Roger J Ball
1375 Vintry Lane
Salt Lake City, Utah 84121
(801) 277-1375
14 March 2007

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 STIPULATION POSITION STATEMENT

When, on 24 January 2006, I asked the Commission to permit me to intervene in this Docket I wrote that "I have not fully determined the specific positions I will take, or the relief I will seek".[1] Today, barely seven weeks later, I am much clearer about the issues, my positions, and the relief that I seek, but there is still some way to go before I will be certain that all of my positions, and all of the relief I will seek, are entirely clear.

Apparently on 15 February,[2] Questar Gas Company (Questar, or Company, or utility), the Utah Division of Public Utilities (Division), the Utah Committee of Consumer Services (Committee), Beaver County Economic Development Corporation, Emery County Economic Development, and 13 towns, cities, counties and other entities

1 "Request to Intervene" of Roger J Ball in Docket No 06-057-T04, page 3, item 9.

2 Although the copy of the Stipulation accessible on the Commission's website docket index is undated and unsigned, the index registers its receipt on 15 February. Although a party in the matter, I have not been served with a copy of the Stipulation by any of the stipulants. No motion has apparently yet been filed with the Commission for approval of the Stipulation. One of the signatories for which the Stipulation was prepared (it is not clear whether it was actually signed by or on behalf of this signatory) does not appear either to have requested or to have been granted intervention in this matter.

(collectively, stipulants) filed their GSS/EAC Stipulation (Stipulation) with the Commission.

It is my position that the Stipulation should be rejected in its entirety by the Commission, I have identified 9 reasons why the Commission should reject the Stipulation, and part of the relief I seek is that the Stipulation be rejected.

1 THE STIPULATION SHOULD BE REJECTED BECAUSE ALL PARTIES WERE NOT NOTIFIED OF THE SETTLEMENT NEGOTIATIONS

On 7 February 2007, the Commission issued its Notice of Additional Hearing to which it attached a letter it had received from an attorney for the Division. The letter stated that:

> based upon positions taken in their respective testimonies, *including rebuttal testimony filed on February 2, 2007, and on-going analysis,* the Division … , the Committee … and Questar … have reached a settlement in principle." (Emphasis in quotations throughout added.)

Clearly, settlement negotiations took place between 2 February, when rebuttal testimony was filed, and 6 February, the date of the Division's letter, yet there is no reference to the involvement of any of the many intervenors in this Docket in those negotiations, or to the notification of those intervenors of those negotiations.

While the Division's letter proposed "that a settlement conference would be held" "Immediately following the submission of testimony on February 8th", it was left to the Commission to distribute that letter to parties with its Notice; neither the Division, the Committee nor the Company appear to have served it upon any of the intervenors.

Shortly after the commencement of the 9:00am hearing on 8 February (Hearing), Questar attorney Colleen Bell said:

> the parties, the Committee, the Division and the Company, have had time to discuss a Settlement Agreement in principle based on the filed testimony positions and the Rebuttal Testimony of the parties and based on ongoing discovery and analysis in this docket. *This occurred in the last couple of days*. We believe that it may be beneficial at this time, or subsequent to maybe hearing those that want to be heard today, to convene this hearing into a settlement conference *so that we can take an opportunity to show others who have not seen that settlement proposal and let them comment on it and have input on it*.[3]

Apparently, settlement negotiations continued after the Division's letter was delivered to the Commission and up until the eve of the Hearing.

The Division, Committee and Questar clearly contravened UCA 746-100-10(F)(5)(b) in a way that exemplifies the public interest transparency concerns expressed in opposition to 2003 Senate Bill 61, and I respectfully request that the Commission reject the Stipulation because the process used to arrive at it was fatally flawed.

2 THE STIPULATION SHOULD BE REJECTED BECAUSE, IN SIGNING IT, THE DIVISION AND COMMITTEE HAVE ENTERED INTO AN ILLEGAL COMPACT TO ACT OUTSIDE THEIR STATUTORY POWERS

As creatures of the Utah Legislature, the Division and Committee have only the powers specifically granted to them in statute.

[3] "Transcript of Proceedings" in Docket No 06-057-T04, page 7, lines 12-24.

UCA 54-4a-6 requires the Division to "act in the public interest in order to provide the Public Service Commission with objective and comprehensive information, evidence, and recommendations".

The Division is not mandated to provide objective and comprehensive information and evidence only in *support* of its recommendations. The plain language of the statute requires it to provide objective and comprehensive information and evidence *whether or not* that information and evidence supports its recommendations.

In paragraph 19 of the Stipulation the Division agrees to "present testimony of one or more witnesses *to explain and support* this Stipulation." In paragraph 20, it further agrees that "if any other party, entity or individual challenges the approval of this Stipulation, requests rehearing of any approval of the Stipulation or appeals the approval of this Stipulation, each party will *use its best efforts to support* the terms and conditions of the Stipulation at the Commission."

UCA 54-10-4(3) requires the Committee to "be an advocate on its own behalf and in its own name, of positions *most advantageous* to a *majority* of residential consumers as determined by the committee and those engaged in small commercial enterprises". The convoluted nature of this language appears to have encouraged the Committee – no doubt pressured by the towns, cities, counties, and others that want this change in rate responsibility – to think it has discretion to determine what "a majority" is. However, it is well established that adjudicators must give words their common meaning.

In this case, the Committee voted 3-2 on the Stipulation. It had no difficulty in recognizing that the 3 votes to support it represented the majority. However, it seems to have a very real difficulty in recognizing that the approximately 825,000 customers who currently pay unembellished GS-1 rates, and who will pay more if this Stipulation is approved, are clearly in the majority with respect to the roughly 8,500 who are paying GSS and EAC rates, and who stand to pay less.

When a state agency acts *ultra vires*, or outside the powers explicitly granted to it by statute, just like a corporation acting outside its charter, the action taken is invalid, ineffective, and unenforceable.

The Division acted *ultra vires* in agreeing to present only information and evidence supporting its recommendation that the Commission approve this Stipulation, and the Committee acted *ultra vires* in deciding to support a position that is clearly "most advantageous" to the minority rather than the majority of consumers, and I respectfully request that the Commission reject the Stipulation because these agencies do not have the power to support it.

Furthermore, should the Commission not grant my request in this regard, I respectfully ask that it entirely discount any and all testimony that may be offered by the Division in support of the Stipulation, because it will patently be biased and unreliable, and that it entirely discount any and all legal opinions offered by the attorneys for the Division and Committee in support of the Stipulation, because they have demonstrated professional incompetence in assisting their clients in this matter.

3 THE STIPULATION SHOULD BE REJECTED BECAUSE THE COMMISSION LACKS AUTHORITY TO PERMIT PERMANENT RATE CHANGES WHICH ARE NOT NECESSITATED BY UNEXPECTED COST INCREASES OUTSIDE A GENERAL RATE CASE

The Utah Supreme Court has declared that the Commission has authority to set or revise rates "only in general rate proceedings . . . [and has] *limited authority* to permit interim rate changes which are necessary because of *unexpected increases in certain specific types of costs*."[4] While this "limited authority" exception has been invoked under the fuel cost pass-through legislation, in an abbreviated rate case, and with the 191 balancing account mechanism, the tariff revisions being contemplated in this Stipulation will impact almost if not all of Questar Gas Company's customers, and do not arise because of "unexpected increases in certain specific types of costs."

UCA 54-7-1(2)(a) requires that the Commission consider "*the interests of the public* and other affected persons" before it uses a settlement proposal rather than a more fully litigated proceeding to resolve a disputed matter. I respectfully request that the Commission find the "interests of the public" require it to reject this Stipulation in light of the precedents quoted.

[4] "Questar Gas v Utah Public Service Com'n, 34 P.3d 218 (Utah 2001)", page 223, citing "Utah Dep't of Bus Regulation v. Pub Serv Comm'n, 720 P.2d 420, (Utah 1986)", page 423.

4 THE STIPULATION SHOULD BE REJECTED BECAUSE THE COMMISSION LACKS AUTHORITY TO APPROVE IT ON ECONOMIC DEVELOPMENT GROUNDS

The Utah Supreme Court struck down an electricity rate subsidy that the Commission approved for senior citizens because on average they earned less than other residential customers. Mountain States Legal Foundation argued that "it is not the function of the Public Service Commission to engage in social welfare programs."[5] While the Court struck down this particular subsidy on the basis of unlawful discrimination, there is a sense, too, from the opinion that the Court believed the Commission was acting in excess of its proper jurisdictional realm.[6]

While UCA 54-3-1 requires that, for any charge to be found just and reasonable, consideration may (not must) include its "economic impact" "on the well-being of the state of Utah", the Legislature does not appear ever to have delegated responsibility for economic development, whether or not it is in rural areas of the State, to the Commission. The State has other agencies to perform this task, and I respectfully request the Commission to hold that rate revision for the purpose of economic development lies outside the powers generally granted to it to fix rates.

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[5] "Mountain States Legal Fn v Utah Pub Serv, 636 P.2d 1047 (Utah 1981)", page 1051.

[6] Much the same feeling comes from "Kearns-Tribune v Public Service Com'n, 682 P.2d 858 (Utah 1984)", where the Court struck down a PSCU rule which regulated utility advertising. The rule ostensibly was enacted as part of the Commission's ratemaking authority, but it smacked too much of "social policy" outside that sphere.

5 THE STIPULATION SHOULD BE REJECTED BECAUSE IT WOULD RESULT IN RATES THAT WOULD BE PREFERENTIAL AND DISCRIMINATORY, AND THEREFORE NEITHER JUST NOR REASONABLE, AND BECAUSE THE COMMISSION LACKS JURISDICTION TO APPROVE IT

The first criterion listed in UCA 54-3-1 that may be considered in determining whether a charge is just and reasonable is "the cost of providing service to each category of customer". In the *Mountain States Legal Foundation* opinion, cited above, there is a general discussion respecting rational classification systems being based upon cost of service, which also supports in some measure the Commission's 9 May 1997 Order Denying Application for Rural Connection Charge Tariff (1997 Order).

The essential basis of the 1997 Order was that "customers have been required to pay the calculated non-refundable customer contribution where the costs to connect them to the (Questar Gas) system have exceeded that contained in the allowance footage."[7]

There has been some discussion in this docket whether GSS and EAC ratepayers are part of the same "class" as GS-1 customers. Questar witness Gary Robinson suggested during the Hearing that they are:

> all of these customers belong to one class that received a revenue requirement. Then in the rate design portion of the case it was determined that the GSS customers would pay a larger portion per customer of that revenue requirement than the GS-1 customers would.[8]

However, in its 1997 Order, the Commission did not hesitate to distinguish between categories of customers on the basis of the various GSS, EAC and RCC charges they

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7 "Order Denying Application for Rural Connection Charge Tariff" in Docket No 97-057-04, page 13.

8 "Transcript of Proceedings" in Docket No 06-057-T04, page 73, lines 18-23.

might pay, were paying, had paid, or had not been subject to. The Commission named "Fillmore, Milford, Delta, Holden, etc" and "Elmo, Cleveland and Silver Reef", saying that:

> these, and others, *have all been implemented and applied to conform with UCA §54-3-8's prohibition against unreasonable preferences or advantages*. All of these existing situations, *of having new customers pay the full customer contribution*, are in contrast with the proposal in this docket. [9]

Subsequently, in the 1998 Legislative General Session, House Bill 180 enacted special provisions, that were effective for less than two years, which allowed the extension of service to several communities on terms similar to those the Commission had denied in its 1997 Order. Both the Commission, in its 1997 Order, and the Utah Legislature, by passing HB180, conceded that the Commission lacked the jurisdiction to approve preferential and discriminatory subsidies of the magnitude contemplated in the application in Docket No 97-057-04. When HB180 was repealed on 31 December 1999, the *status quo ante* was restored, and the Commission, today, again lacks jurisdiction to do what the stipulants are asking it to do.

If approved, this Stipulation will remove the EAC charges being paid by Panguitch and all the similarly situated customers connected as a result of HB180 and make Questar's other customers responsible for compensating shareholders. In denying the Company's application for approval of general new tariff provisions for establishing service to rural communities and for a specific Rural Community Charge for Panguitch, the Commission concluded that: "The proposed RCC mechanism is *not just and reasonable* and would

[9] "Order Denying Application for Rural Connection Charge Tariff" in Docket No 97-057-04, page 13.

be *unreasonably discriminatory*."[10] How can the Commission now find that an even greater subsidy of Panguitch and the other EAC customers by ratepayers at large than it rejected in the 1997 Order would not be unreasonably preferential and therefore would be just and reasonable?

Moreover, the Stipulation would remove the GSS charges to which the Commission in its 1997 Order referred approvingly as having "all been implemented and applied to conform with UCA §54-3-8's prohibition against unreasonable preferences or advantages." In that 1997 Order, the Commission further wrote that:

> Excusing a Panguitch customer from paying over $4,000 of the costs associated with providing service, but not giving an Ogden Valley customer the same opportunity, is an unreasonable difference prohibited by UCA §54-3-8.

Interestingly, the Stipulation, in its paragraph 10 proposal that

> the non-refundable contribution for any future expansion of QGC's distribution system into areas currently not served by natural gas should be funded from third party sources before the expansion begins,

would once again require the full customer contribution to be paid up front, by or on behalf of the new customers.

How can the Commission now find that excusing customers currently subject to GSS and EAC rates from further payment of the costs associated with providing service to them, when many more customers in previous expansion areas have paid all that Questar asked and the Commission approved, and when all the costs of extending

[10] "Order Denying Application for Rural Connection Charge Tariff" in Docket No 97-057-04, page 14.

service into future expansion areas must be found up-front, would not be unreasonably discriminatory?

In 1997 and 1998, Questar and Panguitch advocates argued that the annual cost to each other ratepayer of the subsidy they sought would be no more than the cost of mailing a 1oz first class letter, then 32 cents. The Commission wrote:

> It is not appropriate for the Commission to sanction a subsidy of the magnitude contemplated in the Panguitch RCC proposal that favors (Questar's) service over other, competing service providers.
>
> (Questar) would have the Commission disregard the economic facts and have the extension supported by other customers. It does so upon broad general interest arguments, but does not articulate any net benefit to these other customers. … We have attempted to discover some means of finding the proposal consistent with the need to have a reasonable balance between shareholders, existing customers and new customers as expressed in existing statutory provisions. The record in this case, however, does not establish a demonstrable benefit to (Questar's) other customers sufficient for them to shoulder an additional $1.6 to $1.9 million of (one-time) costs by which (Questar) will subsidize prices to compete with other market participants.[11]

Today, Questar estimates the cost of implementing the Stipulation as $1,552,267 annually, or $1.87 per GS-1 ratepayer,[12] slightly more than the cost ($1.83) of mailing a 7oz first class letter. How can the Commission today find a subsidy of a magnitude so much greater than it rejected in 1997 to be just and reasonable; neither discriminatory nor preferential?

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[11] "Order Denying Application for Rural Connection Charge Tariff" in Docket No 97-057-04, pages 12-13.

[12] Questar Response to Division Data Request No 2.1 in Docket No 06-057-T04, dated 2 March 2007.

It cannot, and I respectfully request that the Commission reject the Stipulation because it lacks the jurisdiction to approve it and because it would result in discriminatory and preferential rates that are neither just nor reasonable.

6 THE STIPULATION SHOULD BE REJECTED BECAUSE IT IS INCONSISTENT WITH THE 1997 ORDER AND ALL PRECEDING SERVICE EXTENSION ORDERS

While agencies can reconsider earlier decisions, and interested parties can ask that they do so, they must have good, rational reasons for making any such change. There is no evidence in this record of circumstances – unforeseen when the existing GSS and EAC arrangements were put into place – that have changed. It is a fundamental principle of administrative law that inconsistent action must be disapproved.

I respectfully request that the Commission reject the stipulation because to approve it would be inconsistent with its previous decisions.

7 THE STIPULATION SHOULD BE REJECTED BECAUSE IT WOULD TRANSFER FROM SHAREHOLDERS TO RATEPAYERS MORE OF THE RISK THAT QUESTAR MIGHT NOT EARN A REASONABLE RETURN ON ITS INVESTMENT IN EXTENDING ITS INFRASTRUCTURE

Much has been made of the notion that existing customers always subsidize new customers. That is a fallacy. When Western Public Service Corporation first developed gas wells, built a pipeline from the wells to the Wasatch Front, constructed a distribution network and marketed its service in Utah, there were no existing customers. Patently,

new customers paid rates based upon all of WPSC's investments and costs, and no other ratepayers existed to subsidize them. The situation in Nephi when it first developed municipal gas service must have been similar, and that would have been the case in Panguitch and any other city or town that opted for a municipal LDC.

Questar Corporation effectively blocked the realization of such options except for Nephi, which is located very close to the Kern River Pipeline, by having the utility rather than Questar Pipeline Company build the expansion from the Indianola Gate south through Cedar City to St George, and by arguing that the sale of gas to municipal LDCs by the utility risked subjecting it to dual regulation by the Commission and FERC, thus ensuring its opportunity to extend the utility's monopoly service as widely as possible across Utah.

Questar has equally effectively ensured, by persuading regulators to allow it to put expansion costs into ratebase and to bundle GSS and EAC with other revenues, that its opportunity to earn a reasonable return regardless of the actual economic viability of its expansion schemes is largely assured.

Questar makes no secret of having estimated the GSS and EAC rates required to enable it to recover the cash contributions, including its rate of return, on the minimum system size required to meet immediate load, while generally building larger extensions to meet forecast demand over a longer time-frame, and putting all the actual investment costs into ratebase, thus guaranteeing both an unquantified (Questar says unquantifiable) subsidy from ratepayers at large to customers in expansion areas and a healthy return on its infrastructure investment.

The other side of the coin is that customers in areas already served by Questar at the time of Wexpro I and II have seen their interest in that low-cost gas eroded as it has been shared with customers in subsequent expansion areas, another form of subsidy.

No prudent manager in a competitive business would invest millions of dollars of his shareholders' money in a business opportunity and neglect to track the financial success of the project. That Questar has done so for years, and that Questar has been allowed to do so for years, is a disgrace.

As industrial and large commercial customers' attorney Gary Dodge has previously told the Commission: "Competition is brutal." No competitive business that maintained a less-than successful project would get away with subsidizing it at the expense of customers for its other products or services. That Questar has done so for several of its service expansion areas for years, and that Questar has been allowed to do so for years, is a scandal.

As the Commission stated in its 1997 Order:

> A business decides what services or products to provide customers, and the areas in which it will compete, based upon its assessment of the costs of doing so and the revenues it will receive from customers as it competes with other market participants. (Questar) is considering whether to provide energy services in the Panguitch market in competition with wood, fuel oil, electricity and propane. We follow a process of having the utility propose what services or products to provide and where to provide them, reviewing those proposals to be consistent with statutory provisions, and, where consistent and in the public interest, approving tariffs which implement the proposals. In doing so, we do not control the conduct of the utility. The utility decides and does innumerable things which impact its operations and financial well being. Our responsibility is to have the utility owners, not ratepayers, take the risks and the rewards that result from the economic forces operating in the marketplace.

Questar chose, nobody compelled it, to expand its infrastructure into numerous communities. Questar asked for Commission approval, the Commission did not initiate any of those proceedings, of GSS and EAC rates that the Company represented would allow it to recover its costs and a reasonable rate of return. Questar has been enjoying not only the stream of revenue from the GSS and EAC rates, but a rate of return underwritten by its ratepayers at large enhanced by its having embedded those investments in ratebase. Now Questar wants to turn this little world upside down. We may not be able to read its corporate mind to determine exactly the breadth and depth of its motivation, but we can both extrapolate and interpolate from what we do know of this conglomerate and its dealings.

Questar Corporation has already secured a return on its Wexpro investments at almost double the rate authorized for Questar Gas, despite the fact that those investments were originally largely underwritten by utility ratepayers. It is increasingly profiting from its Questar Pipeline investments due to their growing use for purposes unconnected with providing service to the utility ratepayers who underwrote much of their initial construction. It has singularly failed to meet its obligation to provide least-cost resources for the growth of load in its utility service territory, having hived off its Exploration and Production business, which sells its low-cost production to third parties at high market rates, leaving the utility to purchase about half of the gas it supplies to its ratepayers from third parties at similarly high market rates. It sought to guarantee that Questar Transportation Services would earn a guaranteed return at the utility's authorized rate on its investment in the CO_2 extraction plant.

By this Stipulation, Questar seeks to ensure that its shareholders cannot fail to earn a guaranteed rate of return on their investment in service expansions and that all its GS-1 ratepayers will be on the hook to make that certain. Clearly, that eliminates any risk associated with those investments, and the Commission should secure an opportunity to review the Company's authorized rate of return to ensure it is commensurate with that reduction in risk. That cannot be done in this proceeding, and requires a general rate case.

During the 2000 Legislative General Session, Questar marshaled a dozen or so otherwise highly-regarded Utahns before the House Public Utilities Standing Committee in support of House Bill 320. Among them was Gerald Sherratt, sometime president of Southern Utah University, today mayor of Cedar City, who proceeded to assure the House Committee that the extension of natural gas service was a great boon to that community and that Questar was commendable for having undertaken the project. How much more political capital will Questar garner from this application to be deployed in further tilting the legislative and regulatory playing field against the very ratepayers it expects to pay the bill for this Stipulation?

Questar should be firmly affixed on the hook it created for itself. It has not objected to the benefits it has accrued from extending its infrastructure; it should not be allowed to change the rules in the middle of the game to avoid or mitigate pitfalls that it may have lately seen developing. If it now sees an unfavorable balance between the risks it took and the future return it is likely to receive from these investments, then the utility's shareholders should pay, not other residential ratepayers.

It is time for this feather-bedding of Questar to end, for regulatory agencies to step up to the task for which utility ratepayers pay them more than $6.5 million every year, and to act to protect ratepayers from the unreasonable demands of this greedy Corporation.

I respectfully request that the Commission reject the Stipulation because to approve it would allow Questar to further privatize its profits while socializing its costs.

Questar will not (it says it can not) calculate accurately and precisely the financial results of its expansion projects. I object to being kept in the dark about the extent to which I have been subsidizing new customers and guaranteeing shareholders' returns through these schemes, and I do not find credible Questar's claims that it has not and can not track these figures.

As a captive ratepayer of this monopoly utility, I consider that Questar should be required to demonstrate with both accuracy and precision the financial results of these projects that have been underwritten in part by my rates.

I respectfully request that Questar be ordered to go back and do the basic book-keeping that any prudent business should have done: to allocate all its expense vouchers and revenues for each expansion area project from which it is currently collecting GSS and EAC rates on a project-by-project basis, and to provide a thorough accounting for each of them. If necessary, if the Company demurs, I ask the Commission to hire independent forensic accountants that have no commercial relationship with any Questar Corporation affiliate to do this job and to do so at Questar's shareholders' expense.

I respectfully request the further relief that all subsidies from ratepayers at large for system expansions should be backed out and credited to those ratepayers through the 191 Account, at least as far back as 6 October 2006, the date of the Application in this Docket.

8 THE STIPULATION SHOULD BE REJECTED BECAUSE ITS APPROVAL WOULD BE AN ILLEGAL FORM OF RETROACTIVE RATEMAKING

Cases dealing with retroactive ratemaking have generally arisen from illicit efforts by public utilities to recoup losses,[13] as opposed to after-the-fact shifting of those losses among different classes of utility customers. There appears to be no Utah precedent that has refused to make such an extension, and no reason why the underlying principle should not be extended to the latter.

The present consequences of these extensions of service, including the GSS and EAC rates, were not unexpected; indeed they were fully expected and bargained for by all concerned.

I respectfully request that the Commission reject the Stipulation on the grounds that its approval would constitute illegal retroactive ratemaking.

[13] An example would be "Utah Dept of Bus Reg v Public Service Com'n, 720 P.2d 420 (Utah 1986).

9 THE STIPULATION SHOULD BE REJECTED BECAUSE THE COMMISSION IS CONSTITUTIONALLY BARRED FROM INTERFERING WITH ANY MUNICIPAL FUNCTION

Article VI, Section 28 of the Utah Constitution provides that:

> The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions.

The Commission has repeatedly been held to be a special commission within the meaning of this constitutional prohibition, and is therefore barred from regulating "municipal functions". Since economic development is a "municipal function", the Commission may not "interfere" with it.

Respectfully submitted on 14 March 2007,

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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:

Colleen Larkin Bell (5253)
colleen.bell@questar.com
C Scott Brown (4802)
scott.brown@questar.com
180 East First South
P.O. Box 45360
Salt Lake City, UT 84145

Michael Ginsberg
mginsberg@utah.gov
Patricia E Schmid
pschmid@utah.gov
160 E 300 South, 5th Floor
Salt Lake City, UT 84111

Reed Warnick
rwarnick@utah.gov
Paul Proctor
pproctor@utah.gov
160 East 300 South, 5th Floor
Salt Lake City, UT 84111

Barry L Huntington
garfieldcountyattorney@color-country.net
Panguitch City & Garfield County Attorney
55 S Main Street
PO Box 388
Panguitch, UT 84759

Leonard Foster, Mayor
lenfoster8@msn.com
Beaver City
60 W Center Street
Beaver, UT 84713

Robert G Adams, Director
rga@cimasolutions.com
Beaver County Econ Dev Corp
105 E Center
PO Box 2211
Beaver, UT 84713-2211

Craig Val Davidson, Administrator
cv.davidson@utahtelehealth.net
Beaver Valley Hospital
1109 N 100 West
PO Box 1670
Beaver, UT 84713

Bill Johnson, Vice Chairman
bjohnson@co.uintah.ut.us
Utah Small Cities Inc
C/O Uintah County
147 East Main
Vernal, UT 84078

Jeff Edwards, President and CEO
jedwards@edcutah.org
Economic Development Corp of Utah
201 South State Street, Suite 2010
Salt Lake City, UT 84111

Betsy Wolf
bwolf@slcap.org
Salt Lake Community Action Program
764 South 200 West
Salt Lake City, UT 84101

Joseph T Dunbeck
jtd@dunbeckgordonlaw.com
Duane W Moss
dwm@ dunbeckgordonlaw.com
Dunbeck & Gordon
Attorneys for Cedar Fort
175 N Main Street, Ste 102
PO Box 947
Heber City, UT 84032

Michael McCandless
econdev@co.emery.ut.us
Emery County Econ Dev Director
PO Box 297
Castle Dale, UT 84513

Leo G Kanell
lgkanell@beaver.state.ut.us
Attorney for Milford City
P O Box 471
Beaver, UT 84713

Ray Terry, Superintendent
ray.terry@m.beaver.k12.ut.us
Beaver County School District
291 N Main Street
Beaver, UT 84713

Von J Christiansen
vjchristiansen@beaver.state.ut.us
Attorney for Beaver County
PO Box 471
Beaver, UT 84713

Delynn Fielding, Director
dfielding@co.carbon.ut.us
Carbon County Economic Development
120 E Main Street
Price, UT 84513

S. Lee Bracken, Mayor
lee@brackensusa.com
City of Enterprise
P.O. Box 340
Enterprise, UT 84725

Ray J Owens, Mayor
ray@sevierriver.org
Town of Joseph
100 N State Street
Joseph, UT 84739

David L Christensen, Mayor
tracy@fillmorecity.org
Fillmore City
75 W Center Street
Fillmore, UT84631

/s/
Roger J Ball