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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

In the Matter of the Application of
QUESTAR GAS COMPANY for a
General Increase in Rates and Charges

In the Matter of the Applications of
QUESTAR GAS COMPANY to Adjust
Rates for Natural Gas Service in Utah

In the Matter of the Application of
QUESTAR GAS COMPANY to Adjust
Rates for Natural Gas Service in Utah

Docket No. 98-057-12
Docket No. 99-057-20
Docket No. 01-057-14
Docket No. 03-057-05

REPLY BRIEF OF THE

UTAH COMMITTEE OF CONSUMER SERVICES

INTRODUCTION

Questar Gas Company ("Questar Gas"or "utility") initiated the present inquiry with its claim that the August 1, 2003, decision of the Utah Supreme Court ("Court") in *Committee of Consumer Services v. Public Service Commission of Utah*, 75 P.3rd 481 (Utah 2003) did not finally dispose of these proceedings. The utility asserts the Court's decision left the Commission with the mandate to still determine the prudence of Questar Gas's CO_2 processing costs.

The utility, its claim and assertions notwithstanding, has never credibly demonstrated that the Court's decision did not finally dispose of these proceedings based upon the Commission's conclusive determination that the utility failed to provide a sufficient record that would permit a regulatory finding that its CO_2 processing costs were prudently incurred and not the result of the influence of affiliate interests. Rather than logically substantiating its assertions by some reasonable analysis of the decision itself, Questar Gas has attempted to support them with specious arguments and a host of inapplicable case authority. The utility's fundamental problem is the Court's decision does not say what the utility wants it to say, and its assertions are, therefore, nothing more than attempts to convince the Commission to unlawfully re-open these proceedings.

These proceedings are over with regard to Questar Gas' prudence case: the Court finally disposed of the matter. It recognized the finality in the Commission's finding that the utility failed to provide sufficient evidence that it had acted prudently: If the record had permitted, the Commission could have carried out its initial obligation to review the prudence of the CO_2 plant contract and its terms, holding Questar Gas to its burden of establishing that its decision to enter into the contract and the costs it agreed to were prudent and not unduly influenced by its affiliate relationship with Questar Pipeline. Since the Commission found that no such record was or could be made available, it should have refused to grant a rate increase that included CO_2 plant costs.

The Court then did what it found the Commission erred in not doing: "We therefore overturn the Commission's decision to accept the CO_2 Stipulation and to grant the rate increase proposed therein."

To the extent the legal authorities cited by the utility have any relevance to the circumstances of this case, they

uniformly emphasize the basic legal principle that is dispositive of the present inquiry: *absent changed circumstances, this Commission is now necessarily bound not only by the Court's decision, but also by its own determination of an insufficient record upon which that decision rests.*

Suggestions by other parties, that the Commission may now revisit its determination *post-appeal* in order to explain it did not mean what it said, are suggesting the very kind of lower court or administrative agency action uniformly prohibited by the law as subversive to binding appellate court decisions.

Such suggestions apparently rest on the notion that the meaning of the Commission's determination of an insufficient record is a surprising new issue, when, in fact, the meaning and legal effect of that determination was a pivotal matter throughout the Committee's appeal. Had that determination meant something other than what the Committee argued on appeal – and what the Court subsequently agreed it meant – the Commission, as appellee, had the primary obligation to clarify its meaning during the appeal process. But the Commission never contested the Committee's interpretation, so how can it – or anyone else for that matter – be heard to say differently now? What the Commission meant by its determination of an insufficient record is now as much a matter of settled law as is the Court's rejection on appeal of the Commission's order allowing CO_2 processing costs into rates.

Questar Gas' unsupported assertions about the meaning and effect of the Court's decision only raise questions. They supply no credible answers. If, as asserted, the Court's decision was based on a Commission failure to make a prudence determination, why did the Court then not remand the matter back to the Commission to do as Questar Gas argues? If the Court did not intend its decision to dispose of these proceedings, why did it explicitly say:

> Since the Commission found that no such record was or could be made available, it should have refused to grant a rate increase that included CO_2 plant costs. We therefore overturn the Commission's decision . . .

And if, as Questar Gas now asserts, the above statement of the Court – as well as virtually everything else in its decision, including the Court's rejection of the Commission's safety rationale as a sufficient basis for rate recovery – is mere "dicta" and "not binding on subsequent Commission action," what value should one then place on unsupported assertions that the utility can't even ground on "dicta"? Questar Gas asserts, once again, in its response

brief:

> [t]he actual holding of the *Decision* did one thing: it reversed the portion of the Commission's *Order* approving the CO_2 Stipulation, because the Commission failed to determine whether the Company's CO_2 processing costs were prudently incurred . □

Where does the Court *ever* conclude it is reversing the Commission's order "because the Commission failed to determine whether the Company's CO_2 processing costs were prudently incurred?" □ What Questar Gas asserts, and continues to re-assert, is simply not part of the Court's analysis and decision.

The Court, very plainly and unmistakably, finally disposed of these proceedings on the basis of a Commission determination that the utility failed to provide a record that would permit a regulatory finding that the CO_2 processing costs were prudently incurred and not the result of the influence of affiliate interests. The Court's decision was a correction of the Commission's legal error in failing to deny rate recovery in consequence of its conclusive determination of an insufficient record. It was not any improper attempt at ratemaking. The Court's decision upholds, and gives legal effect to, the Commission's conclusive ratemaking determination in these proceedings. Just how critically important – and deciding – the Court decided that Commission determination was is demonstrated by the fact it could have based its reversal of the Commission's order on its rejection of the Commission's safety rationale. In that case, the Court would have logically remanded the matter back to the Commission for further ratemaking proceedings to decide the issue of prudence. However, it did not reverse on the grounds of the Commission's erroneous safety rationale. In the Court's mind, the Commission's determination of an insufficient record was the pivotal and dispositive finding in these proceedings; a finding that legally said the utility had its day in court on the issue of prudence and failed to make its case. Case closed.

It is especially incumbent upon the Commission to carefully base its further decisions and actions in these proceedings squarely upon the law. It is not writing now on blank paper – acting as a juridical body addressing issues in the first instance. It is acting in a matter that was finally decided on appeal based upon the Commission's own prior finding that Questar Gas failed to provide the necessary evidence to make its prudence case. There is nothing in the law that gives the Commission any authority or mandate to do what Questar Gas now seeks to have it do: to revise its

determination *post-appeal.*

It is also well to bear in mind that Questar Gas could have timely petitioned the Court to reconsider and clarify its decision. Instead, it has placed the Commission in the awkward position of having to consider the utility's claim that the Court's decision means something other than what it says. Hopefully, the utility's decision not so to petition was not based on any misplaced belief that it could more easily persuade the Commission to its own ends. The Commission was found in legal error previously for disregarding the consequence of its own determination that Questar Gas failed to make its case. It surely does not want to compound that error now.

The Committee respectfully urges the Commission to promptly give effect to the final decision of the Utah Supreme Court on August 1, 2003, that disposed of proceedings which the Commission should have disposed of in its August 11, 2000, Report and Order in Docket No. 99-057-20. The Commission and the Court have conclusively determined that Questar Gas never established its CO_2 costs were prudently incurred and thus lawfully recoverable in rates. As urged in the Committee's August 8, 2003, Petition, pending in Docket No. 03-057-05, the Commission's duty now is to promptly order Questar Gas to cease further collecting CO_2 processing costs in rates and to refund the monies it has previously collected in rates for those costs back to Utah ratepayers.

Dated This 5th day of November, 2003.

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REED T. WARNICK
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CERTIFICATE OF SERVICE

I certify that I mailed or hand-delivered the foregoing **REPLY BRIEF OF THE UTAH COMMITTEE OF CONSUMER SERVICES** in Docket Nos. 99-057-12; 99-057-20; 03-057-14 and 03-057-05 this _____ day of November, 2003.

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