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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

REPLY BRIEF OF QUESTAR GAS

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Questar Gas Company ("Questar Gas" or "Company"), pursuant to the Scheduling Order issued in these dockets on August 26, 2003, submits its reply to the Response Brief of the Utah Committee of Consumer Services ("Committee Response"), the Reply Brief of the Division of Public Utilities ("Division Brief"), the Responsive Brief of the UAE Intervention Group Regarding CO_2 Issues ("UAE Brief"), and the Brief Regarding CO_2 Issues Filed by US Magnesium LLC ("US Mag Brief"), all dated October 23, 2003.[1] As the current reply briefing represents the last round of submissions contemplated by the Scheduling Order, Questar Gas requests that the Commission schedule oral argument on the jurisdictional questions currently before the Commission.

[1] Although it was dated October 23, 2003, Questar Gas received the US Mag Brief on October 31, 2003.

I. INTRODUCTION

In the 1999 general rate case, the Commission allowed recovery in Questar Gas rates of up to $5 million per year in CO_2 processing costs.[2] Consistent with the arguments of the parties to the CO_2 Stipulation, the Commission ordered this recovery without first making an express finding on whether the Company's CO_2 processing costs were prudently incurred. The Utah Supreme Court, in the *Decision*,[3] determined that the Commission erred in allowing such recovery without making a finding that Questar Gas had demonstrated prudence.

The question now before the Commission is whether it has the authority to make the prudence determination it did not previously make in this case.

The Committee of Consumer Services ("Committee") argues that the Commission has no authority to resume ratemaking to make a prudence determination. Thus, the Committee argues that Questar Gas now has no opportunity for rate recovery notwithstanding the prior grant of such recovery and that the rate case should be closed without further substantive consideration of whether any of the Company's CO_2 processing costs were prudently incurred.[4] The Committee argues that even though the Commission thought rate recovery was warranted during the general rate case, it made a binding "conclusive determination" in the *Order* that Questar Gas could not establish prudence and the Commission has no authority to change that determination. The Committee also claims that the language in the court's *Decision* forbids the Commission from resuming its ratemaking function.

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[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 PSC August 11, 2000) ("*Order*").

[3] *Committee of Consumer Services v. Public Service Comm'n of Utah*, 2003 UT 29, 75 P.3d 481 ("*Decision*").

[4] The US Mag Brief generally adopts the Committee's argument without any additional support. The Company's reply to US Magnesium LLC will therefore generally be subsumed within the arguments directed at the Committee.

The Committee is wrong in asserting that the Commission made a conclusive determination foreclosing a finding of prudence. It is also wrong that the *Decision* forbids the Commission from resuming its ratemaking function.

The Commission never made the supposedly "conclusive determination," as both Questar Gas and the Division of Public Utilities ("Division") have demonstrated.[5] The *Order* was reversed, leaving no final decision on rate recovery in place. Therefore, since the Commission did not previously make a determination on prudence, the rate case is not yet over, and it would be improper for the Commission to simply deny recovery of all costs when it has never decided whether Questar Gas has met its burden of demonstrating that some or all of the CO_2 processing costs were prudently incurred. The rate case is now in the posture it was in immediately prior to the issuance of the *Order*, and the Commission can determine again whether to accept the CO_2 Stipulation, if it can be supported by a prudence finding, or to reject the stipulation and reach a different final conclusion on whether or to what extent CO_2 processing costs may be recovered in rates.

Nothing in the *Decision* changes this conclusion. Nothing in the *Decision* bars the Commission from making further findings and concluding the Company's rate case. The Commission has the legislative authority, and responsibility, to conclude these proceedings by deciding whether or to what extent CO_2 processing costs will be allowed in the Company's rates.

Because the Commission did not previously make a prudence determination and because the court held that the Commission must make such a determination before CO_2 processing costs may be included in rates, the Commission should make a determination on the prudence of the CO_2 processing costs. If on review of the record, after the parties have marshaled the existing evidence on prudence, the Commission determines not to accept again the CO_2 Stipulation, it

[5] *See, e.g.*, Response Brief of Questar Gas ("Company Response") at 3-9; Division Brief at 7-10.

should allow the parties the opportunity to address the issue of the appropriate level of recovery. This should provide any party that truncated its case based on the CO_2 Stipulation the opportunity to complete its case and may include additional evidence in the Commission's discretion. In any event, the Commission should now conclude the rate case in a manner consistent with the holding of the *Decision*.

II. ARGUMENT

A. THE *DECISION* DOES NOT PRECLUDE THE COMMISSION FROM PROCEEDING TO DECIDE PRUDENCE. THE COMMISSION HAS THE AUTHORITY TO CONDUCT FURTHER PROCEEDINGS TO CORRECT THE ERROR IN ITS *ORDER*.

Neither the Division nor the UAE Intervention Group ("UAE") argues that the *Decision* prevents the Commission from going forward. They instead properly focus on whether the Commission actually made the so-called "conclusive determination" that Questar Gas did not and could not show prudence.[6] If the Commission did not make that determination, the Division and UAE agree that the Commission may now make a finding on prudence.[7] The Committee, on the other hand, aims all of its substantive discussion at the effect of the *Decision* and ignores any analysis of the *Order*. But while the Committee avoids any such analysis, it continues to assert that the Commission is precluded both by its own past "conclusive determination" and by the court's *Decision* from re-opening these proceedings for a substantive prudence finding.[8] Questar Gas provides this final reply to clarify the effect of the past determinations by both the Commission and the court. Both the *Order* and the *Decision* support the conclusion that further substantive proceedings by the Commission are appropriate.

[6] *See, e.g.*, Division Brief at 3; UAE Brief at 7-8.

[7] Division Brief at 10; UAE Brief at 9.

[8] *See, e.g.*, Committee Response at 12.

1. The So-Called "Conclusive Determination" Was Never Made By The Commission.

The Company Response addressed the language of the *Order* to show that there was no "conclusive determination" of Questar Gas failing to meet its burden of proof to demonstrate prudence.[9] The Division Brief likewise addresses the language of the *Order* and provides a helpful analysis of the distinction between holding and dicta, concluding:

> Based upon an analysis of the definitions and Utah cases cited above, it seems that the ["nor can a sufficient record be developed"] statement quoted from the Order should be classified as dicta. It appears that the statement is not the pivotal point upon which the Commission's decision is based. Indeed, [the] Commission's Order states:
>
> > The most troubling question is whether the contract between QGC and its unregulated affiliate, QTS, was prudently entered. The Company applied for a decision on it in Docket No. 98-057-12, but not in the present proceeding, where the Committee keeps it alive by asserting that the decision to enter the contract is imprudent and recovery from customers of gas processing costs incurred pursuant to it is unreasonable. … But whether or not QGC met this burden, we can and do conclude that its decision to procure gas processing has yielded the desired result, that is, it has effectively protected the safety of its customers.
>
> **Therefore, the Commission did not address the prudence of that contract, but instead addressed the positive results from treating the gas. Accordingly, it seems that the statement quoted above does not prevent the Commission from now attempting to make a decision on prudence**.[10]

The Division correctly identifies a critical point. The Commission's statement in the *Order* that "nor can a sufficient record be developed" did not address the prudence of Questar's CO_2 processing costs and was not necessary to the conclusion of the *Order*. Indeed, the "nor

[9] Company Response at 5-9.

[10] Division Brief at 10 (citation omitted) (emphasis added).

can" statement—if intended to be a finding on prudence[11]—would have been directly contrary to the actual "holding" of the *Order* that led to rate recovery. A statement that is not necessary to the Commission's conclusion, but is instead contrary to that conclusion, cannot be a part of the holding.[12] Thus, the Division convincingly clarifies the meaning of the *Order* and establishes that the "nor can" statement was dicta.

Further, as the Company Response demonstrated, the Committee's view that the *Order* included a conclusive determination that the Company did not and could not show prudence is contrary to Commission precedent, inconsistent with the Commission's course of action in these proceedings—both at the agency level and before the court, and even inconsistent with the view previously taken by counsel for the Committee during the general rate case.[13]

Thus, nothing in the *Order* prevents the Commission from resuming its ratemaking function and making a finding on prudence. The Committee has provided no contrary reading of the *Order* that would support its position that a "conclusive determination" on prudence has already been made.[14] Upon meaningful analysis, no such reading is possible. The Committee's

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[11] The statement that "nor can a sufficient record be developed" referred to the record of "the Company's analysis of options prior to early 1998" and was never equated by the Commission to a conclusive finding on prudence. *See Order* at 34.

[12] *See infra* note 23 and accompanying text.

[13] *See* Company Response at 5-9.

[14] Questar Gas notes that even if a prudence determination had actually been made that conflicted with the rate recovery ordered by the Commission, the general principles of law the Company has previously cited allow the Commission to make findings that differ from those it made earlier in the same case. This principle is further demonstrated by *Parowan Pumpers Ass'n v. Public Service Comm'n*, 586 P.2d 407 (Utah 1978) ("*Parowan Pumpers I*"), and *Committee of Consumer Services v. Public Service Comm'n*, 638 P.2d 533 (Utah 1981) ("*Parowan Pumpers II*"). In *Parowan Pumpers I*, the court found that the "Commission's order [of a rate increase] is not supported by its findings, and in fact is hostile to them. The findings and order are irreconcilable and that irreconcilability is fatal." 586 P.2d at 409. The court ordered a remand to remove the inconsistency between the order and findings, but never stated or implied that it was giving the Commission permission to change its findings rather than reverse the outcome of the order. On remand, "[a]fter additional hearings in which substantial new evidence was adduced, the Commission entered a Supplemental Report and Order which made new findings of fact supporting the same rate increase as initially allowed." *Parowan Pumpers II*, 638 P.2d at 534. The second order was neither challenged on appeal nor condemned by the court when the case was appealed a

repeated assertion that the court took the Commission's "conclusive determination" and upheld and enforced it by making a binding determination that Questar Gas could receive no further opportunity to demonstrate prudence is therefore premised on a factual error. There was no conclusive determination.[15]

2. The *Decision* Does Not Preclude The Commission From Resuming Its Ratemaking Function.

The Committee chides Questar Gas for making "no attempt whatever to support its radical re-interpretation of the Court's decision by demonstrating where, in the decision itself, the Court says what the utility wants it to say."[16] In fact, Questar Gas discussed in some detail the holding of the *Decision*—that the Commission erred by allowing rate recovery when there had been no finding of prudence.[17] Given the clarity of the holding, Questar Gas saw no need to parse the dicta.[18] Nevertheless, to be clear, Questar Gas will provide an analysis of the *Decision* to support its position that the holding of the *Decision* does not prevent further Commission proceedings in this case.

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second time on a different issue. *Id*. In light of such precedent, it is certainly understandable that the Committee has provided no authority for its assertion that the Commission is bound by its pre-appeal findings when the same case continues post-appeal.

[15] It is because the Commission made no determination on prudence that the Committee's desired interpretation of the *Decision*'s holding—the court binding the Commission to a prudence determination that the Commission never made—would be a usurpation of the Commission's legislative fact-finding authority. The Commission should not infer such a usurpation unless the court's holding mandates such a result. It does not. The court's actual holding was a reversal of the *Order* for an error of law or abuse of discretion—the court determining that CO_2 processing costs could not be recovered in rates without a finding that they were prudently incurred. There was no instruction with the reversal. Upon such a reversal without instruction, the case resumes the posture it was in prior to the erroneous order being issued. *See, e.g., Phebus v. Dunford,* 198 P.2d 973, 974 (Utah 1948). Even if the court assumed that the Commission had concluded its proceedings, and that therefore there was no need to include a remand order, that is a very different thing from a court holding precluding the Commission from conducting further proceedings.

[16] Committee Response at 2.

[17] *See, e.g.,* Brief of Questar Gas on Jurisdictional and Refund Issues ("Opening Brief") at 12-13.

[18] The Committee, on the other hand, while making continued references to the finality, clarity, etc., in the court's language, has never made any attempt to actually identify what in the *Decision* is holding and what is dicta.

a. The supposed "conclusive determination" was not part of the holding of the *Decision*.

The "Analysis" portion of the *Decision* begins by stating the argument of the Committee. That argument, in the court's understanding, was "that the Commission abused its discretion **by failing to determine whether Questar Gas's initial decision** to enter into a contract with its affiliate Questar Pipeline [sic] to construct and operate the CO_2 plant **was prudent**."[19] The court does not identify the Committee's principal argument as being whether, having made a "conclusive determination" that Questar Gas failed to demonstrate prudence, the Commission erred in providing rate recovery. Rather, the court premises the entire opinion on the Committee's argument that the Commission erred in failing to make a prudence determination at all.

The court then goes on in paragraph 12 of the *Decision* to clarify that the Commission's failure[20] to make a prudence determination (*i.e.*, require Questar Gas to demonstrate prudence) is the basis for its holding. The court identifies "the real issue"—not one of several alternative issues, but **the** real issue—as being "whether the Commission may rely on a 'safety exception' that relieves Questar Gas of its burden to demonstrate … prudence … ."[21] It is fair to assume that if the court identifies only **one** question for decision as **the** real issue in the case, the answer to that question will provide the holding of the court. What is the question? "Whether the

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[19] *Decision* at ¶ 10 (emphasis added).

[20] The US Mag Brief infers that because Questar Gas cites the court's holding of Commission error, the Company is somehow criticizing the Commission's actions in the rate case. *See* US Mag Brief at 4. ("Questar Gas claims that the Commission's error was its failure to do its job ... ."). This is untrue. Questar Gas was among the several parties to the rate case who argued that the Commission did not need to make a prudence determination on the CO_2 processing costs as long as it found the resulting rates to be just and reasonable. Nevertheless, the court found the inclusion of CO_2 processing costs in rates without a prudence finding to be erroneous. Despite US Mag's apparent confusion, the court was reviewing the Commission's *Order*, not the actions of Questar Gas, for error (*see contra id.*), and in calling the Commission's actions erroneous Questar Gas is merely accepting the reality of a decision by the state supreme court.

[21] *Decision* at ¶ 12.

Commission may rely on a 'safety exception' that relieves Questar Gas of its burden to demonstrate ... prudence?" What is the answer? "We hold that the Commission's safety rationale is neither an adequate nor a fair and rational basis for departing from its prudence review standard."[22]

The necessary conclusion from this holding is that it was erroneous for the Commission to allow rate recovery in the absence of a finding on prudence. That is the only necessary result. The court's language about the Commission's supposed "conclusive determination" does not form a necessary part of the court's conclusion of Commission error and is therefore not part of the holding. Rather, such unnecessary language lies squarely within the definition of dicta.[23] That such language is unnecessary to the decision, and therefore dicta, can be demonstrated by the fact that even if the language about the "conclusive determination" were removed, the court's holding would not change.[24]

The Committee argues that there were two "alternative" holdings.[25] The Committee is wrong. There are not two "alternative" answers to the court's question, nor is there any indication from the court that it was making alternative holdings. Indeed, the only statement the court makes alluding to alternatives addresses an alternative standard of review under which the

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[22] *Decision* at ¶ 13. This, incidentally, is the only place in the *Decision* where the court identifies what it is doing as making a "holding."

[23] *See, e.g., State v. Daniels*, 2002 UT 2, ¶ 35, 40 P.3d 611, 622 (language "not critical to the holding" was dicta); *Consolidation Coal Co. v. Emery County*, 702 P.2d 121, 125 (Utah 1985) (language was dicta "in that it was not essential to the resolution of the issue in the case"); Black's Law Dictionary 1100 (7th ed. 1999) (defining dictum as a statement "unnecessary to the decision in the case").

[24] Necessary is synonymous with essential or indispensable. *See* Webster's Encyclopedic Unabridged Dictionary (2001) (defining necessary as "being essential, indispensable, or requisite"). Language cannot be essential or indispensable to a court holding if the holding would not change in the absence of that language. Yet, even if the Commission did not (as in fact it did not) determine that prudence could never be shown, the court's holding would stand unchanged. With or without the supposed "conclusive determination" that prudence was not and could not be demonstrated, the court held that the Commission erred by allowing rate recovery without first finding that prudence *was* demonstrated.

[25] *See, e.g.,* Committee Response at 29.

court would still make the same, single holding.[26] Even if there could be alternative holdings, it would be incongruous to conclude, as the Committee apparently does, that one such holding is that the Commission made a "conclusive determination" to which it is bound and may do nothing further in the rate case. That answer does not fit the court's question, and does not fit the court's precedent regarding constitutional separation of powers and the Commission's unique role in ensuring just and reasonable utility rates.

Nothing in the holding precludes further substantive proceedings. The *Decision* was a reversal without instruction. The court said nothing about whether the Commission could or could not resume its ratemaking function. Questar Gas has already demonstrated the Commission's continuing jurisdiction upon such a reversal without instruction.[27]

b. The absence of a remand order is irrelevant. Neither an express or implied remand is required for the Commission to resume its ratemaking function.

The absence of a remand order does nothing to undercut the Commission's authority. The Committee has repeatedly cited Utah Code Ann. § 63-46b-17 as somehow preventing the Commission from going forward in this case. As a result of the Commission's supposed inability to resume its substantive ratemaking function, all that remains in the Committee's view

[26] *See Decision* at ¶ 14 ("We note that we would reach the same result under a correction of error standard [as opposed to an abuse of discretion standard] because the Commission's decision to accept the CO_2 Stipulation's proposed rate increase constitutes an erroneous application of the law. **The Commission erred by failing to hold Questar Gas to its burden of showing that the increase was just and reasonable**.") (emphasis added).

[27] *See, e.g., Rock Island Motor Transit Co. v. Murphy Motor Freight Lines*, 58 N.W.2d 723, 729 (Minn. 1953) (holding that when a court sets aside a commission order, "the matter stands before the commission exactly as if no order had been made and that, with or without an order remanding the case to the commission, the commission may take such further actions as it deems necessary, consistent with the law as it has been determined by the court ... [I]f the commission is permitted to proceed to determine the matter on the basis of the law as it has been determined by the courts on appeal, full relief will be available to every one."). *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 … .").

is to "give legal effect" to the court's final decision by, among other things, ordering a refund.[28] The Committee argues that if the court intended the Commission to resume its ratemaking function it could have ordered a remand under Section 63-46b-17(b)(v). But, aside from the fact that no such remand order is necessary, it could also be argued that if the court intended the *Decision* to be a conclusive and final determination of the case it would have ordered the Commission to cease all ratemaking, remove CO_2 processing costs from rates, and order a refund—all as ordering "agency action required by law" under Section 63-46b-17(b)(i) or ordering "the agency to exercise its discretion as required by law" under Section 63-46b-17(b)(ii). There was no reason to do this, however, when all the court held was that the Commission erred in allowing rate recovery without a finding of prudence.

The Committee suggests that if the language of an appellate decision seems "final" or "clear" enough so that the court does not seem to be contemplating further agency proceedings, there is no authority to conduct further proceedings.[29] This backtracks somewhat from the Committee's initial position—which was contrary to law[30]—that in the absence of an express

[28] *See* Committee Response at 25-28. It could be questioned, if the Commission does require a remand to take further action post-appeal, where in the absence of a remand the Commission gets its authority to reduce rates and order a refund.

[29] *See, e.g.*, Committee Response at 20 (noting the absence of allegedly necessary "words in the Court's opinion indicating an intent to return … authority to the Commission").

[30] *See, 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."); *Phebus v. Dunford*, 198 P.2d at 974; 73A C.J.S. *Public Administrative Law and Procedure* § 258 ("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."); 73B C.J.S. *Public Utilities* § 115 ("When an order is set aside and vacated on appeal, the matter stands before the commission as if no order has been made, and with or without an order remanding the case, the commission may take such further action as is consistent with the law.").

remand the Commission may not resume ratemaking.[31] The Committee's new approach, however, is really a continuation of its erroneous assertion that a remand is necessary. The only difference is that now the Committee suggests that the remand can be implicit in the court's language, rather than express. Even in the new softened version, the view is still erroneous.[32] The Commission's job is not to measure the tenor of the *Decision* in an attempt to divine whether the court assumed that there would be further Commission proceedings. Rather, only when the Commission's continuing jurisdiction would actually conflict with the court's holding can the Commission be denied the ongoing authority to continue its legislative function. In this case, there is nothing in the court's holding to conflict with—and therefore prevent—ongoing Commission proceedings.

c. The Committee's reading of the *Decision* would conflict with prior court precedent.

The Commission should reject the Committee's attempt to turn the supposed "finality" and "clarity" of the *Decision* into binding court direction, when that direction was never given. The court never stated or implied that the Commission may not resume its ratemaking function.

The Commission should remember the instruction of the *Wage Case*,[33] the *Parowan Pumpers* cases[34] and *Wexpro II*.[35] When a utility fails to meet its burden of proof the court reverses the Commission decision that erroneously failed to hold the utility to that burden. The court does not assume the Commission's legislative function, determine that the burden of proof

[31] *See, e.g.*, Initial Brief of the Utah Committee of consumer Services at 9 ("The Commission's authority and jurisdiction regarding this controversy … only returns to the Commission to the extent the Court returns or remits it.").

[32] *See* Opening Brief at 12-21; Company Response at 9-10, 12-13.

[33] *Utah Dept. of Bus. Reg. v. Public Service Comm'n*, 614 P.2d 1242 (Utah 1980).

[34] *Parowan Pumpers I*, 586 P.2d at 407; *Parowan Pumpers II*, 638 P.2d at 533.

[35] *Utah Dept. of Admin. Services v. Public Service Comm'n*, 658 P.2d 601 (Utah 1983).

can never be met and declare the case over.[36] To do so would violate constitutional separation of powers.[37] Likewise, just because the Commission takes steps post-appeal that may go beyond what the court assumed would be taken or makes new findings post-appeal, the Commission has not exceeded its authority.[38] What the Commission cannot do is disregard the rule of law laid down in the holding of the court. The Commission would not be violating this prohibition by making a prudence finding in the present case. Given that the Commission did not make the so-called "conclusive determination," it should not infer a holding in the *Decision* that binds the Commission to that nonexistent determination, in violation of constitutional separation of powers.

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[36] *Wage Case*, 614 P.2d at 1250. The Committee has never made any attempt to distinguish the *Wage Case* other than noting that in that case a remand was ordered. That is not, however, a meaningful distinction, and the Committee's attempt to seek a summary dismissal and a refund runs directly against the precedent of the *Wage Case*. Even if in the present case the court thought the Commission was already through with its ratemaking function, under the *Wage Case* the court would not **order** the Commission to cease that function. Cases such as *Utah Dept. of Business Regulation v. Public Service Comm'n* ("*EBA Case*"), 720 P.2d 420 (Utah 1986), cited in the Committee Response, are clearly distinguishable. In such cases, the court is not simply determining that the agency made an error of law or abused its discretion in reaching a determination, or that there was no substantial evidence to support an order. Instead, the implication of the error is that the core objective sought to be achieved by the agency is unlawful (in the example of the *EBA Case*, the Commission's goal being precluded by the rule against retroactive ratemaking). Thus, there is nothing left for the agency to do other than give up its original objective. These cases are inapposite to the situation at hand. The *Decision* did not hold that rate recovery of CO_2 processing costs would be unlawful under any circumstance. It merely held that it was erroneous to grant recovery without first making a finding on prudence.

[37] *See, e.g.*, *Mountain States Tel. & Tel. Co. v. Public Service Comm'n*, 155 P.2d 184, 187-88 (Utah 1945).

[38] *Wexpro II*, 658 P.2d at 615 ("[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. The mandate we issue in a particular case does not displace that statutory division of responsibility. **The Commission is not an automaton, free only to act as programmed by the mandate of the reviewing court**.") (*citing Mountain States*, 155 P.2d at 187-88) (emphasis added); *Parowan Pumpers II*, 638 P.2d at 534.

3. The Authorities Cited In The Committee Response Do Nothing To Undercut The Commission's Authority To Resume Its Ratemaking Function.

The Committee Response cites a number of cases for the non-controversial proposition that "judicial *decision*s are final and binding"[39] on administrative agencies. It cites Corpus Juris Secundum for the proposition that "the power of the administrative body to modify or change its decision is terminated as to questions *decided* on the appeal."[40] It attempts to distinguish *Phebus v. Dunford* and other cases cited by Questar Gas, because—as the *Phebus* court stated—"[t]he only restriction imposed upon [the lower court] in accomplishing a final determination of the case lies in the issues *decided* upon the appeal to this Supreme Court. Those issues may not be acted upon or decided contrary to the way they were *decided* by this court."[41]

There is a common thread in the Committee's citations. They all refer to lower tribunals being bound by the issues *decided* by appellate courts. This, however, is simply another way of saying that such tribunals are bound by the *holdings* of appellate courts. The Committee's citations and attempts at distinction do nothing, therefore, to preclude the Commission from resuming its ratemaking function unless the *Decision* held that the Commission may not resume that function.[42] It did not.

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[39] Committee Response at 1 (emphasis added).

[40] *See* Committee Response at 2, citing 73A C.J.S. *Public Administrative Law and Procedure* § 258 (emphasis added).

[41] 198 P.2d at 974 (emphasis added).

[42] The Committee Response misstates the Company's argument regarding Utah Code Ann. § 54-7-13 and the Commission's authority to re-open a matter post-appeal. Questar Gas has never said that the Commission can "overturn a final appellate court decision." *See contra* Committee Response at 16. But the Committee errs in suggesting that the relevant precedent only supports the Commission's authority to "reconsider and modify their decisions prior to, or absent, appeal." *Id*. at 17. Contrary to the Committee's argument, *Career Service Review Bd. v. Utah Dept. of Corrections*, 942 P.2d 933, 945 (Utah 1997), involved an agency modification post *judicial* appeal, not merely post inter-agency appeal. Likewise, the federal authorities cited in the Company's Opening Brief for this proposition support modification of agency orders post judicial appeal, as long as the modification is not contrary to a court holding. *See also North Alabama Exp., Inc. v. I.C.C.*, 62 F.3d 361, 364 (11th Cir. 1995) ("[T]he objectors argue the ICC acted outside its authority in reopening the prior proceeding to receive new evidence and to reconsider the validity of the transfer without a formal remand from this Court. The ICC has broad

Likewise, the Committee tries to distinguish *Union Pacific R.R. v. Public Service Comm'n*, 300 P.2d 600, 602-03 (Utah 1956), on the ground that the Commission action in that case after an appellate decision was proper because the action did not overturn or conflict with a "previous Court determination on appeal." The Committee asserts that the Commission action in that case was proper because it was "taken in response to something the Court 'opined' be done in its earlier" review. The Committee's attempt to distinguish this case, in fact, supports the argument that the Commission has continuing authority in this proceeding. Just as in *Union Pacific*, the Commission can lawfully take further action on an issue not decided by the court, but which was only raised in dicta. Whether or not the further Commission action comports with the dicta is irrelevant.

The instruction of *Wexpro II* is similar. In citing that case, the Committee Response initially focuses, correctly, on the mandate (or holding) of *Wexpro I*[43] being the only thing that bound further Commission action.[44] There clearly was no affirmative court permission in *Wexpro I* for the Commission to go beyond the scope of the remand order and accept a broader settlement of the dispute. Notwithstanding this, the Commission went beyond the scope of the remand order and did not err in doing so—the *Wexpro II* court finding that there was no error in the Commission approving a post-appeal settlement that "invariably involve[d] some deviation

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statutory authority to reopen a proceeding at any time 'because of material error, new evidence, or substantially changed circumstances.' In this case, where the Court made clear the legal error, despite the absence of a formal remand, the agency acted within its authority in reopening the prior proceeding for additional evidence.") (citing 49 U.S.C. § 10322(g)(1)). Utah Code Ann. § 54-7-13 contains no restriction similar to that contained in this federal statute regarding material error, new evidence, or changed circumstances. The Utah statute merely provides Commission 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."

[43] *Utah Dept. of Administrative Services v. Public Service Comm'n*, 595 P.2d 871 (Utah 1979) ("Wexpro I")

[44] *See* Committee Response at 20 ("The context of the Court's review in *Wexpro II* was the extent to which the Commission's acceptance of a settlement was within or without the Court's 'mandate' on remand.").

from the course of events contemplated in the [*Wexpro I*] mandate" because "[t]**he Commission is not an automaton, free only to act as programmed by the mandate of the reviewing court."**[45] The Committee Response gets this principle completely backwards, however, when it asks, "what would be the source of the Commission's 'mandate' for further proceedings in this case, where no remand was even made and there is the complete absence of any words in the Court's opinion indicating an intent to return such authority to the Commission?"[46] The whole point of *Wexpro II* is that the Commission does not need such express permission to act. It must only refrain from acting contrary to a holding of the court.

Finally, the Committee's attempts to distinguish clear Utah precedent regarding preserving the Commission's legislative ratemaking function during appellate review are falsely premised on the Committee's reported assertion that the Commission has already concluded its ratemaking function. Thus, at its core, the Committee's assertion that this case law is irrelevant rests on its continuing incorrect assertion that the Commission has already "conclusively determined" the prudence issue.

B. ONCE IT RESUMES ITS RATEMAKING FUNCTION, THE COMMISSION CAN CHOOSE THE EXTENT TO WHICH IT RE-OPENS THE RECORD.

The Committee Response suggests that Questar Gas's objective is "not merely to put the case back where it was prior to the Commission's approval of the CO_2 Stipulation; the objective is to roll back the evidentiary record ... ."[47] The Committee's suggestion is erroneous. The Company's objective is merely to have the Commission make a finding on the prudence of the CO_2 processing costs. Questar Gas agrees with UAE that the *Decision* did not reverse the rate

[45] 658 P.2d at 615.

[46] Committee Response at 20.

[47] Committee Brief at 11.

case stipulations but rather reversed the *Order* approving the CO_2 Stipulation.[48] Thus, the case should resume the posture it was in immediately prior to the issuance of the *Order* accepting CO_2 Stipulation,[49] and the CO_2 Stipulation should be approved again as long as it is supported by a prudence finding.

Therefore, the first thing the Commission should do upon resuming its ratemaking function is determine (based on argument by the parties marshalling the prudence evidence already on the record) whether the Company's level of prudence would support the rate recovery provided in the CO_2 Stipulation. If so, and if the Commission chooses to again accept the CO_2 Stipulation, no further process is necessary. The Commission can simply enter a new order, including a prudence finding. If, however, the Commission rejects the CO_2 Stipulation, consistent with due process the Commission should provide those parties who cut short the presentation of their cases last time, as a result of the CO_2 Stipulation, an opportunity to conclude their full cases. At that point, total recovery, no recovery, or something in-between, would be on the table for the Commission's determination. If the Commission concludes that it needs additional evidence before it makes a prudence determination, nothing prevents the Commission from requesting that evidence.[50]

The Committee's criticism of Questar Gas for allegedly seeking a new rate case is ironic. Questar Gas has consistently relied on the authorities stating that once a lower tribunal's decision is reversed for legal error, the case resumes the position it was in immediately prior to the

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[48] UAE Brief at 3-4.

[49] *See, e.g., Phebus*, 198 P.2d at 974.

[50] *See, e.g., Parowan Pumpers II*, 638 P.2d at 534 (following the first appeal, "[a]fter additional hearings in which substantial new evidence was adduced, the Commission entered a Supplemental Report and Order which made new findings of fact supporting the same rate increase as initially allowed."); 73A C.J.S. *Public Administrative Law and Procedure* § 258 ("[A]n 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.").

issuance of the erroneous decision. The Company has stated no intent to expand its initial opportunity to show prudence beyond this point, although it has noted that the Commission is not bound by its previous findings.

The Committee, on the other hand, has seemingly made the assertion, without support, that the Commission is now bound by the facts as stated in the Committee's brief to the court on appeal.[51] Some of these "facts" were not on the record at the agency level and could not become part of the record merely by virtue of their recitation in the Committee's appellate brief.[52] Nor have they become uncontestable, even if they are on the record, by the Committee's continued recitation of them before the court or in the Committee Response. The Committee's argument regarding the facts is premature. The *Order* contained no findings of fact supporting the Committee's prejudicial view of the actions of Questar Gas and its affiliates, and even if it had contained such findings the Commission would not be bound by them. Thus, the parties are free to argue the facts on the record as they see fit, and the Commission can make such findings as it sees fit based on the weight of the persuasive evidence. If the Commission deems the facts on the record insufficient to determine prudence, it is free to re-open the record to the extent it deems necessary.[53]

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[51] *See* Committee Brief at 7.

[52] *See, e.g., Camp v. Pitts*, 41 U.S. 138, 142 (1973) (ordering the Court of Appeals to vacate and remand a decision by the Comptroller of the Currency rather than conduct a de novo review if the administrative record supplied by the Comptroller did not adequately sustain the Comptroller's findings: "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

[53] *See, e.g., supra* note 50. Indeed, the Commission may well have had additional questions that it deemed unnecessary to address in light of the CO_2 Stipulation. If so, as it has done in numerous prior proceedings, the Commission could ask for specific issues to be re-briefed or hold supplemental proceedings to clarify issues. If the CO_2 Stipulation aborted any such questions by the Commission or if the new Commissioners have questions resulting from their lack of prior involvement in the case, there is no reason that the Commission cannot now hold supplemental proceedings or ask for specific issues to be addressed in testimony or briefing. Questar Gas recognizes its burden to demonstrate prudence and believes the evidence on the record is sufficient to make that demonstration. It only seeks an opportunity to brief the issue and marshal the evidence. This is different, however, from saying that the Commission

C. A DECISION ON RATE CHANGES AND REFUNDS WOULD BE PREMATURE UNTIL THE COMMISSION CONCLUDES ITS RATEMAKING FUNCTION.

The Commission should now decide the prudence of the CO_2 processing costs and determine an appropriate level of recovery. The Commission could decide to once again accept the CO_2 Stipulation, or if not, it could eventually issue an order for the same or a greater level of cost recovery than is provided under the CO_2 Stipulation. In such a case, as the Utah Supreme Court has made clear, refunds would be inappropriate.[54] 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 the 191 Account on an interim basis, so customers will not be harmed by maintaining the status quo.

Although there is disagreement among the parties as to whether refunds are theoretically available, no party (including the Committee) has argued that refunds would be appropriately granted at this time if the Commission resumes its ratemaking function. Since the Commission can and should resume its ratemaking function, further consideration of rate changes or refunds should be deferred until the completion of that function.[55]

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has no authority to expand the treatment of the prudence issue or direct the parties to do more than brief on the existing record.

[54] *See, e.g., Wage Case*, 614 P.2d at 1242; *Parowan Pumpers II*, 638 P.2d at 536 (noting that whether or not refunds were available in the absence of a stay, they were inappropriate because after the first appeal reversing the Commission's order the Commission went on to order the same level of recovery).

[55] Questar Gas notes, however, that the argument forwarded by the Division and Committee—that the stay and bonding provisions of Utah Code Ann. § 54-7-17 are merely optional—is subject to serious dispute. For example, under a very similar statutory scheme, the Idaho Supreme Court found the statutory stay provisions to be mandatory. *See Utah Power & Light Co. v. Idaho Public Utilities Comm'n*, 685 P.2d 276, 284-85 (Idaho 1984) (noting that the legislature had provided for an "intricate statutory scheme" for stay and bond procedure and rejecting utility's argument that stay and bond statute was not the exclusive means of obtaining a surcharge after reversal of a commission order on appeal because if the legislature had intended to give utilities two options—appeal with stay or appeal with surcharge/refund—it would have so stated). The question is undecided in Utah. *See Committee of Consumer Services*, 638 P.2d at 535. This issue, as well as retroactive ratemaking concerns, would need

III. CONCLUSION

The issue now before the Commission is straightforward. As the Division recognizes, the *Order* did not address prudence. As both the Division and UAE recognize, the *Decision* did not prevent the Commission from resuming substantive ratemaking.

Since the court held that CO_2 processing costs may not be included in rates without a determination of prudence and since the Commission has not yet made such a determination, the Commission should resume its ratemaking function, allow the parties to argue prudence based on the current record, and make a prudence determination. It should then determine whether to again accept the CO_2 Stipulation. If the Commission does not accept the stipulation, it should allow the parties to complete the presentation of their cases and should obtain any additional evidence it deems necessary. At the conclusion of the case, if the Commission determines that recovery of an amount different than the amount provided in the CO_2 Stipulation is appropriate, it may then consider whether a refund or surcharge is appropriate. This will properly conclude the Commission's legislative function of determining the prudence of the CO_2 processing costs as part of its mandate to determine the justness and reasonableness of the Company's proposed rates.

RESPECTFULLY SUBMITTED: November 5, 2003.

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to be addressed prior to a refund or surcharge being ordered. Such issues warrant further briefing if the time ever becomes ripe (by virtue of a Commission order providing for rate recovery at an amount different than that currently being captured in rates), but should be put aside until the Commission concludes the rate case.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY BRIEF OF QUESTAR GAS** was served by electronic mail on the following on November 5, 2003:

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