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 REQUEST FOR REVIEW, RECONSIDERATION AND VACATION OR CLARIFICATION OF THE COMMISSION'S DECISION AND ORDER DESIGNATING ORAL PRESENTATION AS ARGUMENT

In accordance with UCA §63-46b-12 and UAC R746-100-11(F), I respectfully request that the Commission review, reconsider, and vacate or clarify its Decision and Order Designating Oral Presentation as Argument dated 2 April 2007 (hereinafter, Decision). On subsequent pages I explain why the Commission should take these actions, but I am limited by the text of the Decision itself in understanding the Commission's reasoning. To the extent that the Commission decides to clarify rather than vacate its Order, it may be necessary for me to respond further.

BACKGROUND

The Commission determined that it would treat the live oral testimony – what it styled my "presentation" – that I offered during the 27 March 2007 hearing on the GSS/EAC Stipulation (hereinafter, Hearing) "as argument and not evidentiary testimony". The Commission's rationale was that: "Treating it as argument allows it to be retained in its entirety without the laborious effort of the parties and the Commission to try to remove objectionable portions which could be precluded from the record".

THE DECISION IS OVERLY BROAD, IMPRECISE, UNSPECIFIC, AND VAGUE AND SHOULD BE CLARIFIED REGARDING THE TESTIMONY THAT WOULD BE TREATED AS ARGUMENT INSTEAD OF EVIDENTIARY

Nowhere in its Decision does the Commission specify quite what it means by “Mr Ball’s presentation”. Consequently, it is possible to interpret the decision as applying to everything I said during the Hearing, including stating my name and address and offering corrections to my prefiled written testimony. While I do not believe the Commission intended that, such is not clear from the Decision as issued.

The Decision, in its second and third paragraphs, implies all kinds of breaches of the Standards of Professionalism and Civility and the Rules of Professional Practice. It doesn’t explain how I, who am not a member of the Bar, ought to be subject to these criteria. If I were, nowhere does it point to an objection by any party on the grounds that I breached them. And nowhere does it specify anything that I actually said or did, or explain how any words or deeds breached a specific standard or rule.

In its fourth paragraph, the decision lists numerous objections that were made to my testimony. What is missing are precise and precise reasons for any of those objections: what exactly did I say, why were those particular words objectionable, and why explicitly did the Commission rule as it did on each. Accusations are not proof, and a greater quantity of objections does not guarantee their quality.

I respectfully request that the Commission review its Decision, reconsider, and vacate it, or in the alternative clarify it in those regards.

TESTIMONY THAT WAS NOT OBJECTED TO OR RULED OUT OF ORDER IN A TIMELY MANNER SHOULD BE ADMITTED AS EVIDENTIARY

My testimony during the Hearing is recorded in the Transcript, beginning at line 25 on page 115 until line 22 on page 154. Counsel for the Utah Division of Public Utilities, Michael Ginsberg, interjected at line 16 on page 123, saying three times that he wasn't sure what he was objecting to, and Commission Chairman Richard Campbell allowed me to continue. Counsel for Questar Gas Company, Colleen Larkin Bell, objected on line 17 of page 141, line 2 of page 150, and line 12 of page 151, and on each occasion Mr Campbell allowed me to continue.

Since the bulk of what I said was allowed by the presiding officer during the Hearing, it is improper for the Commission, after the event, to decide to treat it as something other than what I offered it as: testimony.

The segment of my testimony that seemed to attract the most protest was just one of twenty pages in my notes. Ms Bell's objection, beginning at line 19 of page 132, came in response to the first portion:

> *This case is all about politics*. House Bill 180 was entirely political. In this docket, the Commission has heard that Alan Allred, Questar's President, is a member of the Economic Development Corporation of Utah, along with numerous mayors who also happen to be members of the League of Cities and Towns, alongside colleagues from the same communities that stand to benefit here.
>
> The Corporation, the Economic Development Corporation, is an offshoot of the Governor's Office of Economic Development, and several of the governor's political cronies are also members. The Executive Director of the Governor's Office of Economic Development, like the Executive Director of Commerce, is a member of the Governor's cabinet, appointed by the Governor. The Governor has made economic development a key plank in his platform. The Director of the

> Division was appointed by the Executive Director of Commerce, and serves at her pleasure. The Division has no other oversight.
>
> The new Director of the Committee was appointed by the Governor, and is in the process of being given a significantly larger office with windows, even … by the Executive Director of Commerce.[1]
>
> [Emphases in quotations have been added throughout.]

Initially her objection echoed Mr Ginsberg's: "I'm just struggling … with what this is." Then, more specifically: "there are certainly many inappropriate statements … with regard to Questar", clearly referring back to earlier parts of my testimony. Ms Bell then said that she was "not certain that I'm saying that I object to it", and Mr Campbell again allowed me to proceed, although: "I will be sensitive *if the attorneys here feel like* you're going beyond the bounds that are appropriate."

So I continued:

> One of the Governor's cronies, who's a member of the Economic Development Corporation, is the person who told the media that Roger Ball was fired as Committee Director because he'd been a "pit bull." [2]

Mr Campbell interposed at this point without prompting by counsel for any of the stipulants, but again allowed me to continue.

Once again, since all of the preceding was allowed by the presiding officer up to this point, it was improper for the Commission subsequently to order it stricken or, after the event, to decide to treat it as something other than what I offered it as. I respectfully ask the Commission to review, reconsider and vacate as much of its Decision as rules that

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[1] Transcript of Proceedings, March 27, 2007, 9:30am in Docket 06-057-T04, Application to Remove GSS and EAC Rates from Questar Gas Company's Tariff (hereinafter, Transcript): page 131, line 20, through page 132, line 21.

[2] Transcript: page 135, lines 9-13.

those parts of my testimony that were not timely objected to or timely ruled out of order would be regarded as argument and not evidentiary.

IT WAS ADMITTED THAT MY TESTIMONY CONTAINED EVIDENTIARY MATERIAL

In response to Ms Bell's page 133 objection, Mr Campbell said:

> I guess my difficulty is that I'm seeing instances where he's on target on his testimony, and then there's a departure, and then he's back to testimony.
>
> So as far as your testimony, I don't know if you are summarizing testimony as it relates to governor appointments and so forth. That would probably be inappropriate.
>
> Insofar as he's discussing the economic development issue, he has addressed that in his testimony, and certainly we allow summary of his position as it relates to economic development being a criteria used in this case. [3]

On page 160, Mr Campbell asked:

> Mr. Proctor, did you -- is it your belief that there was no live rebuttal testimony in anything he said?
>
> MR. PROCTOR: I believe that there was, on occasion, some rebuttal, and I believe that initially it was, in fact, a summary.

I respectfully request that the Commission review and reconsider its Decision and vacate it, or in the alternative clarify it by specifying those parts of my testimony which would still be regarded as evidentiary.

[3] Transcript: page 133, lines 10-22.

THE AFTER THE FACT DECISION TO TREAT ALL OF THE LIVE ORAL TESTIMONY I OFFERED DURING THE HEARING AS ARGUMENT AND NONE OF IT AS EVIDENTIARY WAS BASED UPON AN OVERLY BROAD AND VAGUE RATIONALE, AND WAS UNJUST, UNREASONABLE, AND PREJUDICIAL

I concluded this segment of my testimony thus:

> One of the mayors is a significant client of one of the members of the Committee. The Chairman of the Committee was nominated by a senior legislator, who no doubt informed him that he would lose his chairmanship unless he voted the right way on this issue. Join the dots any way you like. This is all about politics. But the Commission's decision must ultimately be legally sound, and Stipulants have yet to show how this is to be done.[4]

Now Mr Campbell, sua sponte, invited counsel for the stipulants to identify anything they might wish to have stricken from the record. Counsel for the Utah Committee of Consumer Services, Paul Proctor, responded with a vague and broad list; the Commission without more ado went off the record and returned to immediately strike all that Mr Proctor had requested, whatever that might have been, and more of its own devising, again scarcely defined at all.[5]

Procedurally, this was questionable on several grounds. First, Mr Campbell had clearly indicated that he would hear objections from stipulants' counsel, but then he did not wait for them. This indicated the possibility of prejudice against my presentation of facts in support of my argument that "This case is all about politics." I should have been allowed to enter that foundation. Second, it was overly-broad and vague; it was entirely

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[4] Transcript: page 135, lines 9-13; and page 138, lines 5-14.

[5] Transcript: page 138, line 15, through page 139, line 5. Mr Proctor used the term "any references", Mr Campbell used the same term, as well as "other such references".

unclear what was to be stricken and no precise grounds for striking any specific piece of testimony were given. Third, it was arbitrary and capricious; something I had said clearly pressed some buttons, but what it was, and how that was objectionable, was never clearly stated. It is one thing to allow opposing counsel to object because she or he feels like something inappropriate has been offered, but surely to uphold it the presiding officer must be able to clearly identify the grounds for the objection. Fourth, at no point was I given a reasonable opportunity to respond. (I will address later in this Request the fact that I was appearing alone.) Fifth, Mr Campbell had insisted, over my preference that I do it myself, that Mr Proctor "assist (the Commission) in getting (my) testimony on the record." I question whether, having acted for that purpose as my counsel, it was subsequently proper for Mr Proctor to object to parts of the very testimony he was assisting in offering into evidence.

However, following my testimony during the Hearing, Mr Campbell overruled the Commission's bench order to strike: "frankly I'd give our court reporter a really unachievable task by just a blanket statement of striking certain items." He then proceeded to lay out an entirely different process "to deal with the objections":

> … we'll allow the parties to make a motion once they have a chance to look at transcript, and you can make a specific motion at what you believe is either legal argument or statements that are not related to the testimony or rebuttal testimony. Then we will deal with the motion at that point.
>
> MR. BALL: And I take it, Mr. Chairman, that I'll have the opportunity to respond to those?
>
> CHAIRMAN CAMPBELL: That's what I was going to state next. That's how we would typically work around here. So Mr. Ball will have a chance to respond, and

you'll have a chance to summarize your motion. So we will deal with that after the hearing today. We will now take a 15-minute recess.[6]

To me, this would have been an acceptable potential solution and, going into the recess, it appeared, and I believed it, to be the Commission's final order on the objections, but it, too, was soon overturned.

The 15-minute recess commenced at 2:43pm. Mr Campbell had previously recessed the Hearing twice: at 10:50am he announced a 15 minute break, and went back on the record punctually at 11:05; at 12:08pm he declared a lunch adjournment until 1:30pm, and commissioners retook the stand again promptly at that time. On this occasion, however, the Commission reconvened not after the proclaimed 15 minutes, but 20 minutes later, at 3:03pm, with the following exchange:

CHAIRMAN CAMPBELL: Let's go on the record.

Mr. Proctor?

MR. PROCTOR: Thank you, Mr. Chairman.

During the break I discussed with other counsel a proposal that I would make on behalf of the Committee as a means to, one, close this record and get the matter before the Commission for *decision*, and yet preserve on the record, but not as evidence, not as testimony, Mr. Ball's *statement*. And it would be the entire statement, because *I believe it would be extraordinarily difficult* and really further an unnecessary dispute to try to go line by line and identify those items that violate Rules of Evidence and those items that are borderline summaries of testimony.

... it would be my proposal that the entire of his statement *be treated as argument* …[7]

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6 Transcript: page 155, lines 7-20.

7 Transcript: page 155, line 22, through page 156, line 12; and page 156, lines 15-16.

I have demonstrated how little of my testimony could legitimately be objected to by counsel for the stipulants, and Mr Proctor's argument in favour of the Decision was again overly broad and vague: "I believe it would be extraordinarily difficult and really further an unnecessary dispute to *try to go line by line and identify those items that violate Rules of Evidence and those items that are borderline summaries of testimony*."

What Mr Proctor was saying was that he was unable, at that moment during the Hearing, to "identify those items that violate Rules of Evidence and those items that are borderline summaries of testimony." That supports the thoughtful and considered process the Commission had ordered prior to the recess, and my argument that the Decision, based upon an overly broad and vague rationale offered by Mr Proctor, was unjust, unreasonable, and prejudicial.

The Decision derives largely from this proposal offered by Mr Proctor on behalf of the stipulants. He claimed that "During the break" he had conferred "with other counsel". I was not part of any such conference. The facts that the Commission was late reconvening after the recess and that Chairman Campbell immediately called upon Mr Proctor suggests to me that counsel for the stipulants had communicated their plan to suggest this alternative scheme to bar all of my live testimony from the record to the Chairman and perhaps the other commissioners during the extended break. That the Commission allowed this proposal, which had been developed by counsel for just some of the parties (the stipulants) to the exclusion of the sole opponent (me), to be advanced with so little opportunity for me to consider what was being suggested and to object to it in a thoughtful and comprehensive way is again highly suggestive of prejudice. That the

Commission then adopted it in the Decision is unjust and unreasonable, and the Commission should revert to the process which it had ordered prior to the recess.

I respectfully request that the Commission review, reconsider, and vacate its Decision to treat the live oral testimony that I offered during the Hearing as argument and not as evidentiary testimony. To the extent that the Commission still intends to strike or treat as argument any parts of my testimony, I similarly request that it clarify exactly which parts and, in respect of each, its reasons for so doing.

THERE WAS NO PRIOR BAR TO MY LIVE ORAL TESTIMONY

The Commission commenced its argument in the Decision by claiming that:

> The hearing process the Commission desired to follow was to allow proponents and opponents of the stipulation to have their witnesses provide an oral summary of their prefiled written testimony (if desired), provide live rebuttal testimony (if any) to the prefiled testimony of other parties, and then respond to questioning from the Commission, cross-examination from other parties and re-direct examination.

Such was not communicated prior to the Hearing, nor clearly during the Hearing. In its Scheduling Order Vacating Hearing and Setting an Amended Schedule of 16 February 2007 (hereinafter, Order), the last procedural directive given to parties prior to the Hearing, the Commission wrote:

> … The Committee has requested that the Commission *clarify the procedures to be followed in preparation for and the conduct of* the February 28, 2007, hearing...
>
> 2. Testimony in support of or in opposition to the GSS/EAC Stipulation shall be filed with the Commission on or before March 14, 2007. Copies of such testimony shall be served upon all other parties.

> 3. Interested persons (and parties, to the extent not addressed by any March 14, 2007, testimony) shall file with the Commission a position statement or comments on the GSS/EAC Stipulation on or before March 14, 2007. These position statements or comments shall include a clear and concise statement of the position taken on the approval or rejection of the GSS/EAC Stipulation, the facts and arguments upon which the position is taken, and a summarization of the reasons that the position should be adopted by the Commission.
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> 4. The Commission will *conduct a hearing to receive evidence* and to consider approval or rejection of the GSS/EAC Stipulation on March 27, 2007, beginning at 9:30 a.m. …

Nowhere did the Order state that additional testimony would not be permitted after 14 March nor during the Hearing; indeed it specifically said that one of the purposes of the Hearing would be "to receive evidence". Nor did the Order indicate that the evidence the Commission would receive during the Hearing would be limited to written testimony, prefiled on 14 March or otherwise.

Mr Campbell introduced the Hearing thus:

> I believe it was the Commission's intent to first allow the proponents of the stipulation to present their testimony, and then we would ask questions of those panelists, and then we will *allow the opponents of the stipulation to present their testimony* and so forth.[8]

After the lunch break, and following some redirect examination of Questar Gas Company's witness, Mr Campbell invited Mr Proctor to "assist us in getting (Mr Ball's) testimony on the record."[9] In response to Mr Proctor, I offered some corrections to my prefiled written testimony. Mr Proctor then offered my prefiled written Stipulation Testimony (hereinafter, Testimony), Qualifications & Experience, and Stipulation Supplementary Testimony (hereinafter, Supplementary Testimony), including Exhibit

[8] Transcript: page 10, lines 2-7.

[9] Transcript: page 111, lines 8-14.

1,[10] into evidence. While the stipulants may not have liked the fact that I had filed Supplementary Testimony after 14 March, none of them objected to its admission, and Mr Campbell admitted it without demur.[11]

After Mr Proctor introduced me and offered my prefiled written testimony into the record, the following exchange took place:

> Q. (By Mr. Proctor) Mr. Ball, did you have a summary of your testimony that you wish to give?
>
> A. Yes, please.
>
> THE WITNESS: Chairman, I have some additions as well if I may be permitted to make them at this time.
>
> CHAIRMAN CAMPBELL: We are allowing live rebuttal testimony. Go ahead.[12]

I then proceeded to offer my additional testimony and a summary of my testimony.[13]

Mr Campbell and counsel for the stipulants made numerous references to their expectations about the nature of my testimony counter to the procedural order and his ruling on my ability to offer additional testimony.[14] However, at no point has counsel for any of the stipulants or the Commission pointed to any statute or rule barring additional

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[10] Respectively, Stipulation Testimony of Roger J Ball (subsequently marked RJB Exhibit 1.0 at the Hearing), Roger J Ball – Qualifications & Experience (RJB Exhibit 1.1) dated 14 March 2007, and Stipulation Supplementary Testimony of Roger J Ball (RJB Exhibit 2.0) including Exhibit 1 (RJB Exhibit 2.1) dated 23 March 2007, in Docket 06-057-T04, In the Matter of the Application to Remove GSS and EAC Rates from Questar Gas Company's Tariff.

[11] Transcript: page 115, lines 1-16.

[12] Transcript: page 115, lines 17-24.

[13] Transcript: Mr Ginsberg, page 123, line 16, through page 124, line 1; Mr Campbell, page 124, lines 2-4; Ms Bell, page 132, line 22, through page 133, line 9; Mr Campbell, page 133, lines 10-22, and page 134, line 22, through page 135, line 7; Mr Proctor, page 156, lines 13-15, and page 160, line 14, through page 161, line 1.

[14] Transcript: page 115, line 26, through page 154, line 22.

testimony, and there was no motion, nor any order, to bar additional testimony, at hearing.

I respectfully invite the Commission to review its Decision and, to the extent that it was predicated upon any assumption that additional testimony should not be allowed, reconsider the Decision so that the additional testimony is treated as evidentiary, and that the Commission clarify what it has done in this regard.

EFFECTIVE INTERVENTION BY INDIVIDUALS AND ENTITIES IS IN THE PUBLIC INTEREST

In contrast to the fully-litigated proceedings of previous years, utility strategy over the past decade has increasingly been to use task forces and other stratagems to find accommodations with the Division, either before filing or shortly thereafter, and prior to hearings other than procedural ones. Since 1998, in almost every Questar case the Division has entered into a stipulation with the Company, as both it and the committee have done in the past three Pacificorp general rate cases. In the past two years, the Committee has also shown a propensity for settling matters with Questar.

When I am not satisfied that my interests as a customer are being vigourously represented by the State agencies I help pay for, I must either brace myself to accept what I expect will be the unjust and unreasonable results, or intervene. The costs of intervention in even a case projected to have a relatively minor impact on my bill are high if only in terms of economic opportunities sacrificed to commit the necessary time. Additionally, I must finance my own costs, while ratepayers such as I fund the

Committee's annual budget of some $1.5M, the Division's $3.5M, and Questar's uncapped regulatory expenses. Moreover, I am but one person compared with perhaps nine plus consultants at the Committee, 30-40 at the Division, and goodness knows how many at Questar and Stoel Rives.

I appreciate the fact that the Commission has neither required individuals and entities to be represented by counsel, nor signaled that it intends to do so in the future. Such a requirement might very well make it impossible for individual customers or entities to participate in administrative proceedings before the Commission. As we have seen in this case, had the Commission received testimony, argument, and legal argument only in favour of the Stipulation, there might have been a very different outcome. Clearly, the Commission's existing policy of facilitating the effective intervention of less well-resourced individuals and entities is in the public interest.

Given that customers cannot know whether they need to intervene until the Division and Committee have made their positions known, which often isn't clear until proceedings are well advanced, the Commission should also accommodate late intervention, extend discovery, encourage and if necessary compel response to discovery, and be generous in extending schedules to allow individuals and entities to intervene effectively.

EFFECTIVE INTERVENTION BY INDIVIDUALS AND ENTITIES SHOULD BE FACILITATED

The Commission acknowledges in the second paragraph of its Decision that it "allows individuals and entities to participate in its administrative proceedings through self-

representation, without a retained attorney". Indeed Commission rules specifically permit parties to appear in their own behalf:

> Parties *may* be represented by an attorney … Individuals who are parties to a proceeding … may represent their principals' interests in the proceeding.[15]
>
> Parties to a proceeding before the Commission … may participate in a proceeding including the right to present evidence, cross-examine witnesses, make argument, written and oral, submit motions, and otherwise participate as determined by the Commission.[16]

I have participated in various proceedings before the Commission in my own behalf, without separate counsel, so no-one should have been surprised when I did so on this occasion. I cross-examined witnesses in the 8 February hearing, submitted a position statement containing legal argument, and prefiled written testimony and supplementary testimony in this Docket. Clearly both the Commission and the stipulants ought to have expected that I might exercise the fullest range of rights accorded me by UAC R746-100-5.

Generally, in past proceedings before the commissioners, customer intervenors, whether individuals or entities, who have been unrepresented by attorneys have limited their participation to offering testimony. As a rule, their positions have been sufficiently in harmony with those of the Committee to allow its attorneys to introduce them, to offer their testimony into evidence, and to afford them some protection from the objections and during the cross-examination of opposing counsel. That experience can no longer

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15 Utah Administrative Code R746-100-6B.

16 Utah Administrative Code R746-100-5.

be relied upon, and I respectfully ask the Commission to review, reconsider and clarify its expectations accordingly.

The question, then, becomes: how can the Commission square its interest in facilitating intervention with its desire for orderly proceedings.

An unrepresented intervenor taking a position opposed to the Committee's must necessarily perform two roles during her/his testimony: witness and advocate. Apart from the problem the Commission identified in its Decision, that the intervenor is unlikely to know or understand the subtleties of procedural rules, which I will address later, he/she is faced with the difficulty of having to switch her/his focus between testimony and objections, or between objecting to a cross question and formulating an answer to it. The Commission should be willing to act as a gatekeeper in such situations to an even greater extent that it usually does, not only allowing quiet time for the intervenor to reflect and formulate his/her response, but repeatedly checking to ensure that he/she clearly understands the import of what has been said by others and has not unwittingly overlooked the need to respond to one of several, or some of many, parts of the objection or cross question.

Not in any way as criticism of the conduct of the Hearing, but for the sake of offering a concrete example, in his objection Mr Ginsberg said:

> Commissioner, I hate to interrupt, but I'm not sure that this is either a summary or surrebuttal. I'm not sure what it's rebuttal to. This strikes me as sort of entirely new testimony that certainly could have been filed in his 48 pages that, as far as I know, didn't really address what he's talking about now.

> So I'm not sure how much more of this is -- strikes me it goes well beyond the scope of what this was intended to be, that's additional summary or response of testimony to what we filed.[17]

A presiding officer acting as a gatekeeper or facilitator might check her/his own understanding of the objection, and help the intervenor identify the issues he/she should address by saying something like:

> Mr Ginsberg is objecting to your testimony on several grounds: first, that it is not clear whether it is a summary or rebuttal; second, that it seems to be new testimony that could have been prefiled in written form; third, that it is not connected to your prefiled written testimony; and, fourth, that it goes beyond the scope of summary or rebuttal testimony. Would you like to respond to any of these objections? I will be happy to repeat them at any point to ensure you have the opportunity to deal with them as fully as you may wish.

The presiding officer might follow up with questions such as:

> You have addressed several of Mr Ginsberg's objections: whether your testimony is a summary or rebuttal; how you consider it is connected to your prefiled written testimony; and that it goes beyond the scope of summary or rebuttal. Is there anything you would like to add regarding his objection that this testimony could have been prefiled in written form?

PROCEDURAL BARRIERS OUGHT NOT TO PUT IN THE PATH OF EFFECTIVE INTERVENTION BY INDIVIDUALS AND ENTITIES

Not only is it in the public interest for individuals and entities to be allowed to intervene, but for them to do so effectively. The Decision quotes Comment [2] to Rule of Professional Practice 3.7 including: "The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is

[17] Transcript: page 123, line 16, through page 124, line 1.

expected to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others." That model may be fine when a party is represented by different people performing those separate functions, but what happens with an individual intervenor, or when an entity is represented by one person?

On this occasion, no opposing party clearly stated such an objection. Nor was there grounds for such an objection; certainly my live oral testimony contained argument as well as evidence, just as that of witnesses for the stipulants had earlier during the Hearing, but it contained no legal argument.

During a 28 August 2006 hearing before the Commission, I objected to the admission of testimony on behalf of the Committee by one of its attorneys:

> … I'm going to object on the basis that Mr. Warnick appears to be participating in this case with two different hats on. Up until now he has appeared in this case as counsel for the Committee, and I question the appropriateness of counsel for one of the parties also appearing as a witness. [18]

On that occasion, Mr Proctor argued that:

> … there has been no request of any party, for example, that Mr. Warnick testify to matters that would require him to assert an attorney-client privilege. And without that, then, it really is not for Mr. Ball at this point, having not asked such questions, to raise the issue that he cannot get those answers from a witness. And that is the real problem. We do not want an attorney acting as a witness if to do so would disclose attorney-client privileged matters. I believe that Commissioner Boyer would be familiar with the Rules of Professional Conduct. I know I am through my involvement with the office that enforces them. And the counsel may be permitted to act as a witness for certain matters such as those that are setting policy, foundation and groundwork, those that do not require the witness to disclose attorney-client privileges or work product. Under the

[18] Transcript of Proceedings, August 28, 2006, 9:00am in Docket 06-035-21, In the Matter of the Application of PacifiCorp for the Approval of its Proposed Electric Rate Schedules and Electric Service Regulations: page 44, lines 9-15.

> circumstances, I believe Mr. Ball's objections are simply not well founded and should not be granted.[19]
>
> The issue here is whether or not it is in any way a violation of this Commission's rules or the Rules of Professional Conduct governing the appearance of an attorney in a formal proceeding as a witness. It is not prohibited by either of those rules and his objection to this testimony should be denied.[20]

Mr Campbell then said:

> … We are going to overrule the objection and admit the testimony of Mr. Warnick as well.[21]

Apparently my objection on that occasion was overruled because Mr Warnick's dual role as witness and attorney would not conflict with lawyer-client privilege. There was no such conflict here, either, and there should be some consistency in the presiding officer's procedural rulings.

In its 26 May 2006 Order Approving Rate Reduction Stipulation in Docket 05-057-T01, Questar's Conservation Enabling Tariff Adjustment Option, the Commission decided not to give weight to argument I had offered because I didn't enter evidentiary testimony as a foundation:

> Although numerous parties have submitted briefs or legal argument, both in support of and in opposition to an interim rate reduction, no one has introduced any evidence in support of their arguments.

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[19] Transcript of Proceedings, August 28, 2006, 9:00am in Docket 06-035-21, In the Matter of the Application of PacifiCorp for the Approval of its Proposed Electric Rate Schedules and Electric Service Regulations: page 46, line 24, through page 47, line 19.

[20] Transcript of Proceedings, August 28, 2006, 9:00am in Docket 06-035-21, In the Matter of the Application of PacifiCorp for the Approval of its Proposed Electric Rate Schedules and Electric Service Regulations: page 48, lines 16-22.

[21] Transcript of Proceedings, August 28, 2006, 9:00am in Docket 06-035-21, In the Matter of the Application of PacifiCorp for the Approval of its Proposed Electric Rate Schedules and Electric Service Regulations: page 54, lines 2-4.

> Mr. Ball provided no additional evidence for how the statements may be used beyond their original intent, nor, importantly, what conclusions may be derived therefrom regarding the reasonableness of the utility's earnings or rate of return with and without the requested interim rate reduction. As there is no admitted record evidence to support any interim rate change, we conclude that we must deny the request.[22]

In this proceeding, one of Ms Bell's objections was:

> I'm sorry. Chairman Campbell, I think it's necessary at this point to renew the objection made by Mr. Ginsberg. This, what we are listening to, is really in the nature of legal argument, perhaps, or argument.
>
> Mr. Ball is drawing his own conclusions and opinions from various things. There is no foundation. There are no facts, there's no evidence. We are not hearing any factual evidence upon which you could base a finding, nor has Mr. Ball qualified as an expert whose opinions we could hear. I'm just struggling, I guess, as is Mr. Ginsberg, with what this is.[23]

Ms Bell's objection was overly broad, vague, and lacking in foundation. She failed to point to a single example of anything I had said that was either legal argument or argument and that lacked a factual basis or was without evidence. Moreover, it followed the first portion of the segment of my testimony that had apparently attracted the most protest, a portion that was perhaps the most fact-rich of my live oral testimony. None of these facts were challenged in cross-examination or by rebuttal evidence.

The testimony that the Commission has admitted to the record on behalf of the stipulants in this Docket contains details and data that might be described as facts, evidence or foundation, but also analyses, opinions, conclusions, recommendations and policy statements that might be characterised as argument. Examination of testimony

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[22] Page 8, first complete paragraph under the heading "**Interim Rate Reduction Discussion", second sentence, and page 9, first complete paragraph, penultimate and last sentences.**

[23] Transcript: page 132, line 23, through page 133. line 9.

admitted generally in matters before the Commission shows that it routinely contains a mix of such elements.

No one objected to the admission to the record of my prefiled written Testimony or Supplementary Testimony, which contained several of those components in both categories, and which the Commission admitted to the record during the Hearing. My oral testimony certainly contained facts and data which, together with my prefiled written testimony, constituted the evidence or foundation for the analyses, conclusions, opinions and recommendations that I was now also offering.

If the Commission now treats all my live oral testimony as argument, it creates the conditions in which none of that testimony can be regarded as foundation for any argument. Not only can't that be right as a matter of public policy, but how does it make sense to treat what a non-lawyer offered primarily as a witness as advocacy rather than testimony? Nor would it seem proper to treat everything offered by an individual or entity representative who happened to be an attorney as testimony and none of it as argument.

> MS. BELL: Chairman, I object to the kind of statements that Mr. Ball repeatedly puts in his argument with regard to my client and whether or not they've been prudent, or whether or not they've used integrity in going through these various expansion cases. I would like all of those comments stricken.[24]

Witnesses for the stipulants have asserted in their testimony that the claimed lack of numbers comports with GAAP. Nothing has been offered or admitted into evidence as foundation for those assertions. I am as entitled as those witnesses to assert, based

[24] Transcript: page 141, line 12, through page 142, line 2.

upon my engineering and management qualifications, and extensive experience as a senior utility executive, that the lack of such figures demonstrates imprudent utility project management.

I had prefiled my Qualifications & Experience on 14 March along with my Testimony, no-one had objected, and they had been admitted. If the analyses, conclusions, opinions and recommendations contained in my prefiled written testimony could be accepted into evidence by the Commission, then so could those offered in oral testimony, based upon the same expertise of which I had offered proof in my prefiled Qualifications & Experience that had been accepted by the Commission without objection by the stipulants. None of the stipulants challenged my expertise through cross-examination or otherwise prior to or during the Hearing and I therefore respectfully assert the right to have all of my analyses, conclusions, opinions and recommendations – those offered in oral testimony as well as in prefiled written testimony – given full weight by the Commission in considering all of the issues I addressed as it determines this Stipulation and Application.

It is entirely likely that, in some future matter, I may seek leave, in accordance with UCA R746-100-5 and 6B, to intervene on behalf of some group of ratepayers. Such a group may well lack the resources to retain counsel and wish me to represent it. In addition to exercising its UAC R746-100-5 rights to present evidence, cross-examine witnesses, make argument, written and oral, and submit motions, I might be the person best qualified to testify on at least some of the aspects of the matter for the group.

Somehow, a framework needs to be created in which an individual can both testify and argue. I respectfully invite the Commission to review, reconsider and clarify its Decision so that it does not create barriers to the intervention of individuals and entities

Respectfully submitted on 2 May 2007,

/S/_____

Roger J Ball

CERTIFICATE OF SERVICE
I hereby certify that a true and correct copy of the foregoing Stipulation Position Statement in Docket 06-057-T04 was served upon the following by electronic mail on 14 March 2007:

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