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BEFORE THE UTAH PUBLIC SERVICE COMMISSION

In the Matter of the Application of Questar Gas Company to Adjust Rates For Natural Gas Service in Utah	Dkt. No. 04-057-04
In the Matter of the Investigation of Questar Gas Company's Gas Quality	Dkt. No. 04-057-09
In the Matter of the Application of Questar Gas Company to Adjust Rates For Natural Gas Service in Utah	Dkt. No. 04-057-11
In the Matter of the Application of Questar Gas Company for a Continuation of Previously Authorized Rates and Charges Pursuant to its Purchased Gas Adjustment Clause	Dkt. No. 04-057-13
In the Matter of the Application of Questar Gas Company for Recovery of Gas Management Costs in its 191 Gas Cost Balancing Account	Dkt. No. 05-057-01

PETITIONERS' RESPONSE TO OPPOSITION OF QUESTAR GAS COMPANY, THE DIVISION OF PUBLIC UTILITIES, AND THE COMMITTEE OF CONSUMER SERVICES TO REQUEST FOR INTERVENTION

On November 17, 2005, Petitioners Roger J. Ball ("Ball") and Claire Geddes ("Geddes"), hereafter "Petitioners", with the support of approximately 200 other utility

consumers, sought the right to participate through intervention in these dockets. Additional statements in support were subsequently filed. On November 21, 2005, Questar Gas Company ("Questar") filed a pleading in opposition to this request for intervention. Opposition pleadings were filed by the Utah Division of Public Utilities (the "Division") on November 22, 2005, and by the Utah Committee of Consumer Services (the "Committee") on November 28, 2005. Petitioners submit this response to the arguments of those opposing intervention. Petitioners also file today an additional 146 statements in support from utility consumers, bringing the total number of consumers supporting Petitioners' intervention in these dockets to at least 370.

I. APPLICABLE LEGAL STANDARDS GOVERNING INTERVENTION IN ADMINISTRATIVE PROCEEDINGS

Intervention before agencies is governed by statute, Utah Code Ann. § 63-46b-9. Subpart (2) of Section 63-46b-9 ***requires*** the granting of a petition for intervention on a determination that: "(a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and (b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention."

Section 63-46b-9(2) provides that the presiding officer of the relevant agency *"shall"* grant the petition for intervention if these conditions are satisfied. Hence, intervention is conditioned solely upon satisfaction of subpart (2), and "the Commission cannot simply deny a motion to intervene on the ground that its discretion is unlimited and therefore unreviewable. The Commission's discretion is limited, and to deny a

motion to intervene, the Commission must rely on substantial reasons." *Millard County v. Utah State Tax Com'n,* 823 P.2d 459, 462 (Utah 1991).

The Court in *Millard County* ruled, *apropos* our circumstances in these dockets, that a proposed settlement between parties may not defeat intervention where a petitioner can meet the conditions of Section 63-46b-9. Sound policy supported this ruling, since, "[t]o permit the settlement of a controversy by stipulation to moot an extant motion to intervene under a statute or to moot an appeal from an order denying a motion to intervene could destroy the legal right on which the motion to intervene is based and, in this case, allow procedural strategies to defeat the statutory policy allowing for intervention." *Id.* at 461.

Hence, the language of Section 63-46b-9, as construed by Utah courts, not only is mandatory, but also *favors intervention* on policy grounds. This reading of our statute is consistent with a larger trend in administrative law which has "witnessed a steady and continued expansion of public participation in most agency proceedings." A. C. Aman, Jr., and W. T. Mayton, ADMINISTRATIVE LAW, section 8.4.2, at 215 (1998). This increasing friendliness to consumer intervention, in turn, "sometimes has reflected the courts' concern with the inability of agencies adequately to represent the public interest. It also reflects a pluralistic conception of the administrative process that sees the public interest as consisting of a tapestry of many strands. The public interest as well as the legitimacy of the agency's decisionmaking process thus demands that all important interests and viewpoints be represented." *Id.* at 215-216.

II. PETITIONERS HAVE STANDING

The standing of Petitioners to intervene is uncontested and, in any event, incontestable. The opponents of intervention do not contend that the legal interests of these petitioners will not be affected substantially by this proceeding. Petitioners are customers of Questar; they have a direct interest in utility expenses; their monthly bills will be affected by the outcome of this case. Moreover, that impact, however quantified, must be multiplied by the nearly 400 ratepayers who have filed statements expressing support for the intervention of Petitioners as representatives of their cause.

In addition, transactions which are tainted with a conflict of interest between affiliates in regulated industries, because of their vulnerability to abuse, traditionally have been of concern to the public. Some of these transactions historically have been regulated federally under the 1935 Public Utilities Holding Company Act. *See generally,* J. Seligman, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE, chaps. 5 and 8 (rev. ed. 1995) (statute was intended to prevent gouging and looting between affiliates; these conflicted transactions otherwise would endanger utilities financially and cause deterioration in quality of service to customers). And dummy affiliates have inspired some of the most spectacular price fixing frauds with public utilities in American history. *See, for example,* M. W. Summers, THE ERA OF GOOD STEALINGS, 50-54 (1993) (describing Credit Mobilier and Union Pacific Railroad scandal). Public utilities jurisprudence in the State of Utah also has precedents that treat these concerns. *See, e.g., Utah Power & Light Co. v. Pub. Serv. Comm'n,* 152 P.2d 542, 559-561 (Utah 1944) (dummy construction affiliate and unjustified fees); *Committee of Cons. Serv. v. Pub. Serv. Com'n,* 595 P.2d 871 (Utah 1979) (celebrated

Wexpro case; diversion of utility assets to unregulated affiliate); *US West v. Pub. Serv. Comm'n,* 998 P.2d 247 (Utah 2000) (related principles); *Committee of Consumer Services v. Pub. Serv. Comm'n,* 75 P.3d 481 (Utah 2003) (requiring prudence review of affiliate contracts). Questar Transportation Services is a wholly owned subsidiary of Questar Pipeline Company that was created specifically and solely to build, own and operate the processing plant for which Questar is seeking ratepayer compensation. In view of the courts' ongoing concern with such self-dealing, Petitioners have a legal interest respecting the Commission's scrutiny of Questar dealings with an affiliated business.[1]

More important, if Petitioners are barred from intervention, who will assist the Commission objectively to evaluate the proposed stipulation? If the Petitioners are not permitted to create a record analyzing the impact of Questar's requests on ratepayers, there will be no one to voice concerns on behalf of and in defense of ratepayers.

[1] Questar's pleading argues extensively that intervention should be denied because Petitioner Ball has been a participant in the technical conferences and assorted negotiations which led to the settlement proposal now in this docket, that this participation shows that Ball was aware all along that settlement was an eventuality, and that this possibility should have prompted Ball to seek intervention at an earlier, more timely date. This argument, as shown below, distorts the nature of Ball's involvement in the events which produced the stipulation. To the extent there is reason or reality behind this argument, however, it forces the conclusion that Questar, the Division, and the Committee, have waived their right to oppose the standing of Petitioner Ball to intervene in this matter. *See, Utah Ass'n of Counties v. Tax Com'n,* 895 P.2d 825, 827 (Utah 1995), *citing Utah Association of Counties v. Tax Commission of the State of Utah ex rel. American Telephone & Telegraph Co.,* 895 P.2d 819, 820-821 (Utah 1995) (even absent formal intervention petition, active participation in agency proceedings is *de facto* intervention and parties who allow such active participation without protest are deemed to have waived right to challenge intervention). As such, and as argued more fully below, Petitioner Ball should have received no less than statutory notice of all proceedings in these dockets -- something that, in fact, did not occur -- and should be allowed an opportunity to participate fully in developing a record for evaluation of the proposed stipulation.

The Division and the Committee argue their credentials as defenders of the public and guardians of consumers, insisting that we should trust them to represent the public interest in this docket. Therefore, they oppose Petitioners' intervention. But the Division and the Committee, as parties to the stipulation, and by the terms of that contract, expressly have covenanted that they will not oppose the stipulation with evidence or otherwise and that they will bend their oars at all levels of review, administrative and judicial, to obtain confirmation of that agreement. Gas Management Cost Stipulation, at paragraphs 10, 11, and 13. Thus, the Division and Committee have a vested interest in the stipulation's approval and are handcuffed from applying their expertise as disinterested advisors to assist the Commission in evaluating the pros and cons of the stipulation (as distinct from Questar's application in the first instance for cost recovery), and in making the requisite findings under Utah Code Ann. § 54-7-1(3)(d) and Commission Rule R746-100-10 F. 5.

Moreover, the best studies on regulatory agencies have concluded that, even absent such self-imposed restraints on the rendition of disinterested advice, there often is an "agency identification with regulated industries," and that "we do not need to subscribe to the theory of regulatory 'capture' in order to explain this tendency toward industry domination. Rather, the reason appears to be simply in the fact that regulatory agencies respond to the inputs they receive--in the same fashion as any other decisionmaking body. And, until the recent past, the source of almost all input to the agencies was the regulated industries. As the Landis report noted, '. . . it is the daily machine-gun like impact on both agency and its staff of industry representation that makes for industry orientation on the part of many honest and capable agency members

as well as agency staffs." Public Participation in Regulatory Agency Proceedings, III Study on Federal Regulation pursuant to S. Res. 71, Sen. Comm. on Governmental Affairs, 95th Cong., 1st Sess., at 1-3 (1977).

These limitations on agency performance are recognized in our public utilities code, which grants any person the right to petition and be heard where utility action violates any provision of law, Utah Code Ann. § 54-7-9. And the need to supplement, if not supplant, Division efforts in utility regulation, in light of institutional constraints or bureaucratic incompetence, is reflected in our case law. *See, e.g., Stewart v. Utah Pub. Serv. Comm'n,* 885 P.2d 749, 781-783 (Utah 1994); *MCI Telecommunications v. Pub. Serv. Comm'n,* 840 P.2d 765, 772 (Utah 1992). *Cf. Utah State Coal. of Sr. Citizens v. UP&L,* 776 P.2d 632 (Utah 1989).

Indeed, <u>these very dockets</u>, addressing the gas processing cost recovery issue, exemplify the wisdom -- and the necessity -- for non-agency input on proposed stipulations. The Division's advice has led the Commission into error respecting misbegotten stipulations more than once. An earlier stipulation with Questar was endorsed by the Division, even absent a prudence review, notwithstanding "established practice" at the Commission to undertake such a review. The Commission adopted the position of the Division and approved the stipulation. The Utah Supreme Court reversed the order of approval on appeal, stating that "By accepting the . . . Stipulation with no consideration of the prudence of the underlying source of the new costs (i.e., the contract between Questar Gas and its affiliate Questar Transportation Services), the Commission *abdicated its responsibility* to find the necessary substantial evidence in support of the proposed rate increase in the record." *See, Committee of Consumer Services v. Pub. Serv.*

Comm'n, 75 P.3d 481 (Utah 2003) (emphasis supplied) (hereinafter called the "2003 Supreme Court Opinion").

Even after this strong reprimand from the Utah Supreme Court, the Division stipulated again with Questar for the recovery of gas processing costs. The Commission noted that, "Despite years of analysis encompassing several dockets, and despite its continuing support for the CO2 Stipulation, *the Division has never concluded that Questar Gas's decision to pursue CO2 processing was prudent."* Order, *In the Matter of the Application of Questar Gas Company to Adjust Rates for Natural Gas Service in Utah,* Docket Number 03-057-05 (August 30, 2004) (hereafter called the "August 2004 Order").

The Committee, on the other hand, has opposed cost recovery for gas processing. This opposition has been steadfast for at least 7 years. The Committee won a substantial victory for prudence review in the 2003 Supreme Court Opinion. It won again, after an extended prudence review, when the Commission found no evidence of prudence in the August 2004 Order. This Order, in fact, may be entitled to *res judicata* effect, barring the present effort for stipulation approval. The Committee's turnabout respecting the proposed stipulation, under these circumstances, seems inexplicable.

Hence, while Petitioners applaud the yeoman service that the Division and Committee often perform in the public interest, in this case, there is reason to question the proposed stipulation, and, with due respect, the Division and Committee are not in a position to evaluate objectively their own work product. Their good intentions and hard work are no substitute for outside, detached evaluation; in other words, for intervention by Petitioners. This is a case where agencies may be unable fully to perform their charge.

Indeed, in this case, the agencies have handcuffed themselves and have agreed not to pursue or present the development of evidence in support of ratepayers' legitimate concerns. This case calls for an administrative review that means "the provision of a surrogate political process to ensure the *fair representation of a wide range of affected interests.*" R. Stewart, "The Reformation of American Administrative Law," 87 HARV. L. REV. 1667, 1670 (1975) (emphasis supplied).

III. THE PETITION FOR INTERVENTION IS TIMELY

The opponents of intervention, in the main, argue that Petitioners cannot satisfy Utah Code Ann. § 63-46b-9(2)(b) which forbids intervention when it would materially impair the orderly and prompt conduct of the adjudicative proceeding. They contend that there was adequate notice of a hearing on the proposed stipulation, and that Petitioners responded belatedly in the face of this notice. They likewise contend that the request for intervention came too late, since the stipulation merely resolves a proceeding that has been pending for months. What is more, it is said that Petitioners are inexcusably tardy since they have been intimately involved with every phase in this process but waited until the last minute to seek participation. These arguments are unpersuasive for the reasons set forth below.

(A) Petitioners' Request Is Timely When Viewed in the Overall Context of the Gas Processing Cost Recovery Litigation. It is an understatement to aver that time has not been of the essence in the evaluation of gas processing cost recovery issues in these dockets. The facts, as summarized in the August 2004 Order of this Commission, are that, as early as 1992, Questar may have been alerted to the need to solve the gas/safety issue which it now presses upon the Commission in these dockets, and that, by

the mid-1990s, at the latest, Questar knew or should have known that action was required if not imperative. Questar nevertheless sat on its hands until 1997 and brought the matter to the attention of regulators for the first time in January 1998. Since then, and for the last 7 years, through a labyrinth of dockets, the parties have pursued a solution. There have been two proposed stipulations, with no fewer than two trips (and one attempt at an appeal) to the Utah Supreme Court. Questar has had an extended opportunity to meet the burden of showing "prudence" in the creation of a gas processing plant through an affiliated entity and in the formation of a contract for the processing of gas with that entity. This litigation culminated in the Commission's August 2004 Order, ruling that the utility had failed in this regard. Indeed, the gravamen of that ruling is that, notwithstanding the accumulation of years of research in various dockets, Questar had no proof whatsoever of prudence. Among many similar findings, the Commission held that, if there be evidence of Questar's prudence, it must be found through a process of divination, because ". . . there is *nothing* in the *record* -- no contemporaneous legal memorandum, no meeting minutes, no email, no testimony -- to indicate that, prior to 1997, Questar management conducted *any sort of analysis* -- legal, financial, or otherwise-- concerning the possibility of invoking [section] 13.5 or seeking a change to Questar Pipeline's FERC tariff, or, indeed, consideration of other approaches to obtain sufficient time to retrofit customer appliances." (Emphasis supplied.)

Despite the Commission's holding in August, 2004 that Questar had failed to show prudence in undertaking the gas processing transaction, and that, indeed, "[o]n this record . . . affiliate influence is clear," Questar wanted still another bite at the apple. Another docket was opened, and technical conferences were held. Then still another

docket was initiated with a request for agency action and approval of gas processing recovery costs. The efforts of the participants in these dockets to "show prudence" were a direct affront to the express language of the August 2004 Order. That Order, at several points, in the plainest possible terms, declared that prudence could not be shown by "after-the-fact summarization of a complex decision-making process [as a] substitute for substantial contemporaneous evidence of timely, thorough evaluation of conditions that may impact ratepayer interests, including an evaluation of the costs and effectiveness of the reasonable alternatives that may be undertaken to protect those interests. Additionally, where affiliate transactions are involved, a utility seeking recovery of costs from its Utah customers must show that it placed the interests of itself and its customers first, as it explored its options and that it was not influenced by the impact of a resolution upon an affiliate." The Order found, in equally plain language, that the utility failed to produce any such contemporaneous evidence that the utility acted prudently in addressing the problem while the crisis at hand was amenable to palliation if not resolution. Rather, the Commission found that doors were closed and opportunities were lost as a result of Questar's failure to act timely. This lack of evidence of prudence forced the Commission to conclude that for a very long time Questar did nothing at all -- they didn't approach FERC; they didn't build a separate pipeline; they didn't explore whether alternative non-affiliated methods could transport or process the gas at a fair price. When Questar finally acted after more than 7 years, they were motivated by a conflict of interest involving self-dealing with their affiliate.

Lacking any evidence of prudence that is contemporaneous with the decision to build the plant, Questar has attempted to overcome the clear language of the August 2004

Order by prestidigitation. It has taken the Order's non-exclusive criteria for prudence review, divorced those criteria from the evidentiary standards and chronological constraints quoted above, and then proceeded, in last year's technical conferences and this year's docket proceedings to do exactly what the Commission said they *could not do*, namely, conduct an *after the fact*, reconstructed decision-making process respecting prudence and the plant. Of course, this process and its hindsight "search" for the "best solution" at the "lowest cost" to Utah ratepayers, as described at length in the pleadings and submissions of those opposing intervention, did not even identify for consideration the most obvious choice in this regard, the choice that would have meant "no cost" to utility customers, namely, that Questar's shareholders pay for the imprudence and conflicts of management in Questar's decision to build the plant. This "solution," not only has the virtue of recognizing the probable *res judicata* effect of the August 2004 Order, but also is just, since Questar Regulated Services is the controlling shareholder for both the gas company and pipeline entity and the party responsible for creation of this conflicted transaction in the first instance.[2]

Having ground everyone down with round after round of investigation and litigation and negotiation, that "daily machine-gun like impact on both agency and staff," that the Landis Report, quoted above, identifies as a powerful influence which leads agencies to adopt an "industry orientation," Questar prevailed upon the Division and the Committee to make the stipulation before the Commission.

The opponents of intervention, in effect, claim that time's up, the deal is done, and Petitioners should not be allowed, after the fact, to play the role of "Monday Morning

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[2] Questar Regulated Services is the holding company for Questar Gas Company and Questar PipelineCompany, and all 3 entities are managed by the same identical team of managers.

Quarterback." There is irony in this claim, coming from Questar, an entity which, to mix our sporting metaphors, has had 7 years of Mulligan after Mulligan, both before and after "the fact," to make a case that its transaction with an affiliate is other than imprudent. In any event, it is hard to believe, in light of this history, that a little more time cannot be spared to take a further look at what Questar now claims is an essentially brand new, hitherto untested approach to solving this problem. Our opponents also argue that they have negotiated hard and their deal should stick. But these parties have negotiated before and been reversed by the Supreme Court. Closer scrutiny at this stage, through the intervention of Petitioners, may serve ultimately to save time, because if the Commission approves the stipulation improvidently on a less than adequate record, it will likely result in further delay by appeal again to the Supreme Court -- continuing for more years the Merry-Go-Round of litigation.

(B) **The Petition for Intervention Is Not Rendered Untimely by Ball's Participation as Director of the Committee.** On the timing of the request for intervention, the opponents make most of their hay at the expense of Ball, who, as former director of the Committee, has had considerable involvement with the gas processing cost recovery issue. Our opponents argue or imply, over and over, that, because of this involvement, Ball should have moved formally to intervene at an earlier stage of the proceeding. But this argument is unpersuasive for several reasons.

First, the argument overlooks the representative nature of Ball's involvement in this request for intervention. As noted above, that request speaks, not only for Ball and Geddes, but also for hundreds of other Questar customers who, unlike Ball, are not experts in the art of regulation, and who probably were counting on the Committee, in

view of past experience, to resist any stipulation with Questar on gas processing related issues. Indeed, the Committee's turnabout in this regard would not have been apparent to any consumer until October 13, 2005, when the stipulation was posted on the Commission's website,[3] only seven days before the hearing October 20, 2005. In short, the Committee's change of heart was unexpected, and hence, unlooked for, by any customer. Petitioners, therefore, needed more time, after this surprising turn of events, in which to seek intervention and to vindicate their rights independently from the Committee, given its inexplicable new direction.

Second, even if Ball's involvement can be imputed to other customers, the opponents of intervention draw the wrong inference from his presence in these proceedings. That earlier involvement, in fact, persuaded Ball that the Committee's opposition to cost recovery for gas processing would continue and, hence, that there would be no need to intervene on ratepayers' behalf.

Ball, of course, left the Committee on March 9, 2005, prior to entry of a scheduling order (March 28, 2005) in docket number 05-057-01, the latest docket initiated by Questar in an effort to recover these costs. After that time, Ball had no official role with Committee business; he was engaged as a consultant on out-of-state work and was not involved with public utilities regulation in the state of Utah.

What did Ball know and what did he expect in connection with cost recovery issues at the time he left the Committee?

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[3] The Commission's notice of hearing was posted October 11th and states that the stipulation also was filed October 11, 2005, and is available for review on the website or at the office of the Commission, but the website itself indicates a posting date for the stipulation of October 13th.

In 1999 and 2000, the Committee had insisted on a prudence review of the Questar contract in Docket Number 99-057-20. Questar attempted, without success, to develop a sufficient record to establish prudence in that proceeding. It failed to do so. The Commission, at that time, opined that, "[t]he 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*." Report and Order, *In the Matter of the Application of Questar Gas Company for a General Increase in Rates and Charges,* Docket Number 99-057-20, at 27 (August 11, 2000) (emphasis supplied). This highlighted language, suggesting that it was impossible for Questar to meet its burden to show prudence, later was interpreted as "ambiguous dicta." Order, *In the Matter of the Application of Questar Gas Company for Approval of a Natural Gas Processing Agreement,* Docket Number 98-057-12, at 4-5 (December 17, 2003). The Order's language, however ambiguous, nevertheless was a harbinger of rulings to come.

In August 2003, at the Utah Supreme Court, the Committee won a resounding reversal of Commission approval of the affiliate contract; the Court reprimanded the Commission for "abdicat[ing] its responsibility," and mandated a prudence review of the affiliate contract based upon substantial evidence. *See,* the 2003 Supreme Court Opinion.

In August, 2004, after an exhaustive review, the Commission found that Questar had not produced substantial evidence (indeed, the Commission ruled that there was **<u>no</u>** evidence) that the affiliate contract was prudently made. *See,* the August 2004 Order.

Hence, after the August 2004 Order, there was reason to believe that, under the

law of *res judicata* as applied to agency determinations, Questar would be barred from trying the prudence issue in renewed litigation. A subsequent, clarifying order did not alter this hope, merely stating that Questar could "seek" recovery, but leaving future argument to all participants. The order neither opined on the likelihood of success were such a petition to be filed, nor ventured to prejudge the outcome. Order on Request for Reconsideration or Clarification, *In the Matter of the Application of Questar Gas Company for Approval of a Natural Gas Processing Agreement,* Docket Number 98-057-12, at 4-5 (October 20, 2004).

Ball may have watched the next round of prudence litigation taking shape in 2005, pursuant to a scheduling order entered March 28, 2005, setting trial hearing dates for October 6, 7, 11, and 12, 2005, but he would have remained confident that the Committee, having fought the gas processing contract for approximately 7 years, would stay the course and ultimately prevail.

In short, Ball may be percipient, but he is no prophet: He could not foresee that the parties in these dockets would subvert the intent of the August 2004 Order, by attempting to prove prudence once again, and by making that proof without reference to contemporaneous evidence and in an "after the fact" reconstruction of events. Nor could he foresee that the Committee would transmogrify from "watchdog" to "lapdog," as the *Salt Lake Tribune* editorialized by cartoon in October, 2005. The Committee's change of position, which remained unknown, unknowable, certainly unpredictable, and utterly unfathomable, until the proposed stipulation was actually filed October 13, 2005, took Ball, as well as other customers, completely unawares. Petitioners have moved with alacrity, since October 13th, to fill the regulatory vacuum that was created by that

change. To date, however, no party except Petitioners has moved to represent ratepayers now that their statutory advocate has abandoned their interests.

(C) Notice of Proceedings Respecting the Stipulation Was Inadequate.

Respecting the adequacy of notice for the hearing on approval of the stipulation, this notice was posted on the Commission's website on October 11, 2005, but the notice, on its face, does not reflect a mailing to any party in interest in any of the 5 enumerated dockets. Moreover, as noted above, Questar's pleading in opposition to Petitioners' intervention is tantamount to an admission that Ball, in light of prior involvement in these dockets, was a *de facto* party in interest. *See, Utah Ass'n of Counties v. Tax Comm'n,* 895 P.2d 825, 827 (Utah 1995), *citing Utah Association of Counties v. Tax Comm'n of the State of Utah ex rel. American Telephone & Telegraph Co.,* 895 P.2d 819, 820-821 (Utah 1995) (even absent formal intervention petition, active participation in agency proceedings is *de facto* intervention and parties who allow such active participation without protest are deemed to have waived right to challenge intervention). But in all events, Ball did not receive any notice of the hearing by mail, as apparently contemplated under Rule R746-100-10 A., or as required under Utah Code Ann. § Section 54-7-1(3)(c) ("[t]he commission shall notify all parties to the proceeding of the terms of any proposed settlement).[4] Under these circumstances, we cannot conclude that notice of the hearing

[4] As a party, in addition to a right to notice that was not received in this matter, Ball would be entitled to invoke Commission Rule R746-100-10 F. 5. b., which mandates that, "[p]arties not adhering to settlement agreements *shall be entitled to oppose the agreements* in a manner directed by the Commission." (Emphasis supplied.) What is more, under the same Rule, the Commission, before accepting the settlement, "may require the parties offering the settlement to show that each party has been notified of, and allowed to participate in, settlement negotiations." This showing was not made in relation to Ball at the October 20th hearing, and could not be made in his case, since it is beyond cavil that, after departing from the Committee in March, 2005, he was not included in any settlement negotiations. These standards, fixed by Rule, supplement the statutory requirements for processing settlements found at Utah Code Annotated, Section 54-7-1(3)(d).

satisfied even the technical requirements for adequate notice under the Commission's own rules.[5]

But the notice appears to be flawed in a more fundamental sense. The Commission's rule on notice is triggered "[w]hen a matter is at issue[.]" There is no pleading, such as a motion, however, that puts the stipulation "at issue" or requests a form of relief in connection with the same, informing parties concerning the law and facts that might support the granting of such relief. The naked stipulation, filed October 13, 2005, suggests a substantial departure from the relief sought in the initial application in docket number 05-057-01, but there is nothing to inform ratepayers who may be surfing the Commission's website for information about gas management cost recovery what these departures mean and why they have been presented to the Commission "all of a sudden" by stipulation. The stipulation, in footnote 4 on page 4, requests "that the Commission

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[5] Public Service Commission Rule, R746-100-10 A., provides that, "When a matter is at issue, the Commission shall set a time and place for hearing. Notice of the hearing shall be served in conformance with Sections 63-46b-3(2)(b) and 63-46b-3(3)(e) at least five days before the date of the hearing or shorter period as determined by the Commission." This Commission Rule, however, does not mesh easily with the circumstances in these dockets and the hearing on approval of the stipulation. Section 63-46b-3(2)(b) applies where adjudicative proceedings are commenced by the agency, and requires, among other things, that notice of that agency action shall be mailed to "each party," and to "any other person who has a right to notice under statute or rule." Section 63-46b-3(3)(e) governs the form and manner of notices issued under Section 63-46b-3(3)(d), which, in turn, requires the presiding officer of a given agency promptly to review requests for agency action and to "notify the requesting party" what action, from a series of alternate actions, is to be taken, including notification that "further proceedings are required to determine the agency's response to the request." Section 63-46b-3(3)(e), in subpart (ii), requires agencies, among other things, to "mail any notice required by Subsection (3)(d) to all parties [presumably all those parties requesting agency action as referenced in Subsection (3)(d)], except that any notice required by Subsection 3(d)(iii) may be published when publication is required by statute." The Commission was not an agency requesting action in these dockets and, hence, the notice requirements of Section 63-46b-3(2)(b) do not seem to apply. Section 63-46b-3(3)(e), which regulates notices to parties requesting agency action in specified circumstances, also does not seem to apply. In all events, these statutes require notices to be mailed to all parties or persons otherwise entitled to notice, and it is unclear from the Commission's web/docket whether

take administrative notice of the information presented in the technical conferences in Docket No. 04-057-09[,]" but notice of the content of this "information" is neither described nor included with the stipulation, and, thus, interested persons are not given an opportunity to evaluate the quality of evidence which apparently is being offered in support of this compromise.[6] The stipulation as a whole, likewise, appears to be predicated upon an agreement between Questar and Questar Transportation Services ("QTS"). Prior proceedings on this issue expressly have entailed approval for such an agreement. In any event, no copy of such an agreement is attached to the stipulation for the review of Commissioners or others, and, hence, we are left in the dark, without notice, of the terms and conditions of this undertaking in the background. Indeed, although the stipulation clearly contemplates a "partnership" and revenue sharing between these affiliates, QTS is not a signatory to the agreement, and all concerned remain un-notified whether, in the absence of such signature, the "contract" is binding upon QTS, whether it merely is an illusory agreement, and whether QTS, as a regulated

(a) notice of the hearing was mailed and whether, (b) if mailed, it was sent to all parties and persons otherwise entitled to notice in the 5 enumerated dockets.

[6] The Commission Rules, R746-100-10 F. 3., provides that the presiding officer at an adjudicative hearing "may take administrative notice or official notice of a matter in conformance with Section 63-46b-8(1)(b)(iv)." Section 63-46b-8(1)(b)(iv) authorizes a presiding officer to "take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of technical or scientific facts within the agency's specialized knowledge." The Utah Rules of Evidence, Rule 201, permit judicial notice of "adjudicative facts" under certain circumstances. But parties reading the stipulation, after October 13th, would not be able to evaluate the admissibility of any evidence under Rule 201, because the "adjudicative facts" sought to be "noticed" are not identified, and the "necessary information" for recognition and evaluation of any proffer was not "supplied" as required under Rule 201(d).

entity in its own right, needs regulatory approval of any sort to enter the "contract" with Questar.[7]

Finally, under all of the circumstances described above, Petitioners believe that the notice is insufficient to satisfy due process in a constitutional sense. *See, e.g., Mullane v. Central Hanover Tr. Co.,* 339 U. S. 306 (1950) and *Reliable Elec. Co., Inc. v. Olson Const. Co.,* 726 F.2d 620 (10th Cir. 1984).

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[7] These procedural complications in addressing the merits of the stipulation in this case may confirm the holdings of the Utah Supreme Court, disapproving the use of stipulations to resolve significant issues arising in rate cases, in *Stewart v. Utah Public Service Com'n,* 885 P.2d 759, 763 n. 2 (Utah 1994), which, in turn, cites, quotes, and discusses *MCI Telecommunications Corp. v. Public Service Commission,* 840 P.2d 765 (Utah 1992).

The settlement approval process in the Wexpro proceeding, by contrast, was "widely publicized," involved no fewer than 8 days of public hearings, numerous disinterested expert witnesses, and outside review. The public was given additional opportunity to make statements, written and verbal, to the Commission. *See, Utah Dept. of Admin. Serv. v. Pub. Serv. Com'n,* 658 P.2d 601, 615 (Utah 1983). The Wexpro procedure is a studied contrast with the expedited, abbreviated, and limited review given to the settlement in this case on October 20th.

IV. THE INTERESTS OF JUSTICE ARE ADVANCED BY INTERVENTION

The interests of justice are advanced by intervention. This benefit is conferred through the participation of Petitioners in many ways. These are listed below, illustratively, but not exhaustively.

The Commission will receive outside advice from Ball, Geddes, and the nearly 400 customers they represent. These Petitioners, unlike the Division and Committee, are not handcuffed by stipulation from offering genuinely disinterested input. Moreover, as noted in Questar's pleading, Ball has significant involvement with cost recovery issues. As a former director of the Committee, with expertise and experience in the regulatory arena, his analysis and critique will be invaluable to the Commission.

Somebody needs to raise issues in opposition to the stipulation, in order to obtain the illuminating effect of the adversary process. As matters stand at present, there are no adversaries in this process.

Several issues, in opposition to the stipulation, merit exploration. Examples below are but a few of these issues which have not been presented to the Commission but which are critical to determination of the issues the stipulation raises. For example, the *res judicata* issue, noted above, should at least be briefed and argued to the Commission. There is a fundamental and threshold question whether this stipulation has been proposed in derogation of our public utilities code, especially Utah Code Ann. Sections 54-4-26, and, therefore, is unlawful. The issues of whether the quality of the evidence available in support of the stipulation is anything other than hearsay and whether it is relevant to the prudence standards articulated in the 2003 Supreme Court Opinion and the Commission's

own August 2004 Order should be argued. These and other issues merit further investigation and review.

In any event, evaluation of the stipulation at this point seems premature, since Questar Transportation Services has not signed the document. Moreover, it does not appear that, notwithstanding the revenue-sharing provisions in the stipulation, Questar Transportation is intended to be a signatory to the document. The question whether the stipulation is a product of arms'-length bargaining is at the heart of the prudence review. This simple fact -- that Questar Regulated Services did not have its subsidiary, Questar Gas Company, and its subsidiary Questar Pipeline Company's subsidiary, Questar Transportation Services, sign this contract, speaks volumes about the true relationship between these entities. The Commission should elicit testimony on this score.

Finally, the nature of the record is at issue -- and will be further flawed if Petitioners are not allowed to amplify it in separate hearings. The "technical conferences" on which our opponents rely are not truly a public record which can support a stipulation or a Commission decision. None of the technical conferences were recorded, and those presenting information are not under oath, nor are they cross-examined. The information presented is not provided to the public ahead of time, so that there is only limited opportunity for anyone to prepare any rebuttal information which is meaningful or significant. Indeed, the actual public witness hearing on the stipulation was 16 minutes long -- hardly the type of thoroughgoing and balanced record upon which the Commission should base a decision that Questar ratepayers should be made to pay millions of dollars in increased rates.

CONCLUSION

Petitioners have demonstrated that their request for intervention should be granted. They are ratepayers whose own bills for natural gas will be increased by the Commission's decision in this matter. More importantly, they are the sole voice for other ratepayers -- almost 400 of whom have themselves requested representation in these dockets -- whose rates will also be increased pursuant to the stipulation. As such, their legal interests will be substantially affected by these proceedings. Nor will the Petitioners' intervention impair the interests of justice or the orderly and prompt conduct of this matter. To the contrary, given that the Division and the Committee are parties to the stipulation, they have rendered themselves unable to advocate for anyone or to present to the Commission a record which can legitimately support a determination. It is difficult to see how justice can be served at all without the Petitioners' knowledgeable argument and presentation of additional evidence on basic points which must be addressed pursuant to the Supreme Court's prior rulings in this case, not least of which is the required showing of prudence. Finally, Petitioners' intervention will not delay these proceedings materially. Questar itself waited 7 years to address the issues in these dockets, and Petitioners' involvement may save all the parties another roundtrip to secure the Supreme Court's further review.

Dated this 13th day of December, 2005.

Respectfully submitted,

Janet I. Jenson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Opposition to Request for Intervention in Dockets 04-057-04, 04-057-09, 04-057-11, 04-057-13 and 05-057-01 of Claire Geddes and Roger J Ball (collectively known as Petitioners) was hand delivered, sent by United States mail, postage prepaid, or mailed electronically this 13th day of December 2005, to the following:

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