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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application to Remove GSS and EAC Rates from Questar Gas Company's Tariff	Docket No. 06-057-T04 **RESPONSE OF QUESTAR GAS IN OPPOSITION TO STIPULATION POSITION STATEMENT OF ROGER J. BALL**

Questar Gas Company (Questar Gas or the Company), pursuant to Utah Admin. Code R746-100-4.D, responds in opposition to the "Stipulation Position Statement" (Ball Statement) filed by Roger J. Ball in this matter on March 14, 2007. The Ball Statement, filed in addition to "Stipulation Testimony of Roger J. Ball" (Ball Testimony), not only states Mr. Ball's position in opposition to approval of the GSS/EAC Stipulation filed by

all but two parties in this docket on February 15, 2007, it contains legal argument on a variety of issues and argument based on alleged facts not in the record that are irrelevant to the issues before the Commission in this docket. Questar Gas ask the Commission not to give any weight to those portions of the Ball Statement.

INTRODUCTION

Questar Gas filed its application in this docket on October 6, 2006. The application was consistent with the recommendation of a majority of the QGC GSS/EAC Task Force established by the Commission in Docket No. 05-057-T01. It proposed that the GSS (GSS, IS-4 and ITS) and EAC rates, which had been charged to customers in various expansion areas pursuant to orders of the Commission approving them, be removed from the Company's tariff, that the revenues being collected from these rates be rolled into the GS-1, I-4 and IT rate schedules in a revenue-neutral manner and that tariff language be adopted requiring future expansion communities to fund expansion costs from third-party sources before expansion commenced.

Following a scheduling conference, the Commission set the following schedule: the deadline for filing petitions to intervene was December 1, 2006, direct testimony or position statements were to be filed by January 16, 2007, rebuttal testimony was to be filed by February 2, 2007, and the hearing was scheduled for February 8, 2007, including a public witness hearing on that day. In response to requests from rural communities subject to GSS or EAC rates, the Commission provided notice of a further public witness hearing to be held in Beaver on February 15, 2007.

Mr. Ball did not file a petition to intervene by December 1, 2006 and did not file direct testimony or a position statement by January 16, 2007. Instead, on January 25,

2007, he filed a request to intervene. In the request, Mr. Ball stated that he had not yet developed a position in the matter. The Commission granted Mr. Ball's request the same day.

On February 6, 2007, the Division of Public Utilities (Division), Committee of Consumer Services (Committee) and Questar Gas informed the Commission that they had reached agreement in principle on a settlement, subject to approval of the Committee, and requested that the Commission convene the hearing on February 8, 2007 to allow parties wishing to do so to offer their testimony and then allow the parties to convene a settlement meeting at which the proposed settlement would be presented to all parties for discussion. They requested that the Commission proceed with the public witness hearings as scheduled. They requested that the Commission schedule an additional hearing on February 28, 2007, at which they would offer their testimony, including testimony in support of their stipulation if finally agreed upon, and allow cross examination of their testimony. The Commission provided notice of the additional hearing and of the potential settlement to all parties and the public on February 7, 2007.

At the hearing on February 8, 2007, the Commission directed that all testimony previously filed be offered and subjected to cross examination. Testimony of witnesses for the Division, Committee, Questar Gas, Salt Lake Community Action Program (SLCAP), Beaver County Economic Development Corporation, Beaver County School District, Beaver Valley Hospital, Carbon County and Emery County was offered and admitted without objection and Mr. Ball was allowed to cross examine the witnesses. At the public witness hearing that afternoon, three individuals provided public testimony, two of whom opposed the application. Mr. Ball was allowed to cross examine the

President and CEO of the Economic Development Corporation of Utah, who was a public witness supporting the application.

Thereafter, settlement discussions took place among all parties that wished to participate and continued during the next several days. At its regularly scheduled meeting on February 13, 2007, the Committee approved the settlement. The GSS/EAC Stipulation (Stipulation) was thereafter signed by all parties except SLCAP and Mr. Ball and filed on February 15. The Commission served a copy of the Stipulation on all parties on February 16.

On February 14, Mr. Ball filed a request for reconsideration of the notice of hearing on February 28, requesting additional time to respond to the Stipulation, requesting that a series of public notices (subject to his personal approval) be published by Questar Gas, and requesting additional procedures.

On February 15, 2007, the previously scheduled public witness hearing was held in Beaver. A total of 13 public witnesses, including Mr. Ball, presented testimony, each of whom except Mr. Ball supported the application and the concepts of the Stipulation.

On February 16, 2007, the Commission issued a scheduling order, vacating the hearings set for February 28, directing parties to file testimony or position statements on the Stipulation by March 14, 2007 and scheduling a hearing and public witness hearing on the Stipulation on March 27, 2007.

On March 14, 2007, testimony in support of the Stipulation was filed by the Division, Committee and Questar Gas. In addition, position statements in support of the Stipulation were filed by Beaver County, Beaver County Economic Development Corporation, Beaver City, Milford City, Beaver Valley Hospital, Beaver County School

District, Carbon County Economic Development, Emery County, Cleveland Town, Elmo Town and Town of Cedar Fort. SLCAP filed a neutral position statement, and Mr. Ball filed the Ball Statement and Ball Testimony in opposition to the Stipulation.

In the Ball Statement, Mr. Ball, after attempting to preserve his right to further develop his position or change his mind, states nine reasons that he believes support rejection of the Stipulation. The first reason is a procedural one, that all parties were not notified of all settlement negotiations. The second is that the Division and Committee engaged in illegal conduct in entering into the Stipulation. The third, the fourth, part of the fifth and the ninth challenge the Commission's authority to approve the Stipulation. The balance of the fifth and the sixth, seventh and eighth reasons argue that the Stipulation should be rejected. Many portions of the Ball Statement contain legal argument.[1]

In support of his seventh reason, that the Stipulation would transfer from shareholders to customers more of the risk of earning a reasonable return on investment in extending the Company's system, Mr. Ball speculates about the motives of Questar Gas and its parent Questar Corporation. In so doing, he makes incorrect and irrelevant allegations that are obviously an attempt to prejudice the Commission. In making these unwarranted attacks, Mr. Ball transgresses the reasonable bounds of appropriate advocacy.

[1] Mr. Ball has previously acknowledged that he lacks the training and qualifications to make legal arguments. *See* Surrebuttal Argument for Interim Rate Decrease, Docket No. 05-057-T01 (Utah PSC May 12, 2006) at 7.

ARGUMENT

I. SETTLEMENTS ARE ENCOURAGED AS A MEANS TO RESOLVE MATTERS BEFORE THE COMMISSION, AND THE STIPULATION IN THIS CASE WAS APPROPRIATELY NEGOTIATED AND NOTICED.

The first and second reasons provided by Mr. Ball for rejection of the Stipulation reflect his opposition to the resolution of cases by settlement.[2] The first, that all parties were not notified of all settlement negotiations, exalts form over substance.[3] The second, that the Division and Committee acted illegally in signing the Stipulation, is incorrect.

It is apparent from section 54-7-1 that informal resolution of matters before the Commission is encouraged. Furthermore, in *Utah Dept. of Admin. Services v. Public Serv. Comm'n*, 658 P.2d 601, 613-614 (Utah 1983), the Utah Supreme Court stated that the public policy favoring settlement of disputes applies to controversies before the Commission. Settlements carry no taint of impropriety; they are the preferred way to resolve disputes before the Commission.

A. Negotiation and Notice of the Stipulation Were Appropriate.

The Ball Statement acknowledges that the Commission notified all parties that certain of the parties were engaged in settlement discussions and invited all parties to participate in settlement discussions following the February 8, 2007 hearing. Ball

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[2] *See, e.g., id.*; Request of Petitioners for Reconsideration of the Report and Order of the Utah Public Service Commission Issued January 6, 2006, Approving a Gas Management Cost Stipulation, Docket Nos. 04-057-04, 04-057-09, 04-057-11,04-057-13, 05-057-01 (Utah PSC Feb. 6, 2006) at 46-47.

[3] Another example of this is Mr. Ball's regular complaint that no motion has been filed requesting approval of a stipulation in this and other cases. *Id.* at 70. When parties file a stipulation proposing a settlement of all issues in a case and request the Commission to schedule a hearing on the stipulation, it is readily apparent that the stipulating parties are asking the Commission to approve the stipulation in lieu of proceeding with a fully contested hearing. Furthermore, no Commission rule requires a motion to be filed requesting approval of a stipulation.

Statement at 2. However, Mr. Ball nonetheless complains that Questar Gas, the Division and the Committee apparently had settlement discussions sometime between February 2 and 8 without notifying other parties.

Section 54-7-1 does not require that all parties be notified of settlement negotiations. To the contrary, section 54-7-1(3)(b) expressly acknowledges that settlements may be between two or more parties, and section 54-7-1(3)(c) requires the Commission to notify parties of a proposed settlement, not settlement discussions.

The Ball Statement cites Utah Admin. Code R746-100-10.F.5.b and claims that the Division, Committee and Questar Gas contravened it. That rule states that "[b]efore accepting an offer of settlement, the Commission may require the parties offering the settlement to show that each party has been notified of, and allowed to participate in, settlement negotiations." Given that the governing statute does not contain this requirement, the Commission's use of the permissive word "may" is significant. In any event, the issue is moot in this case because the parties were notified of and allowed to participate in settlement discussions as the Ball Statement acknowledges.

Apparently, Mr. Ball believes that the rule requires that parties not only be allowed to participate in some part of settlement discussions, but that they must be notified of and allowed to participate in any and all settlement discussions. But the rule does not say that and the statute suggests otherwise. Furthermore, the practicalities of settlement also suggest otherwise. Until at least two parties in a case have some reason to believe that settlement might be a reasonable possibility, there is no reason to convene a settlement conference of all parties. Furthermore, where only certain parties have filed testimony and taken a position on the matter, as in this docket, there would be no reason

to contact others who have not taken a position until the parties considering settlement know that they have some reason to do so.

Based on the rebuttal testimony filed on February 2, 2007, it became apparent that the positions of the parties actively participating in the matter were coalescing. Therefore, contact was made among those parties to see if compromise to bridge the relatively small gaps that continued to separate their positions might be possible. As soon as it became apparent that it would, the parties requested that the Commission allow them to meet with all parties to discuss and obtain input on their agreement in principle rather than proceeding with the litigated hearing. There is no basis for the Ball Statement's complaint. Mr. Ball had the opportunity to engage in settlement discussions before the Stipulation was reached.

In addition, any requirement that all parties be notified of and allowed to participate in any and all settlement discussions would be unconstitutional. Citizens of the United States are generally free to meet and associate with others of their own choosing and generally cannot be compelled to meet with others.[4] While it is perfectly appropriate to require that all parties to a matter be given notice of a proposed settlement among two or more parties and be given an opportunity to provide their positions on the settlement, it would be unconstitutional to require a party to meet with all other parties anytime it wished to explore.[5]

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[4] *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate."); *Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F.3d 839, 858 (2nd Cir. 1996) ("The right to associate also includes the right not to associate.").

[5] This is not to suggest that a court or agency cannot require parties to hold settlement conferences or to otherwise meet for a variety of purposes in the course of litigation. Rather, a

B. Participation of the Division and Committee in the Stipulation Is Appropriate

The Ball Statement contends that the Stipulation should be rejected because the Division and Committee acted illegally in entering into it. Questar Gas will generally defer to the Division and Committee on this issue. However, given the policy in favor of settlement and the statutory charges of the Division and Committee, the argument is plainly incorrect.[6]

Questar Gas will respond further only on the argument that it is improper for the Division and Committee to agree to support a stipulation both before the Commission and on appeal. Mr. Ball has previously made this argument, and the Commission rejected it.[7] Just as in that case, the Division and Committee thoroughly reviewed and analyzed the issues and concluded that it was in the public interest to settle the matter prior to entering into the Stipulation.

Furthermore, when parties negotiate a stipulation, they typically are required to compromise their positions in order to reach agreement. They weigh the risks and costs of litigation in making a decision that compromise is in their best interests or the best interests of those they represent. It would make no sense to compromise if any party were free to unilaterally withdraw from a stipulation. Although parties preserve the right

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court or agency cannot prohibit one party from meeting privately with another party unless all other parties are allowed to be present.

[6] *See, e.g.*, Utah Code Ann. §§ 54-4a-1(1)(i) (the Division may "engage in settlement negotiations and make stipulations and agreements regarding matters within the jurisdiction of the Public Service Commission") and 54-10-4 ("[t]he committee shall be an advocate on its own behalf . . . of positions most advantageous to a majority of residential consumers *as determined by the committee*") (emphasis added).

[7] *See* Order on Request to Intervene, Docket Nos. 04-057-04, 04-057-11, 04-057-13, 04-057-09, 05-057-01 (Utah PSC Jan. 6, 2006) ("*Intervention Order*") at 10-11.

to resume their former positions if a stipulation is not approved, it is apparent that defense of those positions will be more difficult once a compromise position has become public. That is one of the reasons settlement discussions are confidential and may not be disclosed during trial. *See, e.g.*, Utah R. Evid. 408. Therefore, the public policy encouraging informal resolution of disputes before the Commission would be essentially nullified if the Division and Committee were free to gain compromises from other parties while reserving the right to withdraw from the corresponding compromises they have made.

Section 54-7-1 removes any concern about stipulation by the Division and Committee depriving the Commission of any necessary information because it requires the Commission to notify other parties of a settlement and to provide them a hearing if requested and to determine that the settlement is just and reasonable in result and supported by substantial evidence after considering the significant and material facts. Utah Code Ann. § 54-7-1(3)(c), (d) & (e)(ii). Mr. Ball's concern seems to be that even after the Division or Committee, in fulfillment of their statutory objectives, have determined that settlement is in the public interest, they must still attempt to advocate a contrary position. This argument makes no sense, but is rather consistent with Mr. Ball's view that if the Division or Committee do not reach the same conclusion he has, they must be acting contrary to the public interest and should advocate his position and presumably any others rather than the one they have chosen after thorough investigation and analysis.[8]

[8] *See Intervention Order* at 7-11.

II. THE COMMISSION HAS AUTHORITY TO APPROVE THE STIPULATION.

The Ball Statement contends that the Commission may not approve the Stipulation because (1) it cannot permit a permanent rate change outside a general rate case, (2) it cannot consider economic development, (3) it is beyond the Commission's jurisdiction, and (4) it is barred from interfering with municipal functions. These contentions are without merit. The Commission has authority to approve the Stipulation.

A. The Stipulation Does Not Involve a Permanent Rate Change.

The Commission has authority to approve a permanent rate change outside of a general rate case in a variety of circumstances, including an abbreviated rate proceeding such as this one.[9] All of the GSS and EAC rates at issue in this case, which were non-revenue-neutral, were approved outside a general rate case. Therefore, elimination of the same rates in a revenue-neutral manner would not require a general rate case. However, other parties in this case took a different position earlier. One of the purposes of the Stipulation was to resolve this dispute without the necessity of litigation.

The Stipulation provides that Questar Gas will accrue uncollected GSS and EAC revenues with interest into Account 191.8 for the shorter of six years or until the revenues are addressed in a general rate case. Following the conclusion of the one-year review of the Conservation Enabling Tariff (CET) as provided in Docket No. 05-057-T01, any

[9] *See Utah Dept. of Business Regulation v. Public Serv. Comm'n*, 614 P.2d 1242, 1249-50 (Utah 1980). In addition to abbreviated rate proceedings, the Commission has a long history of regularly approving tariff changes involving rate changes outside of general rate cases. *See, e.g.*, Report and Order, Docket Nos. 98-057-13, 99-057-08, 99-057-19, 00-057-03 (Utah PSC Jun. 18, 2001) (approving transfer of research and development costs from the commodity portion of rates to the distribution non-gas (DNG) rates); Order Approving Letter Agreement, Docket Nos. 95-057-30, 96-057-12, 99-057-11 (Utah PSC Mar. 29, 1999) (approving transfer of gathering costs from commodity portion of rates to DNG portion of rates); Supplemental Order, Case No. 7206 (Utah PSC Dec. 18, 1981) (approving discontinuation of expansion area rate and rolling in foregone revenue into Account 191).

party may seek amortization of the balance in the account. Thus, the Stipulation does not result in a current rate change, except a substantial reduction for the few customers on GSS and EAC rates,[10] and the anticipated amortization will likely occur in the context of the CET, a previously approved rate adjustment mechanism that will be further reviewed in an upcoming proceeding.

B. The Commission Has Express Authority to Consider Economic Development as Part of the Public Interest.

As noted in the Ball Statement, section 54-3-1 states that in considering whether rates are just and reasonable, the definition of just and reasonable "may include, but shall not be limited to, the . . . economic impact of charges . . . on the well-being of the state of Utah . . . ." Ball Statement at 7. In addition, the public interest that the Commission is to consider in all of its actions, includes the broad public interest of the state.[11]

Despite this broad authority, the Ball Statement argues that the Commission does not have authority to consider the impact of rates on economic development based on "the sense" of the holding in *Mountain States Legal Foundation v. Utah Public Serv. Comm'n*, 636 P.2d 1047 (Utah 1981) and "the same feeling" from *Kearns-Tribune Corp. v. Public Serv. Comm'n*, 682 P.2d 858 (Utah 1984). Ball Statement at 7. In *Mountain States Legal Foundation*, the Court reversed a Commission order approving a special rate for senior citizens on the ground that the Commission failed to provide a rational basis

[10] By statute, rate reductions do not require a hearing, much less a general rate case. Utah Code Ann. §§ 54-7-12(4)(a) & (5)(a).

[11] *Bradshaw v. Wilkensen*, 94 P.3d 242, 249 (Utah 2004) ("The Commission must consider the interests of the utility's customers and the interests of the public."); *Re Utah Power and Light Company*, Docket No. 87-035-27 (Utah PSC Sept. 28, 1988)("The phrase 'to the public in this state' was not employed ritualistically, but is a direct recognition of our responsibility to safeguard the public interest of Utah and it citizens.").

for the special rate. 636 P.2d at 1058-1059. The issue of whether the Commission had authority to consider the impact of rates on economic development was not discussed in the opinion. In *Kearns-Tribune*, the Court reversed a Commission order requiring a utility to place a tag-line on advertisements stating that the advertisements were not paid for with funds included in rates. While recognizing the Commission's broad authority in ratemaking, the Court concluded that the requirement was beyond the authority expressly or implicitly granted by statute. 682 P.2d at 860-861. Again, there was no discussion of whether economic development may be considered in determining whether rates are just and reasonable.

Here, as already noted, section 54-3-1 expressly acknowledges that the impact of rates on the economic well-being of the state is a valid consideration for the Commission. Therefore, the problems identified in the authorities cited by the Ball Statement are not present in this case.

C. Approval of the Stipulation Is Not Beyond the Authority of the Commission.

Point five of the Ball Statement argues that the Commission does not have jurisdiction to approve the Stipulation because it found that it did not have "jurisdiction to approve preferential and discriminatory subsidies of the magnitude contemplated in the application in Docket No. 97-057-04" and because section 54-3-8.1, that temporarily provided such jurisdiction, is no longer in effect. The Ball Statement further contends that the passage of House Bill 180 by the Legislature in the 1998 General Session confirms that the Commission lacks jurisdiction. Ball Statement at 9. Although the Ball Statement characterizes this as a question of jurisdiction, it is apparent that the subject being discussed is the authority of the Commission. This argument is incorrect because:

(1) the Commission did not conclude that it lacked authority in Docket No. 97-057-04, (2) HB 180 was not passed to correct any lack of authority and (3) approval of the Stipulation does not involve the same question dealt with in the 1997 Order[12] and in section 54-3-8.1.

In Docket No. 97-057-04, Questar Gas sought approval of a system expansion into Panguitch based on rates that for that single community would have resulted in other customers picking up approximately $1.9 million of the expansion costs. The Commission rejected the application because it concluded that the evidence did not demonstrate that the Company's other customers would receive a benefit sufficient for them to bear the excess costs, that the rate proposed would be impermissibly discriminatory and because the rates were not just and reasonable. The Commission did not conclude that it lacked authority to approve the rates or the expansion.

In response to that decision, the Legislature passed HB 180 to encourage "extension of natural gas service to municipalities without natural gas service . . . as a means to assist in economic development and to promote the safety, health, comfort, and convenience of citizens residing in those areas." Utah Code Ann. § 54-3-8.1(1) (1998). The legislation directed the Commission to approve such extensions if specified conditions were met. *Id.* The legislation contained a sunset clause repealing section 54-3-8.1 on December 31, 1999. The legislation also provided that approval of such extensions would not violate sections 54-3-8 and 54-4-8. Thus, the legislation did not grant the Commission authority, but rather directed it to approve extensions like the

[12] Order Denying Application for Rural Connection Charge Tariff, Docket No. 97-057-04 (Utah PSC May 9, 1997).

Panguitch extension and clarified that such an extension would not be deemed discriminatory or preferential.

The Stipulation does not seek approval to extend natural gas service into any community in the state. Rather, the Stipulation seeks to discontinue GSS and EAC rates imposed on customers in communities for previous expansions. Customers in those communities have been paying the expansion area rates for several years and for longer periods or in greater amounts per customer than customers in any other expansion areas have been required to pay. The question is not whether the Commission may approve a new extension of service into a previously unserved community at rates that would involve a substantial rate increase for all other general service customers. The question is whether the Commission may discontinue prior expansion area surcharges for several communities based on the facts and circumstances currently before it. The 1997 Order and HB 180 do not address that issue and the automatic repeal of section 54-3-8.1 does not affect it.

D. The Ripper Clause Has No Application to This Case.

The Ball Statement claims that the Commission does not have authority under Article VI, Section 28 of the Utah Constitution to approve the Stipulation. Article VI, Section 28 of the Utah Constitution is known as the Ripper Clause. It prohibits the Legislature from delegating municipal functions to special commissions, such as the Commission. The crucial question in cases applying the Ripper Clause to the Commission is what is a municipal function. *See, e.g., Utah Associated Municipal Power Systems v. Public Serv. Comm'n*, 789 P.2d 298, 301-302 (Utah 1990). In determining whether the Commission is performing a municipal function, the Court applies a balancing test considering, among other things,

> the relative abilities of the state and municipal governments to perform the function, the degree to which the performance of the function affects the interests of those beyond the boundaries of the municipality, and the extent to which the legislation under attack will intrude upon the ability of the people within the municipality to control through their elected officials the substantive policies that affect them uniquely.

Id. at 302.

Applying this test to considering the impact of rates on economic development, it is clear that the Commission is not engaging in a municipal function. First, economic development is not exclusively a municipal function, but is clearly also a state function. If that were not the case, many parts of Title 63, Chapter 38f of the Utah Code, creating the Governor's Office of Economic Development and authorizing it to engage in all sorts of economic development activities in communities throughout the state, would be unconstitutional. Second, it is clear that economic development in the communities in question does affect those beyond their boundaries. In fact, the testimony in this case is both that communities lose economic development opportunities to other communities as a result of the GSS and EAC rates and that citizens located outside their communities are affected by economic development within the communities.[13] Third, setting of public utility rates is clearly a matter within the exclusive jurisdiction of the Commission and is not something that interferes with the ability of the communities to control through their elected officials policies that effect them uniquely. To the contrary, it is Commission exercise of its unquestioned authority here to set and continue the GSS and EAC rates that has affected these communities. Unlike the circumstances presented in other Ripper

[13] *See e.g.*, Direct Testimony of Michael B. McCandless, page 3, lines 14-24; Direct Testimony of Delynn Fielding, page 2, lines 12-19; Prefiled Testimony of Dr. Ray Terry, lines 24-39.

Clause cases where municipalities challenged the authority of a special commission to usurp what they believe are their functions, here the municipalities are supporting the Commission's use of its authority in a manner that will be beneficial to them.

III. THE STIPULATION DOES NOT RESULT IN RATES THAT ARE UNDULY PREFERENTIAL OR DISCRIMINATORY OR THAT ARE CONTRARY TO PRIOR ORDERS.

Citing *Mountain States Legal Foundation* and the 1997 Order, the Ball Statement argues in point five that removal of GSS and EAC rates would be discriminatory in violation of section 54-3-8. The Ball Statement also argues in points five and six that approval of the Stipulation would be contrary to the 1997 Order and other orders approving the GSS and EAC rates. This argument is incorrect for four reasons. First, issues of undue discrimination are largely fact based. The record in this case contains substantial evidence that failure to remove the rates would be unduly discriminatory, not the opposite. Second, elimination of the GSS and EAC rates, which single out certain localities and a subgroup of general service customers for different treatment is consistent with section 54-3-8 and *Mountain States Legal Foundation*. Third, the Commission has broad discretion in defining customer classes and in approving rates for different customer classes. Fourth, the Stipulation is not contrary to the prior orders and, even if it were, the Commission is entitled to change its mind.

A. The Evidence in This Case Establishes That It Would Be Discriminatory Not to Remove the GSS and EAC Rates.

A principal issue in this case is whether it is appropriate for the "surcharges" included in the GSS and EAC rates to be discontinued and spread across all other customers of the same class. This issue raises a fundamental question in ratemaking, whether a single rate should be charged to a group of similar customers or whether

different rates should be charged to different subgroups of the group of customers on the basis of different costs of serving them. There is no easy answer to this question, but it is clear that in deciding the question, the Commission is making a policy determination based on the facts in the record.[14]

The Ball Statement relies on what it apparently regards as a self-evident truth in support of its view that elimination of the GSS and EAC rates will be discriminatory to the balance of the Company's general service customers.[15] While no one disputes that costs per customer associated with extending the Company's system to provide service in the communities in question were probably greater than the average investment required to serve existing customers at the time service was extended, the testimony in this matter is unanimous that that is generally the case.[16] Furthermore, although new customers have typically been required to pay a contribution in aid of construction (CIAC) to mitigate the impact of this fact on existing customers, the CIAC is only a portion of the extra amount, balancing the interests of the new and old customers.[17] The testimony establishes that GSS and EAC rates were not established based on the precise costs of extensions to serve

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[14] *Mountain States Legal Foundation*, 636 P.2d at 1051 ("This Court's scope of review of Commission orders which are attacked for establishing unreasonable or discriminatory rates is narrow. . . . Section 57-7-16, U.C.A. provides in pertinent part: The findings and conclusions on questions of fact shall be final and shall not be subject to review. *Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination*.") (emphasis added).

[15] The view must be self-evident to Mr. Ball because is not supported by any testimony, including the Ball Testimony.

[16] Stipulation Testimony of Gary L. Robinson, lines 118-122. The Ball Statement's argument that "the notion that existing customers always subsidize new customers . . . is a fallacy" (Ball Statement at 12) is not supported by any testimony filed in this case.

[17] Stipulation Testimony of Gary L. Robinson, lines 122-127; Stipulation Testimony of Daniel E. Gimble, page 6, lines 4-25.

customers.[18] The testimony establishes that the GSS and EAC customers in question have been paying their surcharges longer than any prior expansion area customers, that while the GSS customers have been paying the surcharges longer, the EAC customers have paid more on average, that GSS and EAC customers subsidize other general service customers in certain ways, and that any cross subsidization by other general service customers of the GSS and EAC customers through elimination of the GSS and EAC rates and inclusion of the foregone revenues in GS-1 rates in the future would be de minimis.[19]

In short, the testimony establishes that removal of the GSS and EAC rates as proposed in the Stipulation will not be discriminatory.

B. Elimination of the GSS and EAC Rates Is Consistent with Section 54-3-8 and *Mountain States Legal Foundation*.

The prohibition on discrimination and preferences in rates in section 54-3-8 is that a public utility may not establish or maintain any preference or advantage or subject any person to any prejudice or disadvantage or maintain any unreasonable difference between localities or classes of service. Eliminating a difference in rates between different localities and between different customers within the same general service class of customers complies with these directives because the same, and not different, rates will be charged to all customers in the same class and in different localities.

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[18] Direct Testimony of Daniel E. Gimble, page 8, lines 14-16; Supplemental Testimony of Marlin H. Barrow, page 3, line 17 – page 4, line 1; Rebuttal Testimony of Gary L. Robinson, lines 470-474.

[19] Direct Testimony of Marlin Barrow, page 12, line 12 – page 13, line 14, page 14, lines 12-20; Rebuttal Testimony of Gary L. Robinson, lines 52-55, 67-88; Stipulation Testimony of Gary L. Robinson, lines 96-99; Stipulation Testimony of Daniel E. Gimble, page 3, lines 13-29, page 4, line 44 – page 5, line 21, page 6, lines 27-34; Stipulation Support Testimony of Marlin H. Barrow, lines 68-71, 138-147, 156-159.

In *Mountain States Legal Foundation*, a Commission order approving a lower rate for senior citizens based on their generally lower incomes and smaller consumption was reversed because it discriminated against other residential customers. The Court held that the Commission had failed to explain why these different factors justified treating senior citizens differently than other residential customers. 636 P.2d at 1058.

Here, although the Commission may at one time have had a basis to treat customers in expansion areas differently than other customers in the same classes, the testimony establishes that with the passage of time the differences have diminished and the rationale for the different rates has weakened. Therefore, consistent with section 54-3-8, the time has come to eliminate the differences.

C. The Commission Has Broad Authority in Defining Customer Classes and Approving Rates for Different Classes That Do Not Reflect the Relative Cost of Service for the Classes.

Section 54-3-8 has been part of the Public Utility Code in Utah since the code was first enacted in 1917 and has only been amended slightly during the ensuing 90 years. It has been reviewed and applied in several Utah Supreme Court decisions. Similar statutes prohibiting discrimination or preferences between classes of service are in effect in every other state. Despite these facts, prior to the introduction of competition into the local telecommunications markets in the mid-1990s, the Commission and other state commissions had a long history of making substantial deviations from pure cost-of-service principles in pricing telephone service to residential as opposed to business customers, and courts have regularly upheld this inter-class subsidy or discrimination as within the broad authority of the commissions.[20]

[20] *See, e.g., Florida Retail Federation, Inc. v. Mayo, Fla.*, 331 So.2d 308, 312 (Fla. 1976)("Even [if the Court were] persuaded to one policy or the other ('cost of service' or 'value

The Commission and other state commissions were allowed for years to charge business telephone customers double or triple the rate applied to residential customers although the average investment to serve residential customers was in excess of the average investment to serve business customers on the basis of a value of service concept together with a public policy to make telephone service universally available. Furthermore, there has never been a question that the Commission could group all customers in the same class statewide even though the cost to serve the customers in rural areas may have been higher than the cost to serve urban customers. Again, the telephone experience is instructive. The Federal Communications Commission in applying the Telecommunications Act of 1996 to pricing of unbundled network elements expressly acknowledged that implicit subsidies existed between service to customers in rural and urban areas. Given the introduction of competition into the local exchange market, it was recognized that those subsidies would have to become explicit. Accordingly, prices for unbundled network elements were required to be deaveraged into at least three sectors, urban, suburban and rural.[21]

Despite these facts, the Commission has always approved statewide rates for electric service and basic telephone service and, with the exception of the GSS and EAC rates approved for natural gas service in the past, statewide rates for natural gas service. Clearly, the Commission has discretion here to conclude that all general service customers throughout the state belong in one class and that their rates should all be the

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of service' as the essential element, it is not our prerogative to impose that policy upon the Commission. So long as the policy adopted by the Commission comports with the essential requirements of law we may not meddle.").

[21] 47 C.F.R. § 51.507(f).

same. Substantial evidence has been presented in this docket that approval of the Stipulation would be good policy.

D. The Stipulation Is Not Contrary to Prior Orders, and the Commission Can Change Its Mind.

The Stipulation does not request that the Commission rescind or amend any order previously made. In fact, one of the grounds on which the parties contend that the Stipulation is reasonable is that the customers paying GSS and EAC rates pursuant to the prior orders have been doing so for a period of time longer than customers subject to prior GSS and EAC rates were required to pay them. No one is requesting that there be any refund to these customers.

Unlike the questions addressed in the prior orders, the Stipulation does not seek approval to extend natural gas service into any community in the state. Rather, the Stipulation seeks to discontinue GSS and EAC rates imposed on customers in communities for previous expansions. Customers in those communities have been paying the expansion area rates for several years and for longer periods or in greater amounts per customer than customers in any other expansion areas have been required to pay. The question is not whether the Commission should approve a new extension of service into a previously unserved community at rates that would involve a substantial rate increase for all other general service customers. The question is whether the Commission may discontinue prior expansion area surcharges for several communities based on the facts and circumstances currently before it. The prior orders do not address that issue, and the Stipulation does not seek rescission or amendment of them.

Even if the Stipulation were requesting rescission or amendment of a prior order, such a request would be squarely within the authority of the Commission. Section 54-7-

13 authorizes the Commission to rescind or amend prior decisions following hearing, and Utah case law recognizes that the Commission may improve its collective mind regarding what is in the public interest based on current facts and circumstances.[22] Therefore, even if approval of the Stipulation were directly contrary to the 1997 Order or prior orders, which it is not, the Commission has authority to change its mind based on the evidence presented in this docket.

The Ball Statement claims that no evidence has been presented justifying a change in position. Ball Statement at 12. The Ball Statement is wrong. The testimony filed in this docket demonstrates that the prior orders had unintended consequences and that the use of GSS and EAC rates to deal with expansion areas was imprecise.[23] The testimony demonstrates that the prior orders are having a negative impact on the economic well-being of the state.[24] The Stipulation agrees that in the future a different system should be used to deal with expansion areas. Therefore, there is substantial

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[22] *Reaveley v. Public Serv. Comm'n*, 436 P.2d 797, 799-800 (Utah 1968) ("[T]he law does not require an administrative body to be bound by the rules of stare decisis as applied to courts. . . . '[A]dministrative bodies are not ordinarily bound by their prior determinations or the principles or policies on which they are based.' . . . Certainly an administrative agency which has a duty to protect the public interest ought not be precluded from improving its collective mind should it find that a prior decision is not now in accordance with its present idea of what the public interest requires." (citation omitted)). *See also Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1251 (Utah 1992); *Bowen Trucking, Inc. v. Public Serv. Comm'n*, 559 P.2d 954, 956 (Utah 1977) (It is true that the commission's decisions and orders ordinarily become final and conclusive if not attacked in a manner and within the time provided by law. This is not to say, however, that such a decision is res judicata in the sense in which that doctrine is applied in the law courts. The commission has continuing jurisdiction to rescind, alter or amend its prior orders at any time." (citation omitted)).

[23] *See e.g.*, Direct Testimony of Michael B. McCandless, page 3-4, lines 14-24, 52-54; Prefiled Testimony of Robert G. Adams, pages 3-4, lines 25-33, 38-40; Direct Testimony of Delynn Fielding, page 2, lines 12-19; Rebuttal Testimony of Gary L. Robinson, page 19, lines 516-25.

[24] Direct Testimony of Delynn Fielding, page 2, lines 12-19; Direct Testimony of Michael B. McCandless, page 4, lines 35-37.

evidence that the Commission should change its mind on this issue and take a different approach to system expansion in the future, including discontinuing a practice that has proven cumbersome and inadequate.

IV. THE STIPULATION DOES NOT TRANSFER RISK FROM QUESTAR GAS TO ITS CUSTOMERS.

Point seven of the Ball Statement is a rambling and generally irrelevant argument that the Stipulation attempts to transfer the risk of loss of expansion of the Company's system into the affected communities from Questar Gas to its customers. The argument is wrong. However, it is also inappropriate advocacy filled with speculation and unfounded innuendo. In reading this argument, Questar Gas is confident that the Commission will bear in mind that the argument is not evidence and cannot be the basis for a finding of fact in this case. Nonetheless, Questar Gas will briefly respond to some of these arguments.

The Ball Statement first argues that existing customers do not always subsidize new customers because when systems were first built there were no existing customers. While that is a truism, it does not contradict the evidence presented in this case that the typical situation when new customers are added, whether in expansion areas or existing service areas, is that the investment required to serve them exceeds the average system investment at that time.[25] It also does not contradict the evidence that unless a different rate were charged to each customer based on the actual cost to serve that customer there will always be subsidies to one extent or another.[26]

[25] Rebuttal Testimony of Gary L. Robinson, page 5, lines 78-88.

[26] *Id.*

The Ball Statement next argues that Questar Gas effectively blocked municipalization by constructing the extension pipeline to southern Utah. While Questar Gas undoubtedly had reasons for constructing the facilities to serve the areas for which it received a contested certificate in Docket Nos. 86-2016-01, 86-057-03, 86-091-01,86-2019-01, such construction did not foreclose any municipality from building its own system and interconnecting with Kern River or some other supplier to receive its gas supply. In addition, there is nothing wrong with a public utility seeking to extend its service and attacks on such efforts are essentially prohibited collateral attacks on prior Commission orders approving the extensions as in the public interest. *See* Utah Code Ann. § 54-7-14.

Likewise, the Ball Statement's suggestion that Questar Gas has wrongly assured the viability of its expansion by persuading regulators to allow it to put the investment in rate base is a collateral attack on not only the prior orders, but on general rate case orders over a couple of decades. In setting just and reasonable rates, the Commission has explicitly or implicitly determined that the investments included in rate base are for assets that are used and useful and that they are just and reasonable. Furthermore, Questar Gas is not assured of anything as a result of inclusion of assets in rate base. If revenues are less than anticipated or expenses are greater than anticipated, it will not earn the rate of return reasonably necessary to attract capital.

The Ball Statement accuses the Company of imprudence for failing to keep specific accounting records of the costs and revenues associated with each expansion area and claims that the Commission's allowance of this practice "is a disgrace." Ball Statement at 14. As noted in the testimony filed in this case, everyone was aware that the

GSS and EAC rates were based on estimates and projections.[27] Furthermore, the Company accounted for its investments and revenues associated with providing service in these areas in exactly the same way as it accounts for them in all other areas and this accounting has been reviewed in numerous prior cases.[28] Therefore, again the Ball Statement is improperly collaterally attacking prior orders of the Commission contrary to section 54-7-14.

The Ball Statement is flagrantly biased in its view of customer entitlement in arguing that the benefit of Company-owned gas has been eroded by expansion areas. This is a natural consequence of Mr. Ball's view that customers have some sort of ownership interest in the utility and its assets. Under this view of the world, customers of the system who have been on the system the longest apparently have some greater level of entitlement than customers new to the system. And apparently, new customers in portions of the state previously served have a greater entitlement than new customers in expansion areas even though they have been buying gas for identical periods. The accounting and regulatory morass that would be created by acceptance of this view would be monumental, so it is not surprising that it has not been embraced.

The Ball Statement's gratuitous arguments about Wexpro, Questar Pipeline and House Bill 320 in the 2000 General Session of the Legislature have nothing to do with this matter and do not merit a response.

One reading the Ball Statement without knowledge of the facts or the outside world might be led to the conclusion that the motivation for these proceedings was some

[27] *See* footnote 18, above.

[28] Rebuttal Testimony of Gary L. Robinson, lines 501-505.

concern on the Company's part that if it did not eliminate the GSS and EAC rates, it would never be able to recover its ill-conceived investment to extend natural gas service to communities in Central and Southwestern Utah. As the Commission is well aware, it was a letter from Beaver County that led to the creation of a task force by the Commission. It was the conclusion of all members of the task force that the GSS and EAC rates should be eliminated; the Committee only disputed whether the foregone revenues should be rolled into GS-1 rates outside a general rate case. Questar Gas simply filed the application in this docket because the task force recommended that it do so. As a financial matter, Questar Gas is impartial whether the Stipulation is approved or the status quo is maintained. In fact, Questar Gas will be losing $190,000 a year if the Stipulation is approved compared to the status quo, but is willing to accept that loss in the interests of resolving an issue in the public interest.

Finally, Mr. Ball is no more a captive customer of Questar Gas than the residents of any of the expansion communities. He is free to heat his home with electricity, propane, wood or coal just as he states they are.

V. THE STIPULATION IS NOT A FORM OF RETROACTIVE RATEMAKING.

Point eight of the Ball Statement is a severely strained argument that approval of the Stipulation should be barred by an extension of the rule against retroactive ratemaking. Ball Statement at 18. The premise of the argument is that the Stipulation is an attempt to shift the risk of loss for system expansion from shareholders to customers. Questar Gas has already demonstrated the fallacy of that premise. However, the argument also reflects more "legal argument" based on "feeling" and "sense" similar to the Ball Statement's argument on point four repudiated above.

The rule against retroactive ratemaking prohibits the setting of rates designed to recover past under earnings or to refund past excess earnings.[29] While there may be complexities in application of the rule to certain circumstances, this is not one of them. The Stipulation does not seek in any way to allow Questar Gas to recover any past under earnings. Rather, it takes the cost of service found just and reasonable in the last general rate case and proposes that it be spread slightly differently than it was spread in that case in a revenue-neutral manner. And even with respect to the adjustment of the spread, it makes the adjustment entirely within the same general service class of customers, it foregoes recovery of approximately $190,000 of the cost of service and it does not seek an immediate rate change to recover the balance of the adjustment, but rather seeks accrual of the balance for later recovery, most likely through the previously approved CET adjustment mechanism. This is plainly not retroactive ratemaking.

The Ball Statement's argument that approval of the Stipulation would constitute illegal retroactive ratemaking based on an extension of the rule not prohibited by any Utah precedent illustrates an essential problem with the Ball Statement. Since when is an unwarranted and illogical extension of a legal principle acceptable merely because there is no precedent specifically saying that it is not. Under this novel theory of legal analysis, any conceivable principle may be upheld based on lack of authority saying it should not be. The possibilities are endless. Such a theory might make legal analysis easier, but it would be obviously unsound.

[29] *See Utah Dept. of Business Regulation v. Public Serv. Comm'n*, 720 P.2d 420, 420-421 (Utah 1986).

CONCLUSION

Approval of the Stipulation in this matter is well within the Commission's authority and is supported by substantial evidence. The arguments in the Ball Statement to the contrary are incorrect, unpersuasive and, in many cases, irrelevant. Questar Gas respectfully requests that the Commission approve the Stipulation.

RESPECTFULLY SUBMITTED: March 23, 2007.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **RESPONSE OF QUESTAR GAS IN OPPOSITION TO STIPULATION POSITION STATEMENT OF ROGER J. BALL** was served upon the following by electronic service on this 23rd day of March, 2007.

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