Groupwise #36339 Final draft

- 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
		DOCKET NO. 03-057-05
		ORDER

ISSUED: December 17, 2003

By the Commission:

In an August 26, 2003, Scheduling Conference, we directed the parties in these matters to address jurisdictional and procedural matters arising from the Utah Supreme Court's decision issued in *Committee of Consumer Services vs. Utah Public Service Commission,* 2003 UT 29, 75 P.3d 481 (Utah 2003) (hereafter *CO2 Case*). In that decision, the Court reversed a portion of our final Report and Order issued August 11, 2000, in Docket No. 99-057-20, (hereafter August 2000 R&O).

BACKGROUND

In our August 2000 R&O, we accepted a stipulation (hereafter CO2 Stipulation), between Questar Gas Company (hereafter Questar) and the Division of Public Utilities (hereafter the Division), presented in the general rate proceedings of that docket, by which Questar could recover up to $5 million per year for costs associated with CO2 processing services performed by a Questar affiliate. We approved the CO2 Stipulation and incorporated its results in

setting rates in the August 2000 R&O, without directly considering the prudence of Questar's actions which culminated in executing the CO2 processing agreement between the two companies. We believed that the CO2 Stipulation represented a "fair and reasonable settlement of the cost recovery issue" of actions undertaken to address safety issues resulting from high CO2 levels in natural gas delivered to Questar. The Committee of Consumer Services (hereafter Committee) opposed the CO2 Stipulation and the resulting impact it had on rates set by the August 2000 R&O. The Committee appealed our August 2000 R&O to the Utah Supreme Court.

After summarizing the parties' positions in *CO2 Case, supra*, the Court characterized the issue on appeal as "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 to construct and operate the CO2 plant under terms that caused Questar Gas to incur costs it now seeks to pass on to ratepayers." *Id,* P.3d at 485. The court rejected the Commission's safety rationale basis to support the rates ordered in the August 2000 R&O. The Court held that a safety rationale "is neither an adequate nor a fair and rational basis for departing from [a Commission] prudence review standard" and holding the utility to its burden of proof that resulting rates are just and reasonable *Id.* The Court concluded its opinion with the following words, "[w]e reverse the Commission's order and reject the rate increase proposed by the CO2 Stipulation." *Id,* P.3d at 487.

Our August 23, 2003, scheduling order asked the parties to address what further proceedings the Commission can and should conduct, in light of the Court's opinion that our prior safety rationale may not be relied upon as a substitute for holding a utility to its burden to prove prudent actions have incurred costs which may be recovered in just and reasonable rates. The Committee's position can be summarized as follows:

1. The Commission has already found that the record in this case was insufficient to determine whether Questar's decisions relating to the gas processing were prudent.

2. The Supreme Court did not remand the case to the Commission with instructions, thereby implying the Commission could do nothing further.

3. To conduct further proceedings in this case would give Questar a second opportunity to try to prove the

prudence of its decisions.

4. All that remains for the Commission to do is determine the amount of the refund of gas processing costs due ratepayers and how that amount should be refunded.

Questar's position can be summarized as follows:

1. Further proceedings in this case do not constitute a 'second bite at the apple,' but rather permit Questar to complete the presentation of its case.

2. The Commission's acceptance of the CO2 Stipulation interrupted the normal progress of Questar's general rate case and therefore the Commission did not complete the process of adjudicating the issue of prudence.

3. The Supreme Court's ruling, that a safety rationale cannot be used to dispense with a Commission resolution of the prudence issues raised, places the parties and the case back where they were immediately before the Commission approved the CO2 Stipulation.

4. Questar should be permitted to marshal the evidence from the records in Dockets 98-057-12 and 99-057-20 on the prudence issues and argue its prudence case, other parties may do the same and the Commission should render its decision on the matter.

5. The Commission's authority to conduct further proceedings is derived from legislative delegation to set just and reasonable utility rates, not delegated by the Supreme Court's reversal.

US Magnesium LLC makes an argument substantially identical to that of the Committee. The Division and UAE Intervention Group (hereafter UAE) make arguments similar to that of Questar. They argue for further proceedings, to the extent the Commission has not already ruled on the prudence issues.

ANALYSIS

Certain language in our August 2000 R&O is ambiguous at best and has led to the differing opinions of the parties on this matter. That language is, "The record is insufficient to permit us to determine whether the Company's analysis of options prior to early 1998 was sufficiently objective and thorough, that is, to reach a conclusion whether

options were ruled in or out as a result of the influence of affiliate interests. Nor can a sufficient record be developed." August 2000 R&O, page 34. This appears as a finding of fact or conclusion of law. It was not. Rather, it was an ambiguous use of dicta. The very next paragraph, after discussing Questar's burden of proof on prudence, states, "Parties differ as to whether it did so successfully. But whether or not [Questar] met this burden, we can and do conclude that its decision to procure gas processing has yielded the required result, that is, it has effectively protected the safety of its customers." *Id,* at page 35. The phrase 'whether or not Questar met this burden' indicated the Commission did not make that determination and found it unnecessary to do so in view of the Commission's decision to decide the matter on public safety considerations. Further, there is no discussion of an analysis on prudence as required to support the supposed determination. *US West Communications vs. Public Service Commission,* 882 P.2d 141, 144-45 (Utah 1994) and *Milne Truck Lines, Inc. vs. Public Service Commission,* 720 P.2d 1373, 1378 (Utah 1986). A determination of the sufficiency of the evidence was not central to the safety rationale adopted by the Commission. The language was dicta. *See, e.g., Callahan v. Salt Lake City,* 125 P.863 (Utah 1912), *Beaver County vs. Home Indemnity Company,* 52 P.2d 435, 444-45 (Utah 1935). Finally, the ambiguous dicta referred only to the objectivity of Questar's analysis prior to early 1998 and not to evidence relating to other actions or prudence criterion by which one might judge Questar's actions relating to the CO2 levels in the natural gas it delivered to customers. The Commission has not yet put Questar to its burden of proof that its decisions were prudent and rates including some, if any, recovery of processing costs are just and reasonable.

The Commission cannot abdicate its responsibility to analyze the evidence regarding the prudence of Questar's decisions and determine whether any rate increase which includes some, if any, recovery of gas processing costs is just and reasonable. To do otherwise, as requested by the Committee, would be to impermissibly let the Court usurp the Commission's legislative authority to set just and reasonable rates. *Mountain States Telephone & Telegraph Company vs. Public Service Commission,* 155 P.2d 184, 187-88 (Utah 1945)*, Utah Department of Business Regulation vs. Public Service Commission,* 614 P.2d 1242, 1250 (Utah 1980) and *Utah Department of Administrative Services vs. Public Service Commission,* 658 P.2d 601, 615 (Utah 1983)*; see also Parowan Pumpers Association vs. Public Service*

Commission, 586 P.2d 407 (Utah 1978) and *Committee of Consumer Services vs. Public Service Commission*, 638 P.2d 533, 535-36 (Utah 1981) (no refund of rates collected under the overturned Commission decision in *the Parowan Pumpers* case, "rates would have been unlawful only if the Commission had, as it might have done, finally rejected the rates.").

The Supreme Court's reversal of a portion of the August 2000 R&O places the case in the same position it was before the Commission's approval of the CO2 Stipulation. *See, e.g., Phebus vs. Dunford*, 198 P.2d 973, 974 (Utah 1948) ("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 decisions, and vacates all proceedings and orders dependent upon the decision which was reversed."). At that point in time, Questar and other parties had put on their cases in chief and all that remained was final cross-examination of witnesses (Questar, at oral argument has said that this is no longer needed by the company), a marshaling of the evidence and final arguments.

ORDER

Wherefore, we conclude that the parties should now have the opportunity to marshal the evidence from the existing records in Dockets 98-057-12 and 99-057-20 relating to the prudence of Questar's actions and decisions. We will determine whether Questar has met its burden to show that its actions were prudent and that inclusion of any costs relating to remedial actions affecting CO2 levels in the natural gas delivered to customer results in just and reasonable rates. We have set a Scheduling Conference to confer with the parties in order to set the dates on which the parties may make their presentations on these issues.

DATED at Salt Lake City, Utah, this 17th day of December, 2003.

/s/ Constance B. White, Commissioner
/s/ Ted Boyer, Commissioner
/s/ Val Oveson, Commissioner Pro Tem

Attest:

/s/ Julie Orchard
Commission Secretary
GW # 36339