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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of
QUESTAR GAS COMPANY for Approval Docket No. 98-057-12
of a Natural Gas Processing Agreement

In the Matter of the Application of
QUESTAR GAS COMPANY for a Docket No. 99-057-20
General Increase in Rates and Charges

In the Matter of the Application of
QUESTAR GAS COMPANY to Adjust Docket No. 01-057-14
Rates for Natural Gas Service in Utah

In the Matter of the Application of
QUESTAR GAS COMPANY to Adjust Docket No. 03-057-05
Rates for Natural Gas Service in Utah

**RESPONSE BRIEF OF THE UTAH
COMMITTEE OF CONSUMER SERVICES**

INTRODUCTION

The Utah Committee of Consumer Services ("Committee") and Questar Gas Company ("Questar Gas" or "utility")

have filed their initial briefs in these proceedings addressing the Commission's authority and duty in light of the August 1, 2003, decision of the Utah Supreme Court ("Court"). Following is the Committee's response to Questar Gas' initial brief.

INTRODUCTORY SUMMARY

Questar Gas seeks to avoid the consequences of a unanimous Utah Supreme Court decision by persuading the Commission that the Court's decision means something other than what it plainly says. It asserts a reversal without remand is really a reversal with remand; and a decision disposing of this case in consequence of the Commission's conclusive determination that the utility failed to make its case is nothing more than recognition that the Commission has yet to make a prudence determination.

Questar Gas seeks to radically re-interpret the Court's decision because even the legal authorities it cited in its brief *uniformly* recognize the basic principle of American jurisprudence that judicial decisions are final and binding. A lower court or administrative agency cannot become its own appellate court of last resort; nor can an administrative agency subvert an appellate court decision by revising *post-appeal* the administrative determination upon which the appellate decision is based.

The Court's plainly-worded decision makes Questar Gas' task an inordinately difficult, if not impossible, one. In any case, it is a task the utility's brief falls far short of accomplishing. Since the Court can, and does, finally dispose of cases on appeal by means of a reversal without remand decision, whether it did so in this particular case depends entirely on what the Court decision says. Despite that obvious reality, the utility makes 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.

Questar Gas' brief repeatedly asserts that the Commission failed to make a prudence determination. "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 rate-making function where it left off." However, unless one is going to presume an unreasonable and capricious Court, had that been its decision it would most certainly have remanded the case back to the Commission to

make a prudence determination. The Court did not do that.

What the Court plainly did do was uphold, and give legal effect to, the Commission's conclusive determination that Questar Gas failed to make its prudence case – a burden of proof the Court takes pains to point out the Commission and Questar Gas clearly understood was the utility's responsibility to meet.

Rather than giving credence to its unsupported assertions by showing where in the opinion and decision the Court says what Questar Gas wants it to say, the utility, like some medieval scholastic, attempts to show how many teeth are in the horse's mouth by resort to abstract authority rather than simply counting teeth. Unfortunately, the legal authorities it cites fail it as well. Instead of providing the Commission a legal rationale for modifying *post-appeal* its determination of an insufficient record, the case law and authority Questar Gas cites uniformly reinforces the legal principle that is determinative of the present inquiry: "The power of the administrative body to modify or change its decision is terminated as to questions decided on the appeal."

Questar Gas' brief falls further short of the mark in its recounting, in a "Factual Background" section, the safety arguments the utility made to support its claim for rate recovery in these proceedings *pre-appeal*. It is free to make its case as its chooses, but its "faced with a serious threat to customer safety" case has been expressly rejected by the Court as a justification for rate recovery in these proceedings: "While safety concerns may have necessitated the construction and operation of a CO_2 plant, they do not establish who should bear the cost of these measures." and:

> While the commission correctly recognized Questar Gas's obligation to ensure the safety of its customers, it incorrectly concluded that this factor provides a near-automatic justification for a rate increase regardless of how the initial threat to safety arose or how the utility sought to alleviate it.

The utility's factual background statement is, moreover, misleadingly incomplete. This will be addressed in the following section of this brief.

This Committee response addresses Questar Gas' brief sequentially, topic-by-topic. A final section addresses specific statements in the utility's brief not otherwise addressed in the

Committee's Argument.

FACTUAL BACKGROUND STATEMENT

_____Questar Gas devotes five of the thirty-two pages in its brief to a restatement of its pre-appeal safety/prudence case, which is later summarized in the first sentence of Section V. CONCLUSION of its brief as follows:

> 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 Court explicitly rejected Questar Gas'safety/prudence case and the Commission's "required result" rationale as an adequate justification for rate recovery. One therefore must question the utility's purpose in restating its customer safety case now.

If a factual background statement is going to be provided at this post-appeal stage of the proceedings, it should be complete and reflect the status and content of the record on appeal. Questar Gas' statement does not do that. It is incomplete, and contradicted in several critical instances by the record – most notably with regard to the factual foundation in the record for the prudence issues of affiliate control and conflicting affiliate interests, which its statement fails to even mention.

For the record, and for the benefit of new Commission members who did not sit through these proceedings prior to appeal and may be unfamiliar with the Committee's case on appeal, the Committee was required by Court procedural rules to include in its Opening Brief a "statement of the case" on appeal, including "[a] statement of the facts relevant to the issues presented for review." The Committee's "Statement of Facts," recounts the factual background that led to the controversy on appeal – including, obviously, what the record before the Commission contained relating to the issues of Questar affiliate control and conflicting interests. The Committee's Reply Brief on appeal summarized those facts relating to affiliate control and conflicting interest as follows:

1. Questar Pipeline secured the business of transporting Price-area coal seam gas by means of 'future capacity' contracts in the early 1990s, whereunder the coal seam gas producers agreed to transport their gas on Questar Pipeline's system in exchange for a Questar Pipeline commitment to expand its system to accommodate the growing quantities of coal seam gas both parties anticipated would be produced in future years.

2. Questar Pipeline's transport of increasing quantities of Price-area coal seam gas conflicted with the interests and long-established gas supply requirements of Questar Gas and its ratepayers.

3. Questar Gas is managed and controlled by a Questar parent company management group that also manages and controls Questar Pipeline.

4. All analyses in the record relating to the coal seam gas problem and the 1998 CO_2 plant remedy were Questar parent company management group analyses that focused on Questar affiliate interests – not Questar Gas ratepayer interests.

5. The "decision" to process the coal seam gas by means of a CO_2 plant owned and operated by Questar Pipeline was a Questar parent company management group decision. The "decision" that Questar Gas would procure gas processing services from Questar Pipeline's CO_2 plant was a Questar parent company management group decision.

6. Questar Gas never responded to the coal seam gas problem. Prior to 1998, Questar Pipeline had always assumed responsibility for remedying any harm its transport of coal seam gas created for utility customers.

In further explanation of the affiliate conflicting interests issue, the Committee's Statement of Facts also recounted how Questar Corporation invested substantial capital in the expansion and upgrade of Questar Pipeline's system in order to secure the coal seam gas transport opportunity for Questar Pipeline and make transport of increasing quantities of Price-area coal seam gas possible – the coal seam gas that supplanted the utility-selected gas in the pipeline, that generated the need for the CO_2 plant, and that caused the costs which Questar Gas has persistently argued utility ratepayers should bear.

Regardless how Questar Gas or others might now wish to represent the facts of this matter, *neither the Commission nor Questar Gas contested these critical affiliate control and conflicting interest facts placed before the Court by the Committee in the course of its appeal.* The Commission explicitly "rel[ied]" upon the Committee's Statement of Facts in its Response Brief to the Court, and Questar Gas, while not agreeing entirely with the Committee's Statement of the Case, never contested the Committee's factual statements regarding affiliate control or affiliate conflicting interests before the Court.

Those stated affiliate control and conflicting affiliate interests facts thus went before the Court on appellate review along with the Commission's conclusive determination of an insufficient record. They are therefore a critical part of the record of this case now, and any factual background statement that fails to include them is woefully incomplete and misleading. They are completely missing from the utility's factual background statement. There are further specific corrections that need to be made to Questar Gas' Factual Background statement, which will be

addressed in the final section of this brief, Section V, "Response to Specific Statements or Case Citations in Questar Gas' Brief."

ARGUMENT

I.QUESTAR GAS HAS FAILED TO DEMONSTRATE THAT THE COURT'S DECISION IS NOT CLEAR AND FINAL ON ITS FACE.

Since the Court can, and does, reverse cases on appeal without remand to the lower court or administrative agency for further proceedings, whether the Court did so in a particular case depends upon what its decision says. Yet, Questar Gas makes no attempt to tie its repeated assertions that (a) the Court's decision did not finally conclude these proceedings, and (b) the decision is based on a determination that the Commission failed to make a prudence finding, to any contextual analysis of the decision itself.

A simple read of the Court's decision shows the utility's assertions are wrong. As the Committee demonstrated in its Initial Brief, the Court's reversal without remand decision is squarely based on the conclusive Commission determination that no prudence determination could be made because the utility failed to make its case. It is difficult to see how the Court could have stated it any more plainly than it did in Paragraph 13 of its opinion:

> 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 its 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. We therefore overturn the Commission's decision to accept the CO_2 Stipulation and to grant the rate increase proposed therein. □

In Paragraph 14 of the opinion the Court quotes its own words in *Utah Dep't of Bus. Regulation v. Pub. Serv.* Comm'n, 614 P.2d 1242, 1245 (Utah 1980) to emphasize it is the utility's burden to provide the necessary record to demonstrate entitlement to rate recovery – not the burden of others to prove the contrary. Questar Gas did not meet its burden in this case, and the Court severely reprimands the Commission for "abdicating its responsibility" to hold the utility to its burden of proof. □

Questar Gas mistakenly quotes, without any accompanying analysis, from Paragraph15 of the Court's opinion as support for its assertion that the Court's reversal is based on a Commission failure to make a prudence determination. Paragraph 15, however, comes well after the crux of the Court's decision in Paragraph 13, and is part of a discussion of the Commission's alternate reversible error in failing to hold Questar Gas to its burden of proof. None of the Court's reasoning and discussion in Paragraphs 14 and 15 alters or contradicts its decision in Paragraph 13, as quoted above.

In summary, despite its numerous assertions about what the Court's decision purportedly says, Questar Gas fails to provide any contextual or other analysis of the Court's decision to back up its assertions that the decision means something other than what it plainly says. The utility's failure necessarily undermines the value and relevance of its brief, premised as it is on the correctness of the utility's unsupported assertions.

A. *The Court's Decision Does not Put this Case in a Position where the Commission Can Disregard its Own or the Court's Determinations*

On pages 14-19 of its brief, Questar Gas raises various arguments intended to show that the Court's decision allows the Commission to rehear the utility's prudence case. It argues the decision does nothing more than put these proceedings back where they were prior to the CO_2 Stipulation, that the Court would be usurping the Commission's "legislative function" with a final decision, and even that the Court has "sanctioned" prior instances where the Commission has overturned an appellate court decision. An examination of the case law Questar Gas cites shows the law comes nowhere close to supporting the utility's arguments. What that case law uniformly does show is the Commission is without authority or jurisdiction to revisit and revise *post-appeal* its determination of an insufficient record in this case.

Questar Gas attempts to argue there is a general rule of law, stating "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," which empowers the Commission to disregard its own determination on appeal of an insufficient record, as well as the finality of the Court's decision, in these proceedings. The utility cites the case of *Phebus v. Dunford*, 198 P.2d 973, 974 (Utah 1948), among others, as support for its argument. Unfortunately, neither the general rule nor the case authority Questar Gas cites support its argument.

The objective of Questar Gas's argument 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, and the Commission's determination of an insufficient record, so the utility can write anew on blank paper. There is nothing in the law that supports such disregard of binding legal determinations post-appeal.

The *Phebus* case Questar Gas cites confirms the legal principle which is determinative of the present inquiry; namely, prior judicial determinations are final and binding, as that principle is expressed in such legal doctrines as collateral estoppel, *res judicata*, or as more simply, but no less emphatically, stated by *Phebus*:

> The lower court's former decision, in its entirety, having been set aside, that court should proceed to a determination of the case the same as if no such previous decision by it had been rendered. The only restriction imposed upon it 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. Other than that restriction, the lower court may act in this case as it may act in any case at a time prior to its final determination of the facts and law of the case. [Emphasis added.]

Applying the injunction in *Phebus* to the Court's decision in these proceedings, any re-opening of these proceedings post-appeal to allow Questar Gas to try again to make its prudence case would directly infringe upon prior, now-binding, determinations by both the Commission and the Court.

B. *The Court's Decision Usurps no Legislative Function of the Commission*

Questar Gas repeatedly invokes the term "legislative function of the Commission," or similar words, in an attempt to undermine the finality of the Court's decision. For example, it argues the Court's decision can not be final because it would "usurp the Commission's legislative function"

In addressing the Commission's "legislative function," Questar Gas fails to mention the Court's appellate function. The Court in this case is discharging its duty of appellate review under the statutory authority and limitations of Utah Code § 63-46b, the Utah Administrative Procedures Act. That appellate review authority gives the Court explicit power to order agency action required by law; order the agency to exercise its discretion as required by law; set aside or modify agency action; enjoin or stay the effective date of agency action; or remand the matter to the agency for further proceedings. If the Commission has, as a matter of law, acted in a way that requires any of the above

corrective steps by the Court, there is no legal basis for the argument that the Court usurped the Commission's legislative authority.

Questar Gas asserts a final decision by the Court ending the controversy in this case would necessarily involve:

> "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.

This is an excellent example of the utility resorting to argument and authority in the abstract rather than simply counting teeth. The Court's opinion and decision usurps no legislative function of the Commission. On the contrary, as the Court makes clear, its decision is based upon, and upholds, the conclusive determination the Commission made in exercise of its ratemaking – or as Questar Gas would describe it "legislative" – function.

The law is clear that the legislative or adjudicative function of the Commission to set or revise rates is dependent upon the utility providing sufficient information to permit the Commission to do so:

> The Commission 'is entitled to know and before it can act advisedly must be informed of all relevant facts,' otherwise, 'it could not effectively determine whether a proposed rate was justified.' The utility must therefore put forth substantial evidence to establish that its proposed increase is 'just and reasonable.' The Commission, in turn, bears responsibility for holding the utility to its burden.

The Commission's conclusive determination of an insufficient record, "[n]or can a sufficient record be developed," completed its legislative and adjudicatory function in these proceedings. Its reversible error was to then not deny Questar Gas' application for rate recovery in consequence of that ratemaking determination – an error the Court corrected with its decision.

Except for the *Wage Case* and 73A C.J.S. **Public Administrative Law and Procedure** § 258, the case law Questar Gas cites for its usurpation of legislative function argument has been addressed above. Questar Gas cites the "*Wage Case*," *Utah Dep't of Bus. Regulation v. Pub. Serv. Comm'n*, 614 P.2d 1242, 1245 (Utah 1980) for the statement that the Court's review is "confined to legal issues" and may not "engag[e] in rate-making, which is strictly a legislative power." As discussed, there is nothing in the Court's opinion in the *Wage Case* that contradicts the finality its decision imposes on these proceedings. The Court's decision is no saunter into the legislative world of ratemaking. It is

instead a decision premised upon a conclusive Commission determination that completed the agency's ratemaking function in these proceedings.

Questar Gas' quote from *Corpus Juris Secundum* is equally inapplicable. It says, in essence, that an administrative body is not precluded from reopening a case where its prior decision was found not to be supported by, or based on, the evidence. However, the Court's decision in this case makes abundantly clear it is not annulling the Commission's determination of an insufficient record, but rather upholding and enforcing it.

A more applicable statement from *Corpus Juris Secundum* § 258 than the one quoted by Questar Gas, is the following:

> Judicial decisions on appeal from administrative decisions or orders determining questions of law are final and conclusive on the administrative body, and the administrative body is bound to honor such judicial decisions, and, when its continuing jurisdiction conflicts with a prior judicial determination, it may act only in a changed situation. Thus, the power of the administrative body to modify or change its decision is terminated as to questions decided on the appeal.

C. *Any Commission Authority to Re-open Matters Post-Appeal Does Not Empower It to Overturn, or Act Contrary to, Appellate Court Decisions*

Perhaps the most novel argument Questar Gas makes in its brief is its statement: "[t]he Commission's authority to conduct further proceedings is sanctioned by binding precedent regarding the authority of agencies to re-open matters post-appeal."

The utility implies the case of *Career Service Review Bd. v. Utah Dept. of Corrections*, 942 P.2d 933, 945 (Utah 1997), as well as Utah Code §54-7-13, supports the idea that the Commission can "re-open" these proceedings post-appeal for purposes of modifying its *pre-appeal* determination of an insufficient record and thereby overturn a final appellate court decision. Not only is the utility's idea foreign to the concept of appellate review in American jurisprudence – as stated, for example, in the C.J.S. quote above – but the case the utility cites, *Career Service Review Board*, does not support the idea.

That case involves an appellate agency, the Utah Career Service Review Board, reopening and reconsidering its earlier decision. The Utah Supreme Court upheld the Career Service Review Board's modification of its prior decision, stating: "Utah is among the majority of western states to have held that administrative agencies have the power to

reconsider their decisions in the absence of statutory provisions to the contrary." However, the further comments of the Court, and the case law of other western states it cites, make clear the Court is addressing the power of administrative agencies to reconsider and modify their decisions *prior to, or absent*, appeal.

As for the provisions of Utah Code §54-7-13, that the Commission "may at any time. . . rescind, alter, or amend any order or decision made by it," Questar Gas cites the case of *Union Pacific R.R. v. Public Service Comm'n,* 300 P2d 600, 602-03 (Utah 1956) as holding that "the Utah Supreme Court has affirmed modification of a Commission order after appellate action." The case does not hold that at all.

In *Union Pacific R.R.* a Utah-regulated motor carrier, Mr. Prichard, had earlier obtained from the Commission a certificate which was thought to have granted him authority to haul acid in certain counties of the state. However, his authority to haul acid was subsequently reviewed by the Court in the appeal of a completely different case where the Court concluded "the certificate issued to Prichard did not authorize the transportation of acid," but further observed:

> [w]hile it is not strictly germane to the issue before us, we opine that if he is to continue to transport acid under his certificate, it is desirable, as the Commission has suggested, that proper steps be taken to clarify [Mr. Prichard's] authority so that all concerned will know what his rights are."

Mr. Prichard subsequently filed with the Commission a "Petition to Clarify By Amendment" to "have his authority include the hauling of salt and acid in bulk throughout the state," which the Commission then granted. An appeal of the Commission order granting Mr. Prichard's petition alleged that since the Utah Supreme Court had previously ruled in another case that Mr. Prichard "had no authority to haul acid" the petition to amend procedure under Section 54-7-13 of the Utah Code, 1953, was "not authorized by law." The Court rejected the argument and affirmed the Commission's decision.

As should be evident, *Union Pacific R.R.* is not the authority Questar Gas claims it to be. The Court did not find anything in the Commission proceedings at issue which overturned, or conflicted with, a previous Court determination on appeal. In fact, the Court took pains to point out Mr. Prichard's petition to the Commission was taken in response to something the Court "opined" be done in its earlier appellate review of another case.

In summary, Questar Gas has failed to provide any legal authority supporting its argument that the Commission

has the authority or jurisdiction, in *post-appeal* proceedings, to revise its *pre-appeal* determination of an insufficient record.

II. QUESTAR GAS HAS NOT IDENTIFIED ANY LANGUAGE OR INTENT IN THE COURT'S DECISION THAT WOULD AUTHORIZE FURTHER COMMISSION PROCEEDINGS

Questar Gas' brief asserts "overwhelming authority" for its position that the Commission retains jurisdiction to "resume its ratemaking function following [a] reversal;" however, it fails to cite any such overwhelming authority in its brief. As shown above, neither *Phebus*, nor the *Wage Case*, nor *Corpus Juris Secundum*, nor *Career Service Review Board*, nor *Union Pacific R.R.* support Questar Gas' argument. In fact, the case law the utility cites unanimously rejects the idea that the Commission may revise its determinations or an appellate court determination *post appeal*.

Questar Gas cites *Wexpro I* and *II* to support its assertion, but there is no support there either. For purposes of the present discussion, and in contrast to the Court's reversal without remand decision in these proceedings, *Wexpro I* and *II* involve the Court's *remand* issued in *Wexpro I*. The issue faced in *Wexpro II* was whether the Commission violated the Court's mandate in *Wexpro I* by accepting a settlement not foreseen in the remand order. The Court in *Wexpro II* decided the Commission did not violate the remand mandate, stating:

> The policy in favor of settlements also applies to cases remanded by appellate courts, even though settlements in this circumstance invariably involve some deviation from the course of events contemplated in the mandate . . . (Page 614).
>
> Since – as decided by the Commission – the settlement achieves the result sought by the Court's mandate, the Commission's deviation from the process contemplated in the mandate was appropriate . . . (Page 615)

The Committee would call attention to the importance the Court places upon the "mandate" remitted in its remand to the Commission in *Wexpro I*. 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. By extension, 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?

The Committee's Initial Brief went into considerable detail to explain why the Court's decision leaves the Commission without authority or jurisdiction to continue these proceedings post-appeal. It analyzed the form of remittitur utilized by the Court and concluded that form made it necessary to go to the Court's opinion to determine what, if any, authority and jurisdiction were remitted to the Commission to continue proceedings. Further, the analysis

of the Court's opinion in the Committee's Initial Brief shows the Court finally disposed of these proceedings with its decision, and it therefore did not intend they be continued.

III QUESTAR GAS HAS HAD ITS DAY IN COURT IN THESE PROCEEDINGS

Putting aside, for the moment, Questar Gas' assertions regarding the meaning and effect of the Court's decision, the utility's claim that it is entitled to a further opportunity to make its case is without merit for the fundamental legal reason that it has already had its fair and sufficient day in court.

A. *The Commission Conclusively Determined Questar Gas Failed to Make its Case*

Questar Gas argues in its initial brief "[t]he Committee knows that parties truncated their adjudication of the case as a result of the CO_2 Stipulation." Questar Gas refers to statements in the record during hearings in the latter Docket No. 99-057-20 proceedings indicating in the event the Commission did not approve the CO_2 Stipulation, various parties would have further cross-examination of witnesses.

Questar Gas' arguments as to what it did or did not intend in reserving further limited cross-examination of Division witnesses are unseasonably late and moot. The Commission necessarily considered the status and content of the entire record – both Docket No. 98-057-12 and Docket No. 99-057-20 – in making its determination that the utility failed to provide a sufficient record of its prudence, including the comments by parties' counsel in the latter proceedings that some further cross-examination of witnesses was intended were the Commission to not approve the CO_2 Stipulation. The Commission in this case approved the stipulation, but, more importantly, made the conclusive determination Questar Gas failed to make its prudence case. Ultimately, the Court determined that Commission determination was on the merits with its reversal without remand decision.

The Commission's conclusive determination of Questar Gas' insufficient prudence case, and the Court's judgment denying rate recovery based on that determination, constitute a final and conclusive judgment on the merits. Questar Gas' after-the-fact arguments now as to what was in, or might have been added to, the record are barred by the doctrine of *res judicata* insofar as they seek to overturn a final decision on the merits. Moreover, as stated in *Phebus* and *Career Service Review Board* cited, but incorrectly interpreted, by the utility, any attempt by the Commission now

to revise its determination *post-appeal* is unlawful because the Commission is without jurisdiction to do so in consequence of the Committee's perfected appeal and the decision of the appellate court.

B. *Questar Gas' Own Record Statements Show It Has Had every Reasonable Opportunity to Make its Case*

Pages 11 through 16 of the Committee's Initial Brief quotes extensively from Questar Gas' statements in the record of these proceedings. Those Questar Gas statements show the utility considered and concluded: (1) it fully understood these proceedings required it to make a persuasive and legal showing of prudence; (2) all parties had ample opportunity to make their case regarding the utility's prudence, or lack thereof; and (3) nothing could be further added to the record that would be new or meaningful.

C. *The Record Reflects that Questar Gas Had every Opportunity to Make its Case.*

The Committee's Initial Brief also tracked the repeated opportunities Questar Gas had in its pre-filed rebuttal testimony in Docket No. 98-057-12, in its filed direct testimony in Docket No. 99-057-20, and again in its pre-filed rebuttal testimony in Docket No. 99-057-20, to respond to opposing parties' accumulating testimony and evidence that raised and documented the issues of affiliate control and conflicting affiliate interests. That the utility did not adequately respond was the result of tactical decisions on its part on how best to present its case, not of any lack of opportunity to do so.

IV. THE COMMISSION'S DUTY NOW IS TO GIVE EFFECT TO THE COURT'S DECISION

The Commission has before it a final and binding appellate Court decision that "reverse[s] the Commission's order and reject[s] the rate increase proposed by the CO_2 Stipulation." The Court's decision has remitted or remanded nothing back to the Commission that requires or allows further proceedings in this matter. The Commission's duty now is to give legal effect to that final decision.

In response to the Court's August 1, 2003, reversal without remand decision, the Committee filed on August 8, 2003, a petition with the Commission requesting that new interim rates be set in the current Docket No. 03-057-05 191

Account pass through proceedings to reflect (1) a cessation by Questar Gas of the collection of CO_2 processing costs in rates, and (2) a refund credit plus interest for monies heretofore collected by the utility in rates for CO_2 gas processing. The Committee's pending petition provides a roadmap for the Commission to give effect to the Court's decision.

A. *The Commission Needs to promptly Order CO_2 Cost Recovery out of Existing Rates*

The Court has conclusively "reject[ed]" Questar Gas' rate recovery of CO_2 processing costs in these proceedings. The Commission therefore needs to promptly order the cessation of further recovery of those costs in rates, as there is no lawful rate in effect under which Questar Gas can continue to collect them.

B. *The Commission Needs to Refund to Ratepayers CO_2 Processing Cost Monies heretofore Collected in Rates*

Questar Gas asserts in its brief 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.

As justification for this assertion, Questar Gas argues:

> With the possible exception of costs collected in [Docket No. 03-057-05] 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.

The utility's assertion that what has been collected in rates for CO_2 processing costs is irretrievably in its pocket has no validity whatever. The rates ordered by the Commission that allowed those monies into Questar Gas' pocket were necessarily provisional by virtue of the Committee's appeal of the Commission's orders in Docket Nos. 98-057-12, 99-057-20, and 01-057-14, and the Commission's order in Docket No. 02-057-02 that conditioned the finality of rates set in those proceedings upon the eventual outcome of the Committee's appeal.

Questar Gas' assertion that the elective stay and bonding provisions of Utah Code § 54-7-17 similarly lets it keep the CO_2 processing cost monies collected in rates pending appeal is also without validity. Utah Code § 54-7-17 states "[t]he court may stay or suspend, in whole or in part, the operation of the commission's order or decision . . ."[Emphasis added]. The subsequent requirements in that statute for payment into the Court, or a bank or trust

company, and refund of all such monies collected to the persons entitled to them, are mandatory requirements only in the event the statutory election has been made. Nowhere does the statute provide it exclusively governs the Commission's authority to order a refund of monies collected under an unlawful rate, nor does statute anywhere provide that refunds can only be granted in compliance with that statute.

Questar Gas cites the case of *Committee of Consumer Services v. Public Service Comm'n of Utah*, 533,535 (Utah 1981), to support its argument that no refund is possible unless a stay has been imposed by the Court; but, the Court in that case expressly states it has never ruled on those very circumstances:

> Petitioners' also contend that, apart from the procedure outlined in the Public Utility Code for a stay and suspending bond, parties who have paid a rate determined by this court to be unlawful are entitled to a refund from the Commission directly of the rates which were paid pursuant to the unlawful order. This Court has never ruled on that issue. But in *Mountain States Tel. & Tel. v. Public Utilities Commission*, 180 Colo. 74, 502 P.2d 945 (1972), the Colorado Supreme Court held, under statutory provisions similar to those of Utah's, that the Colorado Public Utilities Commission had the power to order a refund of revenues collected under an order held to be unlawful, irrespective of a suspension of the rates. Other courts with differing statutory schemes have held to the same effect. [Emphasis added].

There is clearly no legal bar preventing the Commission from properly refunding any and all monies collected by Questar Gas under an unlawful rate, especially where the finality of the rate was made conditional pending the outcome of an appeal as to the lawfulness of the rate, as in the present case. It if further difficult to imagine the Commission would see any regulatory benefit in voluntarily circumscribing its authority to order refunds as Questar Gas here argues.

V.RESPONSES TO SPECIFIC STATEMENTS OR CASE CITATIONS IN QUESTAR GAS' BRIEF

The Committee has chosen to address several specific statements in Questar Gas' brief in this final section rather than in the preceding body of argument. The responses are organized sequentially according to the order in which the statements were made in the utility's brief.

Statement 1: The Commission did not, however, rule on the prudence of the Carbon Dioxide Extraction Agreement ("CO_2 Processing Agreement").

Response: In contrast to its application in the Docket No.98-057-12 proceedings, the utility never petitioned the Commission to rule on the prudence of the Carbon Dioxide Extraction Agreement in the Docket No. 99-057-20 proceedings.

Statement Two: 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.

Response: As discussed extensively in the Committee's Initial Brief and in this brief, the Court's decision is very clearly not based on a determination that the Commission erred in approving the CO_2 Stipulation without finding that the costs incurred under it were prudent. The Court's decision is based squarely on the Commission's conclusive determination that Questar Gas failed to provide a sufficient record that would permit a finding of prudence. In the alternative, the Court concluded the Commission erred in not holding Questar Gas to its burden of proof. With regard to the absence of any remand in the Court's decision, not only did the Court not expressly remand the case to the Commission, it also never anywhere in its opinion implied or suggested such a result. The opinion's reasoning shows very clearly that a remand back to the Commission would serve no purpose since the conclusive factual and legal determination of the Commission that Questar Gas failed to make its case allowed the Court to finally dispose of the controversy on appeal.

Statement Three: 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 [incurred]. This is not an 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.

Response: The Court finally disposed of these proceedings on the conclusive Commission determination that Questar Gas failed to provide a sufficient record that would permit a determination of prudence. "Nor can a sufficient record be developed." While a prudence determination might allow partial recovery on a finding of partial prudence, an "all-or-nothing determination" is neither wrong or inequitable where the utility falls short of meeting its heavy burden of proof, or even some reasonable threshold of persuasive evidence. In this case, the Commission determined

Questar Gas failed to provide a sufficient record that would permit

the Commission:

> 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.

The Commission is clearly saying there was not enough evidence regarding the extent, or lack thereof, of affiliate control and conflicting affiliate interests to allow some measurement and determination of partial prudence recovery. A final determination that no recovery is proper because Questar Gas failed to make its case seems justified under the circumstances.

Statement Four: 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.

Response: The implication of this statement -- that Questar Pipeline had no choice but to transport the increasing quantities of coal seam gas which brought on the customer safety crisis Questar Gas talks about -- is simply not credible. There is no FERC requirement that interstate pipelines accept and transport gas they *lack the system capacity to transport*. The CO_2 processing costs of Questar Gas arose as a direct result of Questar Pipeline's and Questar Corporation's voluntary business decisions to secure a business opportunity for Questar Pipeline to become the exclusive gatherer and pipeline transporter to market of the coal seam gas being produced in increasing quantities near Price, Utah. The undisputed record proof for this was identified and discussed in the Committee's Opening Brief on appeal to the Supreme Court.

Statement Five: Until 1998, Questar Gas was able to manage the declining heat content without requiring a change in the heat content specified in its tariff.

Response: One must wonder how a parent company management group managing Questar Gas could have prudently concluded it was proper to manage the heat content of the utility's gas without requiring a change in the heat content of its tariff, or other effective measures prior to 1998, when that parent company management group at the same

time was managing an expansion and upgrade of Questar Pipeline's pipeline system that began in the early 1990s so Questar Pipeline could transport the increasing quantities of coal seam gas that directly led to the purportedly unexpected crisis in1997-1998.

Statement Six: 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 Payson gate 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.

Response: This is simply not a credible statement. Who should have been surprised in 1997-98 when coal seam gas production increased? How could the Questar parent company management group that managed Questar Corporation's capital investment in the expansion and upgrade of Questar Pipeline's capacity to accommodate increasing quantities of Price-area coal seam gas – on the assumption some responsible Questar business manager must have made that increasing quantities of coal seam gas were indeed coming – at the same time say with any conviction that, wearing their hats as managers of Questar Gas, they were surprised by the increase in production "starting around 1997?" If projections of growth in production were credible enough to persuade Questar Gas to make substantial capital investments, they should have been sufficiently credible to warrant prudent planning and action by Questar Gas back in the mid-1990s, or sooner for the changing Btu problems they try and assert they first became aware of in 1997-98.

Statement Seven: Questar Gas is not responsible for customer appliance adjustments that may be necessary to accommodate the change in tariff-specified heat content.

Response: This statement goes beyond the bounds of the present proceedings, but, since made, deserves some comment. In a March 7, 2000 Response to Division of Public Utilities' Data Request No. 14.7, in Docket No. 99-057-20, then Questar Gas Manager of Regulatory & Gas Supply Services, Alan Allred, stated, in part:

> [T]he Company is continuing to check and adjust customers appliances as a part of its on-going customer service. As Company service technicians devote more time to this work, other work may need to be reduced. For example, inspection of new construction gas piping is being transferred to city building inspectors, who have the responsibility to insure that building codes are met. Such changes should allow the Company to devote more effort to checking and adjusting customers' appliances. The Company is attempting

> to accomplish this effort without increasing manpower and therefore without increased cost. The 10-year initial term for the CO_2 processing contract represents the minimum time necessary for an orderly transition period. There should be little or no additional cost to customers if their appliances are adjusted in the manner described above.

At the time of this answer, Questar Gas clearly considered it the utility's responsibility to make sure customer appliances were properly adjusted, and it devised and described to the Division of Public Utilities and the Committee a program for administering the adjustments that must be made by Questar Gas technicians, how the appliances requiring adjustment would be identified by Questar employees, the date the adjustments were completed, and what adjustments were made, that would ensure and document the completeness and finality of the appliance adjustment program that today is called Questar Gas' Green Sticker Program. Questar Gas' Green Sticker Program today is a far cry from what it indicated was necessary back in March 2000. It is also much more expensive for utility customers.

Statement Eight: > 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. 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. Therefore, Questar Gas requested its affiliate Questar Transportation Services to build and operate a CO_2 processing plant . . .

Response: Such statements as "Questar Gas determined," "Company determined," and Questar Gas requested its affiliate" paper over the critical affiliate control and conflict of interest issues that ultimately determined the outcome of these proceedings. Questar Gas never established in the record that it determined or decided anything. The determinations, requests and decisions mentioned, and otherwise at issue in this case, were made by the management of Questar Regulated Services Company, the Questar Corporation parent company management group which controls and manages not only the affairs of Questar Gas but, in this case, the conflicting interests of its sister company, Questar Pipeline Company, as well. Questar Gas never presented any evidence that demonstrated the determinations, requests, and decisions in question were made for and on behalf of Questar Gas and its ratepayers and not for and on behalf of the conflicting business interests of Questar Pipeline and Questar Corporation.

Statement Nine: > Indeed, the success of this option [seeking an amendment to Questar Pipeline's FERC tariff] 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.

Response: Questar Gas' statement about asking the FERC to favor an affiliate over other customers is incorrect, but does illustrate the conflict of interest which Questar's parent company management group faced in trying to represent and manage the conflicting interests of Questar Gas and Questar Pipeline. One would assume that a petition to the FERC would not plead for favoritism but fairness, based on the historical background showing the purpose for the construction and use of the pipeline and the current percentage of use by customers (Questar Gas controls over 70% of the pipeline's reserved capacity). Questar Gas' second statement – about not pursuing the "FERC option" until the heat content problem became critical – assumes that it would have been prudent for the utility to have done nothing until the heat content problem became critical. Since the incompatibility of coal seam gas was known and obvious since 1991, or earlier, when Questar Pipeline first contractually committed to coal seam producers to expand its pipeline system to meet their growing transport requirements, one must ask if a prudently managed public utility would have done nothing by way of effective response until it faced a heat content crisis in 1997.

CONCLUSION

The Commission is going to shortly decide whether to give effect to the Court's final decision or re-open these proceedings as Questar Gas is urging. In making that decision, the Commission should bear in mind what this response brief has demonstrated:

1. Court's decision is plainly-worded and difficult to misunderstand.

2. Questar Gas has failed to credibly demonstrate that the decision means other than what it plainly says.

3. Even the case law cited in Questar Gas' brief make clear the Commission lacks the requisite authority to directly overturn an appellate court decision, or to indirectly do so by revising *post-appeal* its conclusive decision of an insufficient record – the determination which was the basis for the Courts reversal without remand decision.

4. Not only has the Court finally disposed of these proceedings with its reversal without remand decision, but the record shows Questar has had its fair and sufficient day in court for purposes of making its prudence case.

5. There is no lawful rate in effect under which Quesetar Gas may recover its CO_2 processing costs.

6. All CO_2 processing costs collected in rates by Quesetar Gas were necessarily collected under provisional rates that were contingent upon the outcome of the Committee's appeal.

7. There is no legal bar to the Commission properly returning to ratepayers the monies heretofore collected by Questar Gas for CO_2 processing costs; and, given the unanimous Utah Supreme Court decision and the provisional nature of the rates under which those monies were collected, refunding those monies to ratepayers is the proper course of action.

8. Committee's August 8, 2003, Petition pending before the Commission is an appropriate method and procedure for the Commission to utilize in giving legal effect to the Court's August 1, 2003, decision.

Most surely, it should be clear to the Commission that any attempt to hold further proceedings for the purpose of revising *post-appeal* its essential determination that Questar Gas failed to provide a sufficient record that would permit a finding the utility's CO_2 processing costs were prudently incurred, and not influenced by conflicting affiliate interests, would be a clear case of the Commission compounding its earlier error of not denying Questar Gas's application to recover its CO_2 processing costs in rates based on the utility's insufficient record.

The Commission, therefore, needs to conclude the present inquiry by deciding it will give legal effect to the Court's decision and remove Questar Gas' CO_2 processing costs from rates.

Dated this 23rd day of October, 2003.

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REED T. WARNICK
Assistant Attorney General
Counsel for Utah Committee of Consumer Services

CERTIFICATE OF SERVICE

I certify that I mailed or hand-delivered the foregoing **RESPONSE 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 23rd day of October, 2003.

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