate increase proposed by the CO_2 Stipulation." *Decision* ¶ 6. The court stated that it "overturn[ed] the Commission's decision to accept the CO_2 Stipulation and to grant the rate increase proposed therein," *id.* ¶ 13, because "[b]y accepting the CO_2 Stipulation with no consideration of the prudence of the underlying source of the new costs (i.e., the contract between Questar Gas and its affiliate Questar Pipeline [sic]), the Commission abdicated its responsibility to find the necessary substantial evidence in support of the proposed rate increase in the record." *Id.* ¶ 15. The court did not state in the *Decision* that it was remanding the case to the Commission for further proceedings.[14]

C. 2001 PASS-THROUGH APPLICATION – DOCKET NO. 01-057-14; REMAND OF DOCKET NO. 98-057-12

On December 14, 2001, Questar Gas filed a pass-through application, assigned Docket No. 01-057-14, requesting an annualized cost decrease. After remand of the court's decision reversing the Commission's order in Docket No. 98-057-12, the Commission consolidated that docket with Docket No. 01-057-14. The Commission authorized the decrease to become effective on January 1, 2002 on an interim basis. The decrease was made final by the Commission in an order issued on August 14, 2002.

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[14] The Committee takes the position that failure to state that the matter is remanded to the Commission is significant and that the court's reversal effectively ends this proceeding. *See* Transcript (August 18, 2003) at 15. Accordingly, in the Petition, the Committee argues that "[t]he Court's decision makes the Company's recovery of coal-seam gas processing costs in rates unlawful. The Company therefore needs to promptly cease further collecting such costs in customer rates and further needs to promptly refund to its customers any and all monies already collected in rates for such expenses." Petition ¶ 6.

This brief demonstrates the error of the Committee's Petition and its underlying premise, which is that the court's reversal ends this matter except for an adjustment in rates and a refund of past rates collected. The Commission has the jurisdiction and the obligation to make a decision on the level of costs Questar Gas has prudently incurred under the CO_2 Processing Agreement.

The Commission's August 14, 2002 order addressed recovery of CO_2 processing costs through Account 191. Because Questar Gas had been recovering $5 million of CO_2 costs annually in general rates since the *Order* in Docket No. 99-057-12, the Commission was concerned only with recovery of CO_2 processing costs for the period from June 1, 1999 through August 10, 2000. The Commission was not bound by the recovery it had authorized in Docket No. 99-057-20. Nonetheless, the Commission found that the recovery, including a $5 million annual cap, represented a reasonable resolution of the issues and, therefore, concluded that it would apply the same terms to the recovery of the CO_2 costs incurred prior to August 11, 2000. After determining the amount of CO_2 costs included in interim rates in Docket No. 99-057-12, the Commission authorized the recovery of an additional $3.76 million for the prior period on the same rate spread as was approved in Docket No. 99-057-20.[15]

On October 7, 2002, the Committee appealed the Commission's August 14, 2002 order. That appeal was consolidated with the Committee's prior appeal of the *Order*.

D. 2002 GENERAL RATE CASE – DOCKET NO. 02-057-02

Questar Gas filed an application for a general rate increase on May 3, 2002, which was assigned Docket No. 02-057-02. The parties, including the Committee, ultimately settled all issues in the case by stipulation except cost of equity and capital structure. The stipulation provided for future recovery of CO_2 processing costs based on the amount specified in the CO_2 Stipulation. The stipulation also provided that recovery of CO_2 costs should be through Account 191 and allocated on the same basis as agreed in the Rate Design Stipulation. Neither the stipulation nor the order approving it in Docket No. 02-057-02 were conditioned on the outcome

[15] Because the Rate Design Stipulation recovered a portion of CO_2 processing costs from customers whose rates are not subject to Account 191, the Commission directed that recovery of a portion of the $3.76 million would be through rate changes made in a new pending general rate case, Docket No. 02-057-02.

of the Committee's appeals in Docket Nos. 99-057-20, 01-057-14 and 98-057-12, and no party appealed the order.

E. 2003 PASS-THROUGH APPLICATIONS – DOCKET NOS. 03-057-05 AND 03-057-10

On May 30, 2003, Questar Gas submitted an Account 191 application, assigned Docket No. 03-057-05, requesting an annualized gas cost increase to become effective on July 1, 2003. CO_2 processing costs of $5 million were included in this application. The Commission issued an order authorizing the proposed rate increase on an interim basis, effective as of July 1, 2003. The Committee's Petition was filed in this docket on August 8, 2003, following issuance of the *Decision*. The Petition seeks a reduction in current Account 191 rates and a refund of all CO_2 processing costs previously recovered in rates.

On September 4, 2003, following issuance of the *Decision*, Questar Gas filed a further Account 191 application, assigned Docket No. 03-057-10, requesting an annualized gas cost decrease to become effective October 1, 2003. The Company's application in this latter docket specified that it is seeking recovery of all CO_2 processing costs, but is leaving recovery at $5 million on an interim basis pending the outcome of this proceeding. The Company, Division and Committee are entering into a stipulation in this docket providing that the proposed rate reduction may be implemented and that future recovery of CO_2 processing costs will be deferred for later decision in this or other dockets.

IV. ARGUMENT

A. THE COMMISSION HAS AUTHORITY TO CONDUCT FURTHER PROCEEDINGS TO CORRECT ERRORS IN ITS ORDER.

This matter is now before the Commission after reversal by the Utah Supreme Court of the Commission's *Order* approving the CO_2 Stipulation. The court identified the single issue before it as being "whether the Commission may rely on a 'safety exception' that relieves Questar Gas of its burden to demonstrate the prudence of its contract with Questar Pipeline

[sic]." *Decision* ¶ 12. The court resolved the issue by holding "that the Commission's safety rationale is neither an adequate nor a fair and rational basis for departing from its prudence review standard." *Id.* at ¶ 13. Thus, the court determined that reversal was necessary because:

> By accepting the CO_2 Stipulation with no consideration of the prudence of the underlying source of the new costs (i.e., the contract between Questar Gas and its affiliate Questar Pipeline [sic]), the Commission abdicated its responsibility to find the necessary substantial evidence in support of the proposed rate increase in the record.

Id. at ¶ 15.

The court based its reversal on the Commission's failure to determine the prudence of the costs incurred under the CO_2 Processing Agreement in approving the CO_2 Stipulation. The question, therefore, is whether, because no pre-appeal determination was made by the Commission on the prudence of the CO_2 processing costs, the Commission is now foreclosed from determining the prudence of those costs. The answer to this question, based on well-established principles of law, is that the Commission can, and indeed must, give Questar Gas a full and fair opportunity to demonstrate the prudence of the CO_2 processing costs, as part of the Commission's yet-unfinished business of ratemaking.

The underlying issue in the general rate case—whether, or to what extent, Questar Gas will be allowed to increase its rates to include CO_2 costs—remains open. There has never been a full adjudication of that issue because the acceptance by the Commission of the CO_2 Stipulation led to an early conclusion of the rate case the first time, and the *Order* approving the CO_2 Stipulation was reversed. Continuing the rate case where it left off therefore would simply allow proper conclusion of the case. It would not constitute a second bite at the prudence apple. Rather, the Commission alone has the jurisdiction to decide the rate issue in the first instance and its statutory mandate under Utah Code Ann. § 54-4-4 as well as principles of due process necessitate that it do so now, consistent with the court's *Decision*.

1. The Effect of the Reversal Was to Put the Case Back in the Position It Was in Prior to Issuance of the Order.

The Commission has the authority to undertake a prudence review of the Company's CO_2 costs. That authority is supported by the well-established principle that "[a] reversal of a judgment or decision of a lower court … places the case in the position it was before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed." *Phebus v. Dunford*, 198 P.2d 973, 974 (Utah 1948); *see also Worley v. Travelers Indemnity Co.*, 173 S.E.2d 248, 250 (Ga. 1970) ("[R]eversal without direction results in a vacation of the judgment and trial de novo … .") (citations omitted); *Tucson Gas & Elec. Co. v. Superior Court*, 450 P.2d 722, 725 (Ariz. App. 1969) ("Upon a reversal, without instructions, generally a new trial is required … ."). Thus, after a reversal the parties are not precluded from further presentation of their cases. Nor is the lower tribunal precluded from further hearing. Rather, the parties are put back in the position they were in prior to the issuance of the order that was reversed. Only if an appellate decision completely resolved all potential issues in the case could it be said that a reversal precludes further substantive proceedings by the lower tribunal. *Cf. Call v. City of West Jordan*, 727 P.2d 180, 181 (Utah 1986) ("[P]leadings may be amended after remand ... so long as they do not cover issues specifically foreclosed by the appellate court."). Such is obviously not the case here where the Utah Supreme Court made a single holding—that the Commission erred in failing to make a prudence determination. Indeed, the court neither purported to resolve all outstanding issues nor did it order that the Commission is now precluded from making the prudence determination that it failed to make before.

a. When the Commission is the lower tribunal, the ability to proceed after reversal is even clearer because the appellate court may not usurp the Commission's legislative function.

The *Decision* could not possibly have resolved every issue in the rate case because to do so would have involved the court taking upon itself the role of the Commission—deciding in the first instance whether all or some portion of the costs incurred under the CO_2 Processing Agreement could be found prudent and what rate increase would be just and reasonable. The court is prohibited from exercising such a role. While appellate courts may review decisions of administrative agencies for lawfulness, they may not assume the duties of the agency. *See, e.g.*, *Federal Power Comm'n v. Idaho Power Co*., 344 U.S. 17, 21 (1952) ("The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part.' But that authority is not power to exercise an essentially administrative function.") (citation omitted). This is particularly the case in ratemaking, which is a legislative function relying heavily on agency expertise. *See, e.g., Beaver County v. Qwest, Inc*., 2001 UT 81, ¶ 12, 31 P.3d 1147, 1150 (upholding dismissal for lack of subject-matter jurisdiction of a complaint in court, noting"[w]e have consistently adhered to the legislature's intent in delegating adjudication of the rate making function to the PSC").

Indeed, the Utah Supreme Court has addressed the Commission's legislative function, as well as the limits of its own judicial review, in a factual setting highly analogous to the present one. In *Utah Dept. of Bus. Reg. v. Public Service Comm'n ("Wage Case")*, 614 P.2d 1242 (Utah 1980), the court reversed a Commission decision to allow a rate increase reflecting wage and salary increases. The court reversed because the Commission failed to make a finding that the proposed rates were just and reasonable. In reversing, the court also noted the utility's burden to demonstrate the justness and reasonableness of its proposed rate increase.

Just as the Committee now asks the Commission for a refund based on the court's reversal of the *Order*, in the *Wage Case* the Division asked the court "to declare the order of the P.S.C. invalid and void from its inception, and to order the amounts collected thereunder to be refunded." *Id*. at 1250. The court refused, holding that:

> To undertake such a course would be tantamount to this Court engaging in rate-making, which is strictly a legislative power, for the P.S.C. in fixing and promulgating rates acts merely as an arm of the Legislature. The review by this Court of the orders of the P.S.C. is confined to the legal issues of whether there is substantial evidence to sustain the findings of the P.S.C.; whether the P.S.C. has exercised its authority according to law; and whether any constitutional rights of a complaining party have been invaded or disregarded. Any interference by this Court beyond the aforementioned limits would constitute an interference with the law-making power of this state. Thus, the order of the P.S.C. is set aside, and this matter is remanded to the P.S.C. to determine whether the adjustment sought by applicant would be a just and reasonable rate.

Id. *See also Utah Dept. of Admin. Services v. Public Service Comm'n ("Wexpro II")*, 658 P.2d 601, 615 (Utah 1983) ("[T]he public authority empowered to regulate and 'supervise all of the business' of a public utility, U.C.A., 1953, § 54-4-1, is the Commission, not this Court."); *Mountain States Tel. & Tel. Co. v. Public Service Comm'n*, 155 P.2d 184, 188 (Utah 1945) (in setting aside a previous Commission decision "[w]e did not [determine that the rates charged by the utility were unjust, unreasonable or confiscatory] simply because that is not our function. Indeed, it is not a judicial function. It is legislative and is to be exercised by the arm of legislature—the Public Service Commission."); *Mulcahy v. Public Serv. Comm'n*, 117 P.2d 298, 299-300 (Utah 1941) ("[E]ver since *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60, it has been recognized that one department of the government cannot control the judgment or official acts of another department, acting within its proper sphere of governmental power, within the scope of its authority."). *See also, e.g., San Carlos Irr. and Drainage Dist. v. United States*, 111 F.3d 1557, 1564 (Fed. Cir. 1997) ("[R]ate making is generally inherently a policy decision better left to an agency, and … the doctrine of primary jurisdiction requires that the agency redetermine

rates in cases where a court determines the agency has abused its discretion … .") (citations omitted).

Thus, under the *Wage Case* and the other aforementioned authority, upon reversing a Commission determination because the Commission failed to make a finding that rates were just and reasonable (or, in the present instance, that up to $5 million of the costs incurred annually under the CO_2 Processing Agreement were prudent), the court cannot (1) preclude the Commission from further consideration of the justness and reasonableness of the proposed rate increase or (2) "order the amounts collected [under the erroneous order] to be refunded." 614 P.2d at 1250. If the court cannot take these actions itself, surely it cannot force the Commission to take these actions in its stead—to do so would be an equally inappropriate interference with the Commission's legislative function. But this prohibited act of forcing the Commission to summarily order refunds is precisely what the Committee claims the *Decision* mandates. The Committee's reading, however, is directly contrary to, and precluded by, the controlling authority of the *Wage Case* and would violate the constitutional separation of powers noted in *Mulcahy*.

Again, while the court has authority to review the lawfulness of Commission orders, it is the Commission that must now exercise its delegated legislative function of ratemaking consistent with the court's *Decision*. As *Corpus Juris Secundum* notes in this regard:

> A court decision annulling the administrative body's determination because it was reached without supporting evidence does not preclude the administrative body from reopening the proceeding and receiving further evidence to justify its determination, and an administrative body is not precluded from reopening the case for the taking of evidence and the issuance of another order where the first order has been set aside as not based on evidence. Reversal of an administrative decision on the ground that the administrative body has misinterpreted the law does not prevent it from making the same decision on proper grounds on a subsequent application.

73A C.J.S. *Public Administrative Law and Procedure* § 258 (1983) (citations omitted). *See also,*

e.g., Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134, 145 (1940) ("But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge.").

The Committee's insistence that the *Decision* foreclosed any further proceedings by the Commission is insupportable. The court cannot usurp the Commission's legislative function in violation of constitutional separation of powers.

b. The Commission's authority to conduct further proceedings is sanctioned by binding precedent regarding the authority of agencies to re-open matters post-appeal.

The authority cited above conclusively establishes the Commission's authority to resume its ratemaking responsibilities following the *Decision*. Additional authority also supports this conclusion. For example, in allowing the Career Service Review Board to reopen a matter, take new evidence and reconsider a prior decision post-appeal, the Utah Supreme Court held that "administrative agencies have the power to reconsider their decisions in the absence of statutory provisions to the contrary."[16] *See Career Service Review Bd. v. Utah Dept. of Corrections*, 942 P.2d 933, 945 (Utah 1997). In *Career Service*, the prior appellate action resulted in a voluntary dismissal. *Id*. at 936. There was no remand to the administrative agency; however, the agency later reopened the prior administrative action post-appeal and in so doing was upheld by the

[16] In the case of the Commission, not only is there no "statutory provision[] to the contrary," there is express statutory authority to "at any time, upon notice to the public utility affected and after opportunity to be heard, rescind, alter, or amend any order or decision made by it." *See* Utah Code Ann. § 54-7-13. Similar statutory provisions have been interpreted elsewhere to empower an agency's modification of its orders after a final determination of an appellate court. *See, e.g., American Chain & Cable Co. v. Federal Trade Comm'n*, 142 F.2d 909, 911-12 (4th Cir. 1944), *cited with approval in Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 342 (1945). Indeed, the Utah Supreme Court has affirmed modification of a Commission order after appellate action. *See, e.g., Union Pacific R.R.. v. Public Service Comm'n*, 300 P.2d 600, 602-03 (Utah 1956). Of course, this authority is confined by the rule against retroactive ratemaking, as well as by res judicata where applicable in the regulatory context.

court. This is consistent with all of the above-cited precedent and again reflects the fact that the Commission's ongoing jurisdiction derives from the legislature, not the courts, and that while the court reviews Commission determinations for lawfulness it cannot preclude the Commission from exercising its legislative authority to determine appropriate rates in the first instance.

Thus, reversal of the *Order* puts the case back to its position before the *Order* was issued—the Commission adjudicating the justness and reasonableness of the Company's proposed rate increase related to the CO_2 processing costs. *See Phebus*, 198 P.2d at 974. The *Decision* makes clear that in approving the CO_2 Stipulation the Commission erred in failing to make a determination on the prudence of the CO_2 Processing Agreement. That is all the court decided, and such a decision does not and could not strip the Commission of its well-established authority to resume its ratemaking function where it left off. *See, e.g., J-T Transport Co. v. United States*, 185 F. Supp. 838, 851 (W.D. Mo. 1960) ("Courts of review have no power to order an administrative body to perform discretionary acts in a particular manner, or themselves to exercise administrative functions."). Rather, what the *Decision* requires is that on resumption of its ratemaking function the Commission must make a prudence determination regarding the CO_2 processing costs before it again accepts the CO_2 Stipulation or otherwise includes all or some portion of the CO_2 processing costs in rates.

2. The Fact that the Court Did Not Use the Word "Remand" or Provide Instructions on Remand Is Not Significant.

In the face of the overwhelming authority supporting the Commission's jurisdiction to resume its ratemaking function following reversal, the Committee would have the Commission believe that further proceedings are precluded because the court did not expressly remand the case to the Commission for such proceedings. Such a view, however, is inconsistent with the established precedent.

The term "remand" is not talismanic, nor is the Commission's ongoing jurisdiction dependent on the court's use of that or any other term. In *Career Service,* for example, the Utah Supreme Court determined that "administrative agencies have the power to reconsider their decisions in the absence of statutory provisions to the contrary," and upheld the agency's re-opening of the record post-appeal, notwithstanding the absence of a remand order. *See* 942 P.2d at 936, 945. The fact that the court did not expressly remand, therefore, does not strip the Commission of the authority to resume its ratemaking function.[17] Of course, the Commission is bound by, and may not take action inconsistent with, the *Decision*; but this does not mean that the Commission may take no substantive action at all.

The Committee's argument that the Commission may not conduct further proceedings in the absence of an express remand order is not unlike the argument that, when a remand is ordered, the administrative agency may not exceed the express scope of the remand order. The Utah Supreme Court rejected this argument, however, in *Wexpro II*. There it was argued that, where the court had rejected the PSC's prior approval of an agreement allowing Mountain Fuel to transfer oil properties to an unregulated subsidiary, the Commission could not go beyond the express scope of the remand order in its subsequent action, in which it approved a settlement. In rejecting the argument, the court noted with approval that "[t]he Commission … obviously saw the negotiated settlement as a means of resolving not only the questions remanded from this Court, but also other important controversies whose speedy and economical resolution would serve the public interest." 658 P.2d at 613. *See also Re Atlantic Seaboard Corp*., 38 F.P.C. 91, 94, 69 PUR 3d 451 (F.P.C. July 14, 1967) ("The first and most basic argument advanced ... is that an administrative agency is not limited by a remand to hearing only those issues specifically

[17] Even in non-agency contexts (where separation of powers principles are not at issue), the Utah Supreme Court has made clear that the lack of the word "remand" does not prohibit additional proceedings. *See Gray v. Defa*, 153 P.2d 544, 546 (Utah 1944); *see also DeBry v. Cascade Enterprises*, 879 P.2d 1353 (Utah 1994), *DeBry v. Cascade Enterprises*, 935 P.2d 499, 502 (Utah 1997).

discussed by the court. This contention is correct. Where a court has pointed out error, the agency is not precluded on remand from affirming its original decision if the error can be corrected with or without additional evidence.").

Just as the scope of a remand order does not constrain the scope of subsequent agency proceedings, the absence of a remand order does not preclude subsequent agency proceedings.

3. The Commission Now Must Make a Prudence Determination on the CO_2 Processing Costs and Conclude Its Regulatory Function of Determining the Justness and Reasonableness of the Company's Proposed Rate Increase Based on Those Costs.

The Commission now has before it the rate case as it existed immediately prior to the *Order*. *See Phebus*, 198 P.2d at 974. The Commission can and should resume the proceedings where they left off and conclude the adjudication of the justness and reasonableness of the Company's proposed rate increase, including, by mandate of the court's *Decision*, whether the expenses incurred under the CO_2 Processing Agreement were prudently incurred.[18] If it so chooses, the Commission may again approve the CO_2 Stipulation, as long as the approval is supported by adequate findings.

[18] We note that "[i]n considering whether ... decisions were prudent, [the Commission is] bound to consider [the] decisions in light of the circumstances which existed **at the time the decisions were made."** Order, *In the Matter of the Application of Mountain Fuel Supply to Adjust Rates for Natural Gas Service in Utah*, Docket Nos. 91-057-11 and 91-057-17 (Utah P.S.C. September 10, 1993) (emphasis added.) Thus, in considering the prudence of the costs incurred under CO_2 Processing Agreement, the Commission must focus on Questar Gas's prudence at that time and may not consider the FERC-sanctioned actions and tariffs of Questar Pipeline in either accepting the coal-seam gas on its system or failing to seek a tariff change to require the gas producers to pay for CO_2 processing costs. Any consideration of Questar Pipeline's FERC-sanctioned actions and tariffs is also prohibited as being squarely within the jurisdiction of the FERC and therefore outside the purview of the Commission. *See, e.g., Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 374-75 (1988) (holding that states may not consistent with the Supremacy Clause conduct any proceedings that challenge the reasonableness of FERC allocations and that "[t]he reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state ... courts."); *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986).

While Questar Gas believes that the Commission already has ample evidence upon which to make a finding of prudence,[19] the Commission has the authority to reopen the record and take additional evidence. *See, e.g.*, 73A C.J.S. *Public Administrative Law and Procedure* § 258; *Call v. City of West Jordan*, 727 P.2d 180, 181 (Utah 1986) ("[P]leadings may be amended after remand ... so long as they do not cover issues specifically foreclosed by the appellate court.").

The Commission should not regard a reopening of the record as constituting a second bite at the prudence apple. Several parties, including Questar Gas, cut short the presentation of their cases in Docket No. 99-057-20 due to the entry of the CO_2 Stipulation.[20] In light of this unfinished business, if the Commission now both rejects the CO_2 Stipulation and refuses to allow the parties to resume and conclude the presentation of their cases, the parties will have been denied their due process rights and the Commission will have failed to complete its statutory ratemaking function.

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[19] This includes uncontroverted evidence that the full cost-of-service pricing for CO_2 processing from Questar Transportation Services was less than would have been obtained from an independent third-party and that CO_2 processing was less expensive and more reliable than the alternatives considered by Questar Gas or proposed by the Division and Committee. *See, e.g.*, Post-Hearing Brief of Questar Gas Company, Docket No. 98-057-12, Exhibits 1.2R, 3.1R and 4.

[20] *See, e.g., Transcript (*June 5, 2000) at 99 ("[C]ommissioner WHITE: So if we don't accept your stipulation, you're going to want to cross examine these two witnesses again? MR. REEDER: Yes. CHAIRMAN MECHAM: Is that your point, Mr. Dodge? MR. DODGE: Yes. Thank you."); i*d*. at 219 ("MR. SACKETT: Mr. Chairman, I wanted to also -- intended to make the same kind of reservations in this kind of peculiar situation in which a witness and maybe other witnesses will make statements with which the Company has in the past been in substantial disagreement. And but for the stipulation that's before you, we would have considerable cross examination for Mr. Hanson and others. And so it's with that understanding, and I assume the same from Mr. Ginsberg, vis-a-vis Mr. Terzic and Mr. Allred. CHAIRMAN MECHAM: Okay.").

Even if the parties had "finished" the presentation of their cases in Docket No. 99-057-20 and the Commission had reached a non-truncated conclusion to the adjudication, the Commission would still be free to re-open the record for additional evidence following appeal. *See, e.g.*, 73A C.J.S. *Public Administrative Law and Procedure* § 258.

a. The Commission's prudence determination need not be all or nothing.

The record shows that all of the Company's CO_2 processing costs were prudently incurred and warrant recovery.[21] However, in entering the CO_2 Stipulation with the Division, Questar Gas agreed to an amount of recovery that was less than its total CO_2 processing costs. Although the court overturned the *Order* approving the stipulation, there is no reason why the Commission could not again approve the stipulation, or a new stipulation, or otherwise issue an order providing for full or partial recovery. Likewise, in the Commission's assessment of the prudence of the CO_2 Processing Agreement costs, there is no reason that the Commission must find that either all or none of the costs based on the agreement were prudently incurred.[22] The Committee's own witness admitted as much.[23] The Commission should bear this in mind whether it re-opens the record or merely takes further argument on the evidence currently in the record.

Cases are myriad in which this Commission and others have disallowed only a portion of costs (rather than all costs) based on a finding of less-than-complete prudence. In Docket No. 95-049-05, for example, the Committee made similar arguments to those it has made in this case, to the effect that affiliate interests had tainted the transactions and that no recovery was appropriate. *See Re U S West Communications, Inc.*, 1995 WL 798880 (Utah P.S.C. November 27, 1995) ("The Committee argues that the Supreme Court [through the remand order in

[21] And if the Commission determines not to accept the CO_2 Stipulation Questar Gas will of course seek to establish that recovery of all of the CO_2 processing costs is appropriate.

[22] Unlike a court proceeding, in which a party can absolutely win or lose its case depending on whether it makes a prima facie showing, in the ratemaking context the Commission exercises a legislative as opposed to quasi-judicial function and must balance the interests of utility customers and utility shareholders, as well as consider the overall public interest in setting a level of recovery. This allows the Commission flexibility to partially accept party positions or craft its own positions, and does not require all-or-nothing determinations.

[23] *See* Transcript (June 5, 2000) at 241 (McFadden) (denying that prudence is the issue, but noting that if prudence did apply: "Of course, if the Commission found that the Company was imprudent, the Commission could disallow **a portion** or all of the costs.") (emphasis added).

U S West Communications, Inc. v. Public Service Comm'n, 901 P.2d 270 (Utah 1995)] has in essence given us just two choices: find that the Company has met its burden and allow full recovery of these transactions in rates; or find that the Company has not met its burden, and, lacking a means to quantify the cost overruns, disallow all affiliate transactions from rate recovery."). The Commission, however, rejected the Committee's all-or-nothing approach and found:

> Although we conclude the Company did not meet its burden, we do not agree with the Committee that every dollar of affiliate transactions should be disallowed from rate recovery. Lacking any evidence to the contrary, we conclude that ratepayers received some value for the goods and services obtained through USWC's affiliate relationships. We are not convinced, however, that these services were obtained at lowest cost. The Company has failed to meet its burden and we adopt the Division's recommendation to disallow ten percent of [the affiliate] charges.

Id.; *modified on reconsideration, Re U S West Communications, Inc.*, 1996 WL 523851 (Utah P.S.C. June 6, 1996); *see also Re U S West Communications, Inc.*, 1993 WL 214610, 142 P.U.R. 4th 1 (Utah P.S.C. April 15, 1993) (finding various partial disallowances appropriate where "[U S WEST] had not justified these charges as necessary and reasonable").

In this case, the Company's customers are indisputably receiving something of significant value by having the CO_2 processing performed; and any alternative means for customers to receive an equivalent value would have cost **something.** If not the full costs, then at least the costs up to the amount of that prudent alternative should be recovered. The Commission must provide a reasoned explanation for departing from its past practice regarding affiliate transactions that provide value to utility customers if it is to deny all recovery to Questar Gas.[24] In this case there is no reason to depart from past practice. There is strong reason to allow all of the costs; and, at a minimum, the Commission should uphold a portion of them. Not only would

[24] *See* Utah Code Ann. § 63-46-b-16(4)(h)(iii) (grounds for appeal include actions "contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency").

a failure to do so be a departure from past Commission practice, it would also discourage utility investment, as utilities will be less likely to invest if they face an all-or-nothing decision at the Commission, where they will either be found 100 percent prudent or recover nothing. The Commission, then, need not make an all-or-nothing determination on the prudence of the CO_2 processing costs. It should allow inclusion in rates of those costs it finds were prudently incurred.

b. Failure by the Commission to resume the adjudication of the rate case would undermine the public policy in favor of settlement and would be highly inequitable.

The adjudication of the Company's rate case was abbreviated by the Commission's acceptance of the CO_2 Stipulation. The entry of the CO_2 Stipulation was consistent with the strong public policy preference for the settlement of disputes. *See* Utah Code Ann. § 54-7-1; *see also Wexpro II*, 658 P.2d at 613-14 ("The policy in favor of settlements applies to controversies before regulatory agencies, so long as the settlement is not contrary to law and the public interest is safeguarded by review and approval by the appropriate public authority."). The public policy preference for settlement would be seriously undermined if, when parties settle disputes through stipulation—but those stipulations are rejected, the parties are precluded from resuming and concluding the full adjudication of the dispute. The Committee knows that parties truncated their adjudication of the case as a result of the CO_2 Stipulation.[25] Yet despite this, the

[25] *See supra* note 20, identifying portions of the transcript where parties noted that they would have made further presentation of their cases but for the CO_2 Stipulation.

Further, if the case had not been truncated by the entry of the CO_2 Stipulation the Company would have dealt squarely with the erroneous casting of the prudence issue as requiring speculation about what the FERC might or might not do in an imaginary case involving an attempt by Questar Pipeline to change it tariffs, while ignoring the fact that the FERC had approved Questar Pipeline's tariffs and certificates in actual cases. The fact that Questar Pipeline is affiliated with Questar Gas did not and does not overcome federal pre-emption or give the Commission any broader authority to penalize Questar Gas because Questar Pipeline's quality specifications or open access transportation policies might have been different. As the Supreme Court explained in *Nantahala*, "Many of these [filed rate doctrine] cases involved purchases by closely related entities, but these courts have uniformly concluded the FERC's regulation still pre-empted review by state utility commissions of FERC-approved rates." 476 U.S. at 965.

Committee now opposes the resumption of the adjudication to allow the Commission to conclude its ratemaking function. In so doing, the Committee undermines the public policy favoring the settlement of disputes.

In seeking to prevent Questar Gas from making a showing of prudence and obtaining recovery of its CO_2 processing costs, the Committee also acts contrary to principles of equity. The CO_2 plant is currently necessary to protect the safety of the Company's customers. Questar Gas cannot now, nor in the medium-term future will it be able to, accept unprocessed gas without jeopardizing public safety. Yet the Committee argues that the Commission should preclude recovery of the CO_2 costs without even giving Questar Gas the opportunity to have the Commission rule on the level of costs that were prudently incurred. This is an untenable position.

c. Failure by the Commission to resume the adjudication of the rate case would violate the Company's constitutional right to due process.

If the Commission does not allow this case to proceed, it will deny the Company's constitutional right to due process of law because, given the reversal of the *Order* approving the CO_2 Stipulation, Questar Gas would never have received a full and fair opportunity to present its entire case and have the Commission rule on the prudence of the costs incurred under the CO_2 Processing Agreement. *See, e.g., Empire Elec. Ass'n v. Public Service Comm'n*, 604 P.2d 930, 932, 933 (Utah 1979) ("In proceedings before an administrative agency, it is requisite ... that a party be given the opportunity to prepare and present his case and to have an adjudication in conformity with the law."). The parties to the CO_2 Stipulation contemplated their ability to withdraw from it in the event that the stipulation was not approved in its entirety by the Commission. *See* CO_2 Stipulation ¶ 16. If, therefore, the Commission had refused to accept the CO_2 Stipulation, the parties could have withdrawn from it and continued to litigate the case to its conclusion, receiving due process and awaiting a final order on the justness and reasonableness

of the Company's proposed rate increase. If the Commission now refuses to continue its ratemaking function, the effect will be precisely the same as if during the 1999 rate case the Commission had both rejected the stipulation and then refused to allow the parties to continue to litigate their cases. This would not have satisfied due process requirements if it had happened during the course of the case prior to appeal, and it would not satisfy due process requirements now, when no further process on the question of establishing prudence has been added since the CO_2 Stipulation was accepted by the Commission.[26]

Add to this the fact that the CO_2 processing costs are significant enough that rates set without any recovery of those costs would be confiscatory,[27] and a failure by the Commission to resume its ratemaking function to allow Questar Gas to demonstrate the prudence of its CO_2 processing costs would violate the Company's constitutional property rights. *See, e.g., Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944) (fair return allows a company to maintain its financial integrity, attract capital, and compensate its investors for the risks assumed); *Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (a taking occurs when "an unreasonable balance has been struck in the regulation process so as unreasonably to favor ratepayer interests at the substantial expense of investor interests") (J. Starr concurring).

B. THE COMMITTEE'S PETITION IN DOCKET NO. 03-057-05 MUST BE DENIED.

In its Petition, the Committee asserts that the court's *Decision* makes recovery of CO_2 processing costs per se unlawful and that, therefore, the Commission should refund the total amounts collected to date in all of the various dockets discussed in Section III above and reduce

[26] *See, e.g., State ex rel. Midwest Gas Users' Ass'n v. Public Service Comm'n,* 996 S.W.2d 608, 610-11 (Mo. App. 1999) (noting lower court holding of constitutional due process violation by commission in rejecting a stipulation and thereafter refusing to provide a hearing, cross-examination or briefing on issues addressed therein; commission conceding error).

[27] In the 1999 rate case, denial of recovery of any CO_2 processing costs would have reduced the Company's test-year net income by about 20 percent.

rates going forward in the Company's current pass-through application. The Commission should deny the Petition because the request is premature.

As discussed above, the Commission should now undertake further proceedings to decide the prudence of the CO_2 processing costs and determine an appropriate level of recovery. At the conclusion of those proceedings the Commission could decide that the same, or a greater, level of cost recovery as that provided under the CO_2 Stipulation is appropriate. In such a case, as the Utah Supreme Court has made clear, refunds would be inappropriate. Therefore, a decision on refunds at this time would be premature. For the same reason, the Commission should not adjust prospective rates at this time. Rather, it should first complete its ratemaking function and determine what rate level would be just and reasonable. CO_2 processing costs are currently included in Account 191 on an interim basis so customers will not be harmed by the status quo.

Because it is clear that a decision on refunds at this time would be premature, Questar will not in this brief provide a lengthy argument on the ultimate unavailability of refunds. Suffice it to say that even if the Commission ultimately determines that it is without jurisdiction to re-open the case to determine the Company's prudence, the Commission is still foreclosed from ordering refunds of rates collected in all dockets with the possible exception of Docket No. 03-057-05. With the possible exception of costs collected in that docket, the CO_2 processing costs that have been collected are final and have either not been appealed or were appealed without any request for a stay or posting of a bond. In either case refunds are not legally available. *See, e.g.*, Utah Code Ann. § 54-7-17; *Committee of Consumer Services v. Public Service Comm'n of Utah*, 638 P.2d 533 (Utah 1981). If the Commission erroneously determines not to resume its ratemaking function and reach a determination on the prudence of the CO_2 processing costs, therefore, there are still legal impediments to refunds.

1. Any Refund Would Be Premature Before Additional Commission Proceedings To Determine an Appropriate Level of Recovery.

As a result of the *Decision*, the Commission must now determine the prudence of the costs incurred under the CO_2 Processing Agreement and it retains the responsibility to determine the appropriate level of CO_2 processing cost recovery. If, in resuming the rate case where it left off, Questar Gas is able to demonstrate the prudence of these costs at a level at least equal to the level in the CO_2 Stipulation previously approved by the Commission there will be no cause for refunds (even if refunds were theoretically available).

This conclusion is supported by the Utah Supreme Court's decision in the *Wage Case*, 614 P.2d 1242, where the court denied the Division's request for a refund in circumstances procedurally identical (with the exception of a remand being expressly ordered in that instance) to those in the present case—the court refusing to order a refund, but instead stepping aside to allow the Commission to fulfill its ratemaking function. The decision in *Committee of Consumer Services* likewise supports a finding that refunds are inappropriate at this juncture.

In *Committee of Consumer Services*, the court addressed the issue of refunds after reversal, in the absence of a stay. The court determined that it need not decide whether refunds would be appropriate in the event that they were collected under an order later found to be unlawful, because prior to the second appeal the Commission had established the same level of rates on remand that had been established in the original (reversed) order. *Id*. at 535-36. The court found that it would be "anomalous" to require a refund of rates twice established by the Commission as lawful and which had "never been held to be unsupportable on the merits either by the Commission or by this Court." *Id*.; *accord Thermoid Western Co. v. Union Pacific Railroad Co.*, 365 P.2d 65, 69-70 (Utah 1961). Likewise, in the present case the court did not find that the costs incurred under the CO_2 Processing Agreement were imprudent. Rather it held that the Commission erred in failing to decide whether they were prudent.

In this case, therefore, since it is entirely possible that the same or a greater level of recovery as that provided in the CO_2 Stipulation may be found to be just and reasonable, ordering refunds at this time would be premature and contrary to binding precedent. The Commission should fulfill its obligation to go forward with additional proceedings and make the necessary findings on prudence before it considers the refund issue.

2. Rates Collected Pursuant to the Order in Docket No. 03-057-05 May Be Subject to Refund.

The only category of CO_2 costs for which a refund might be available are those included in the Questar Gas Account 191 filing in Docket No. 03-057-05. Questar Gas made the filing on May 30, 2003, requesting an annualized gas cost increase to become effective on July 1, 2003. Pursuant to the order in Docket No. 02-057-02, this filing included the annual computation of CO_2 processing costs.

On June 20, 2003, the Commission issued its interim order making the Company's proposed increase effective on an interim basis as of July 1, 2003. There has been no order making these rates final to date; therefore, Questar Gas concedes that these in-period costs are currently subject to adjustment for any of the three specifically delineated adjustments provided for in the tariff, specifically: if they are not in compliance with Account 191 standards and procedures; if they are not in compliance with prior Commission orders; or if they are imprudently incurred. However, the Commission must make such a finding before an adjustment is appropriate. Questar Gas believes that the Commission will ultimately find that none of these exceptions applies in this proceeding and, thus, no adjustment should be made at this time.

3. The Commission Does Not Need to Reduce Rates Immediately Pending a Final Decision.

Regardless of whether any given category of previously collected rates is subject to refund, there is no sound reason for the Commission to issue an order reducing rates immediately pending final decision on the Company's appropriate level of CO_2 processing cost recovery. The current cost recovery mechanism for the CO_2 processing costs is the Company's Account 191 application in Docket No. 03-057-05, which was made effective on an interim basis on July 1, 2003. Questar Gas concedes that interim rates are subject to further adjustment and refund for any of the three reasons noted above without raising retroactive ratemaking concerns. Leaving rates in place on an interim basis will promote rate stability and avoid rate shock.

The Commission has full authority to make all lawful adjustments as a result of the on-going review and investigation when it issues its final order. Ratepayers will not be harmed by permitting the CO_2 processing costs to be recovered on an interim basis pending the Commission's resolution of the issue because whatever level of recovery is ultimately permitted can be made to take effect in Docket No. 03-057-05 when the Commission issues its final order.

It is not uncommon for the Commission to undertake a review of the costs that are part of an Account 191 application prior to a final order being issued. Such costs are subject to adjustment and later true-up. Because further proceedings are necessary in order to establish the prudence of the costs, leaving the rates that are currently being collected in place will provide rate stability by avoiding potentially unnecessary variability in rates associated with removing rates that may later by added back into the account.

V. CONCLUSION

Faced with a serious threat to customer safety, Questar Gas acted prudently by entering into the CO_2 Processing Agreement to assure that customers would receive gas that could safely be burned during a reasonable transition period to adjust their appliances to conform with the

heat content of gas that will eventually be delivered to them absent CO_2 processing. The Committee has sought to deny Questar Gas recovery of the costs incurred under that agreement because it believes the FERC **might** have required Questar Pipeline to refuse to transport the coal-seam gas or required others to bear the costs of processing the gas had actions been taken at the FERC. These actions were not pursued because they did not provide a timely and reliable solution to the safety problem and because they would likely have been futile.

Despite the Committee's position, it is generally accepted that it would be imprudent now for Questar Gas to stop managing the gas within a safe range. The suggestion that Questar Gas is now barred from recovery of costs that no one seriously disputes it must incur for the benefit of its customers because the Utah Supreme Court failed to state that it was remanding the case for further proceedings is both unlawful and unjust. More importantly, as the body with exclusive jurisdiction to perform the legislative function of setting rates, it is the Commission's duty to correct the error in its *Order* identified by the court and to determine whether and to what extent costs incurred by Questar Gas under the CO_2 Processing Agreement are prudently incurred. This is not an all or nothing proposition, nor would sound regulatory practice or policy suggest that it should be. In exercising its exclusive jurisdiction, the Commission is free to consider additional evidence or to decide the case based on the record already developed, after affording all parties due process of law. Refusal by the Commission to allow completion of the case would be inequitable, would undermine the policy in favor of settlements and would deprive Questar Gas and other parties of due process of law.

Questar Gas respectfully submits that the Commission should set a schedule for further proceedings in these dockets and further respectfully submits that the Committee's Petition for immediate rate changes and refunds should be denied. Not only is the Petition premature, Questar Gas believes that the majority of the rates collected to date are not subject to refund. On

the other hand, rates currently being collected are interim. Therefore, customers will suffer no prejudice as a result of maintaining the status quo while the Commission makes its decision on prudence.

DATED: September 25, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF QUESTAR GAS ON JURISDICTIONAL AND REFUND ISSUES** was served by electronic mail on the following on September 25, 2003:

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