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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 DIVISION OF PUBLIC UTILITIES

The Division of Public Utilities (DPU or Division) files its response to the briefs filed by Questar Gas Company

(Questar or the Company) and the Committee of Consumer Services (CCS) in these dockets.

I. INTRODUCTION

Currently the Public Service Commission of Utah (Commission or PSC) has before it the issue of whether it may determine, or should determine, if certain costs associated with removing CO_2 from the gas stream may be, or should be, recovered in rates. This issue arises from a long and entangled line of cases before the Commission and the Utah Supreme Court.

Questar's general rate case, Docket No. 99-057-20, was a continuation of the dispute that began in Docket No. 98-057-12. In that latter general rate case, the Commission was asked to determine whether Questar's decision to build the CO_2 plant, with ratepayers bearing all costs, was prudent.

After investigation and analysis, the Division of Public Utilities found that Questar "may not have been entirely prudent" in its decision to build the CO_2 plant. Accordingly, the Division recommended that the Company be allowed to recover in rates 50% of the CO_2 removal costs. With this recommendation on the record, the DPU entered into a Stipulation with Questar, opposed by the CCS, where a defined amount of CO_2 costs, about 68%, would be allowed in rates for a period of five years. Despite the CCS' opposition, the DPU believed that the Stipulation was reasonable and in the public interest, and recommended that the Commission approve the Stipulation. The Commission approved the Stipulation, and the CCS appealed the decision to the Utah Supreme Court.

Now we are close to the end of the five year recovery period agreed upon in the approved Stipulation, and are faced with a Utah Supreme Court decision that states that the reasons given by the PSC for approving the Stipulation and the awarded rate increase were incorrect. In its decision, the Utah Supreme Court "reverse[d] the Commission's order and reject[ed] the rate increase proposed by the CO_2 Stipulation." What exactly the Utah Supreme Court's decision means with respect to further action by the Commission is the essence of the current round of briefing.

The Company essentially argues that the Utah Supreme Court rejected the Stipulation and that now the Commission should decide the issue of prudence, which the Commission did not decide in the rate case. The CCS, on the other hand, argues that the Commission decided the case on the merits by finding that the Company had failed to

meet its burden of proof to show that its actions were reasonable. The CCS argues that the Utah Supreme Court recognized that the Commission had determined that the Company had failed to meet its burden of proof, and also that the Commission had found that a sufficient record could never be developed such that the Company could meet its burden of proof. Therefore, the CCS asserts that a remand from the Utah Supreme Court to the Commission is unnecessary and that reopening the record for the PSC now to make a decision on prudence would serve no purpose. Furthermore, the CCS concludes that all money collected by Questar since the CO_2 plant went into service in June 1999 should be returned to ratepayers. In addition, the logical conclusion of the CCS' argument is that the PSC has already found that the Company has failed to meet its burden of proof and, therefore, that future recovery of CO_2 plant costs would not be justified unless circumstances had changed since the original PSC decision.

The issue of whether the prudence issue was decided on the merits seems to revolve around the language in the Commission's order stating that the Company had not provided a sufficient record to determine if "analysis of options prior to early 1998 were 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 interest. Nor can a sufficient record be developed." The issue before us now seems to be whether that language was indeed the holding of the Commission, binding it now and forevermore to that decision, or was the language instead dicta, words unnecessary to its ultimate decision, made in the context of approving a Stipulation where the Commission thought that it did not have to rule on prudence. The Commission will have to answer those questions concerning what it meant by the quoted language and if the Commission meant its decision to be a decision on the merits dealing with prudence.

Approaching the issue both from a practical standpoint and from an understanding of its duties under the Utah Code, the DPU does not object to the Commission, in a limited way, attempting to decide today the issue of Questar's prudence in building the CO_2 plant and allowing charging the costs to the ratepayers. The consequences of the CCS' interpretation seem to go well beyond a reasonable reading of both the PSC's decision in Docket No. 99-057-20 and the decision of the Utah Supreme Court. Seemingly, the CCS is advocating that Questar be forever prohibited from

recovering any costs associated with building the CO_2 plant and removing the CO_2 from the gas stream unless conditions change.

II. THE RECORD IN THESE DOCKETS NEED NOT BE REOPENED FOR ANY ADDITIONAL EVIDENCE BUT IF IT IS REOPENED, IT SHOULD BE FOR A LIMITED PURPOSE.

The record, as it currently exists, is complete. Even Questar has taken the position that "Every issue, sub issue, point, counterpoint, argument, rebuttal, and relevant factual development was heard and considered by the Commission usually several times over . . ." The record for Docket No. 99-057-20 included Docket No. 98-057-12. In Docket No. 98-057-12, although the PSC did not directly address prudence, the Company thought that it had put on sufficient evidence for the Commission to make a decision on the prudence of the affiliated contract for the CO_2 plant.

The DPU believes that the record is arguably complete as it stands, and if more is desired, the only additions should be limited cross examination and briefing. In the rate case, Docket No. 99-057-12, the Stipulation presented to the Commission was supplemented with direct and rebuttal testimony on the record. Even Questar acknowledges that the only exercise that did not take place was cross examination and briefing directly on the prudence issue independent of the Stipulation.

Although cross examination is generally considered essential and maybe even has a due process basis, the DPU does not think that the facts of the case require cross-examination to survive a due process analysis. Notably, the Commission is re-looking at a record developed in multiple dockets a number of years ago. It seems patently unproductive to ask witnesses to be subject to cross examination on testimony they presented many years ago. Although some parties raised the issue of cross examination if the Stipulation was rejected, the Division believes they could have cross examined witnesses at the time of the initial hearing; their failure to do so may give the Commission discretion to determine if it wants cross examination or wants only the issue to be briefed.

III. THE DECISION OF WHETHER TO ADDRESS THE ISSUE OF PRUDENCE TODAY APPEARS TO REST ON THE STATEMENTS BY THE COMMISSION THAT THE RECORD IS INSUFFICIENT AND THAT A SUFFICIENT RECORD COULD NEVER BE DEVELOPED.

The CCS argues that the Utah Supreme Court's decision not only rejected a rate increase based on the

Stipulation, but also rejected the rate increase independent of the Stipulation. The CCS argues that the Utah Supreme Court reaches this conclusion because, on the essential issue of prudence, the PSC had already ruled that Questar failed to meet its burden of proof and that no record could be developed that would permit it to meet its burden of proof. The CCS' interpretation raises at least two questions. First, it is important to determine whether the PSC's statements are either "dicta" or "holding." The Commission's determination of how its statements are to be interpreted will answer that question. Second, even if the language is a final decision of the Commission and is classified as a holding, which it very well may be, it is important to determine whether the language is limited to decisions Questar made before 1998. Possibly, there are other ways for the PSC to address prudence rather than determining if Questar's actions before 1998 were prudent.

The critical language from the PSC Order 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.

Whether the statement is a holding, or merely dicta, may have a great influence on the what decision the PSC makes at this point in time.

Black's Law Dictionary (Black's) provides a helpful starting place for our analysis. "Obiter dictum" (often called dictum) is defined as "A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." Contrastingly, Black's defines "holding" as "A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision."

A myriad of Utah cases have explored the distinction between holding and dicta. In Callahan v. Salt Lake City, the court noted, "A 'dictum' is an opinion expressed by the court, but which, not being necessarily involved in the case, lacks the force of an adjudication." Another older Utah case provides a test for determining whether a statement is dicta. In Utah Fuel Co. v. Industrial Commission of Utah, the Court said:

> It may be said that dictum is of two kinds – one, the expression of an opinion by the court of judge of a mere collateral question not involved or of mere argument or illustration

> originating with him and not argued or presented by counsel; and the other, an expression of opinion on a question involved and argued by counsel and passed on by the court although not necessary to the decision. But where there are two grounds argued, presented, and involved, upon either of which the judgment or decision on the record can be rested, and both are sustained, the ruling on neither is dictum, but each is the judgment or decision of the court and the one of equal validity with the other.

Additionally, Utah courts have addressed the effect of statements being classified as a holding or as dictum. For example, in Beaver County v. Home Indemnity Co., the Utah Supreme Court stated that:

> The expressions of the writer of that opinion can only be as broad as the questions to which they related. The question of whether the surety could limit its liability was not before the court. Consequently, the language could not apply to such question and must function only as a part of the reasoning in the arrival to a conclusion in regard to that question. Otherwise, such language would not even be dicta, but would be entirely irrelevant to the question under review. Obiter dicta is that part of an opinion which does not express any final conclusion on any legal question presented by the case for determination or any conclusion on any printiple [sic] of law which it is necessary to determine as basis for a final conclusion on one or more questions to be decided by the court. It may, however, be relevant in that it is explanatory of the rationale.

Moreover, in Spring Canyon Coal Co. v. Industrial Commission of Utah, the court noted, "dictum is not embraced within the rule of stare decisis." Much more recently, Judge Bullock of the Utah Court of Appeals noted in a dissent that, "Dicta [in a particular case] may have expressed a view on the subject, but dicta are not holding, and only a holding of the court need be followed under the principle of stare decisis."

If the statement quoted above from the Order that the record was insufficient and that a sufficient record could not be developed is viewed as dicta, then there is nothing to preclude Questar from later making a showing of prudence. If the statement is viewed as a holding, then Questar arguably is precluded from making a showing of prudence, as least pertaining to facts before 1998. If the statement is viewed as a holding, then reopening the record, as Questar seeks, is unnecessary. If the statement is viewed as a dicta, the Division believes there is merit in reopening the record, albeit for a limited purpose. Of note, just because a statement is classified as dicta does not rob it of all meaning or importance. As discussed above, dicta still can be persuasive.

Based upon an analysis of the definitions and Utah cases cited above, it seems that the above 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, 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.

IV. THE DPU DISAGREES WITH QUESTAR'S CONCLUSION THAT NO RATES COLLECTED ARE SUBJECT TO REFUND WITH THE POSSIBLE EXCEPTION OF DOCKET NO. 03-057-05.

Questar in a very cursory fashion tells the Commission that it is foreclosed from ordering any refund of rates collected in any docket except Docket No. 03-057-05. Questar points to the fact that the CCS did not get a stay of any of the intervening dockets or did not appeal all of the dockets. As authority for its proposition that no refunds can be granted by the Commission, Questar cites Utah Code Ann. § 54-7-17 and a 1981 case entitled Committee of Consumer Services v. Public Service Commission (the "Committee case").

The DPU does not agree with Questar's conclusion. First, Utah Code Ann.§ 54-7-17 does not appear mandatory, but seems only to establish a procedure if the court grants a stay. Second, Questar is too broadly reading the Committee case. The Committee case only holds that "Rates are not subject to a refund which based on a public utilities commission order that is defective because of a formal error in the findings and that is later corrected without changing the authorized rates." In the Committee case, the Utah Supreme Court specifically held that it was not ruling on the authority of the Commission to order a refund of rates unlawfully collected.

Most significantly, Questar does not cite the Commission's own order addressing this issue. In a US West rate case, the Commission concluded: "We think it clear that the Court does not intend to put every appellant in a rate case at risk in the event a stay is not granted. Rather, we think it reasonable and in line with views expressed in some of our Orders that this Commission, either on its own motion or under the direction of the Court, has the necessary authority to order a refund or surcharge in the proper case."

This ruling of the Commission has been applied numerous times over the years, most recently in the remand of Questar's appeal of Docket No. 98-057-12 where customers paid for CO_2 costs not collected in the general rate case without a stay being requested or granted.

V. CONCLUSION

The Commission has before it an important question. The Commission is best equipped to determine what it meant when it said:

> 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.

Once the Commission has answered that question, the rest of the pieces will fall neatly into place, and the Commission can determine how to proceed. If the Commission decides that the language is dicta, and not binding, then the Commission can determine the proper amount of Questar's recovery of CO_2 costs. However, if the Commission determines that the language is a holding, and binding, the Commission can determine that Questar is foreclosed from recovering costs associated with CO_2 removal for a certain period. Based upon its analysis presented above, the Division believes that the critical language regarding the sufficiency of the record should be classified as dicta. Indeed, Questar did not seek a ruling on the prudency of the processing contract.

Additionally, the DPU asserts that Questar's arguments regarding the necessity of a stay or bond are without merit. The stay or bond issue is superfluous to the main issue.

Furthermore, regardless of how the language quoted above is classified, the DPU believes that the record before the Commission is complete with the possible exception of cross examination and briefing on the prudence issue.

Dated this _____ day of October, 2003.

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CERTIFICATE OF SERVICE

I certify that I mailed or hand-delivered the foregoing **REPLY BRIEF OF THE DIVISION OF PUBLIC UTILTIES** in Docket Nos. 99-057-12; 99-057-20; 03-057-14 and 03-057-05 this _____ day of October, 2003.

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