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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF METROPOLITAN WATER DISTRICT OF SALT LAKE & SANDY REQUESTING AN INVESTIGATION INTO PUBLIC UTILITY CONDEMNATION PRACTICES AND INITIATION OF A FORMAL RULEMAKING PROCEEDING	Docket No. 14-2573-01 QUESTAR GAS COMPANY'S RESPONSE TO PETITION AND REQUEST FOR AGENCY ACTION AND MOTION TO DISMISS
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Questar Gas Company (Questar Gas or Company) respectfully submits this Response to Petition and Request for Agency Action and Motion to Dismiss (Response). As more fully set forth below, Questar Gas contends that the Petition should be dismissed and the Utah Public Service Commission (Commission) should decline to take any agency action pursuant to Utah Code Ann. § 63G-4-201 (3)(ii). As more specifically set forth below, (1) the Commission does not have authority to address condemnation requirements or procedure; (2) the Utah courts have already asserted jurisdiction over matters addressed in the Petition and Request for Agency Action (Petition); (3) the Commission cannot promulgate regulations that conflict with or amend state condemnation statutes as requested in the petition; and, finally, (4) to the extent that the Petition is intended to serve

as a customer complaint against Questar Gas it should be dismissed because the Company has not violated any applicable law, rule, or order of the Commission.

I. BACKGROUND¹

There are three significant conflicts between Questar Gas and Metropolitan Water District of Salt Lake & Sandy (Metro Water) which form the basis for Metro Water's Petition. Both the Third Judicial District Court in and for Salt Lake County and the Utah Court of Appeals are currently addressing the three conflicts. If the Courts were to accept the position that Metro Water advances, Questar Gas' ability to prudently and safely provide natural gas service to its customers would be compromised, and it would have limited ability to protect the infrastructure that is currently included in Questar Gas' rate base, and its customers' rates. Questar Gas is now defending its property rights, and its ability to manage its system safely, in state court. The three conflicts are discussed, in chronological order, below.

A. The Westview Drive Case

The first conflict involves Questar Gas' pipelines and Metro Water's Salt Lake Aqueduct in and near Westview Drive in the Olympus Cove area of Salt Lake County. Beginning in approximately 1956, Questar Gas' predecessor Mountain Fuel began installing intermediate high-pressure natural gas pipelines within Westview Drive, a public, county-owned street in the vicinity of 4500 South and Wasatch Boulevard. Metro Water owns a non-exclusive easement underneath Westview Drive and operates the Salt

¹ Questar Gas provides this background information for purposes of this Response and Motion to Dismiss. Questar Gas specifically denies those allegations contained in Metro Water's Statement of Facts that are inconsistent with this background statement or the attachments hereto. Should the Commission opt to commence a formal adjudicative proceeding in this matter, Questar Gas reserves the right to respond to each and every allegation separately.

Lake Aqueduct within that easement. Metro Water obtained its Westview Drive easement in 2006, when the Bureau of Reclamation quitclaimed its own easement rights to Metro Water.

Fifty years earlier, in 1956, Mountain Fuel signed a 50-year license agreement with the Bureau of Reclamation related to Mountain Fuel's installation of pipelines in the opposite side of Westview Drive from the Salt Lake Aqueduct (1956 BOR License Agreement). The 1956 BOR License Agreement was expressly limited to "be effective only as against such interests as the United States may have in and to the land and premises affected hereby." Metro Water obtained ownership of the non-exclusive Salt Lake Aqueduct easement in October 2006 and in December 2006 the 1956 BOR License Agreement expired.

Beginning in December 2006, Metro Water demanded that Questar Gas execute a Cooperation Agreement for Non-District Use of District Lands and Interest in Lands (Metro Water Land Use Agreement). The Metro Water Land Use Agreement contained a number of terms that limited Questar Gas ability to safely and prudently operate its system. For example, the Metro Water Land Use Agreement would allow Metro Water to shut off Questar Gas' natural gas facilities in the event of an emergency as determined by Metro Water in its sole discretion and would require Questar Gas to remove its natural gas facilities upon 90-days' notice if Metro Water determines in its "sole option" to terminate the BOR License Agreement. Questar Gas responded to Metro Water's request by proposing a common use agreement and explained that it would be unreasonable to enter into the Metro Water Land Use Agreement because it would put Questar Gas' critical infrastructure and its customers at risk either financially or from a safety perspective. The

negotiations were unsuccessful and Metro Water believed that Questar Gas should nevertheless enter into the Metro Water Land Use Agreement. Though Questar Gas informed Metro Water that it would not sign an agreement which expands the scope of Metro Water's rights under Metro Water's easement, or which subjects Questar Gas to Metro Water's regulations, it repeatedly offered to enter into a Common Use Agreement which would facilitate cooperation between Metro Water and Questar Gas and would help govern the co-existence, maintenance, and operation of adjacent facilities in overlapping or immediately adjacent non-exclusive easements. (See letter dated March 16, 2011 attached hereto as Exhibit 1; letter dated October 21, 2011 attached hereto as Exhibit 2.)

Metro Water refused Questar Gas' offers to enter into a Common Use Agreement. Instead, Metro Water filed suit in Third District Court in August 2012 under Case No. 120905379 (Westview Drive Case). Among other things, Metro Water sought to exclude Questar Gas' pipelines from Westview Drive, claimed that Metro Water owned Questar Gas' pipelines, and asked the Court to find that Questar Gas' pipelines were a public nuisance.

On August 28, 2013, Judge Faust issued a Memorandum Decision in the Westview Drive Case denying Metro Water's Motion for Summary Judgment. A copy of Judge Faust's Memorandum Decision is attached hereto as Exhibit 3. The Court found that "Utah law provides that 'the owners of dominant and servient estates must exercise their rights so as not unreasonably interfere with the other.' *U.S. v. Garfield County*, 122 F.Supp. 2d 1201 (D. Utah 2000) (*quoting Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 158 (1956))." When the above legal standard was applied to the facts of the case, the Court could not find that Questar Gas had unreasonably interfered with Metro

Water's easement right. The Court specifically noted that the "parties have had their respective pipelines in the easement for more than sixty years without any problems or interference with each other and there is no issue of interference at this time, despite an assertion from Metro [Water] that there may be in twenty or thirty years in the future." Additionally, the Court found that "nothing contained in the statutes, nor Metropolitan Water's regulations, grant Metropolitan Water unilateral authority to modify or interfere with [Salt Lake] County's right to grant a franchise to Questar, or to claim ownership of Questar's Pipelines, which Questar undisputedly continues to operate." Finally, in relation to Metro Water's property rights, the Court found that "Metropolitan Water is the holder of a non-exclusive easement" and no public nuisance exists.

Metro Water appealed the Court's decision to the Utah Court of Appeals in appellate case No. 20140050-CA. Metro Water has filed its opening brief, in which it *inter alia* continues to seek removal of Questar Gas' pipelines from Westview Drive, and a requirement that Questar Gas sign Metro Water's agreement which allows Metro Water to turn off, shut down, remove, or otherwise operate (collectively "Operate") Questar Gas' pipelines and requires Questar Gas to remove its facilities upon 90-days' notice, at Metro Water's sole discretion. Questar Gas believes this would be a violation of its non-delegable duties and a violation of 49 CFR Part 192. Metro Water also expressly seeks a Court of Appeals ruling that Questar Gas is subject to Metro Water's regulations. Questar Gas' responsive brief will be filed with the Court of Appeals on July 25, 2014.

B. The Point of the Mountain Aqueduct Case.

The second conflict involves Questar Gas' intermediate high-pressure (IHP) natural gas lines near Metro Water's Point of the Mountain Aqueduct (POMA) at

approximately 200 East Fairmont Hill Court (approximately 14200 South) in Draper, Utah. Like the Westview Drive Case, Metro Water holds a non-exclusive easement. Questar Gas' lines are within a public utility easement and cross the non-exclusive Metro Water easement. Questar Gas' pipelines were installed in 2006 in the public utility easement and without any complaint from Metro Water. Around that same time, Metro Water installed POMA beneath and near dozens of Questar Gas facilities without any written agreement in several other locations in Draper and Sandy. In one Sandy neighborhood, on Newcastle Drive and Highland Drive, Metro Water crossed 28 Questar Gas service lines and IHP main pipelines without any apparent concern, and with the cooperation and coordination of Questar Gas. (See Declaration of Rhonda Forde, attached hereto as Exhibit 4.) Eight years later, Metro Water filed suit against Questar Gas in Third District Court (case no. 140900286) claiming *inter alia* that Questar Gas' pipelines are a public nuisance, and that Questar Gas is interfering with Metro Water's POMA. This case is in its early stages; discovery has just begun.

C. The Corner Canyon Case.

The third conflict involves Questar Gas' replacement of Feeder Line 6, a high-pressure natural gas pipeline running from 3300 South in Salt Lake County into Utah County. Feeder Line 6 is a significant source of natural gas to the eastern portions of Salt Lake and Utah County. Specifically, Questar Gas plans to replace and relocate Feeder Line 6 in and near the Corner Canyon area of Draper City. In Corner Canyon, Questar Gas has determined that Feeder Line 6 must be relocated and that the best route is underneath an existing publically-accessible dirt road which, for approximately 900 feet, crosses property owned in fee by Metro Water. The property at issue functions as a public

park by arrangement with Draper City. Part of Metro Water's property is encumbered by the Salt Lake Aqueduct; the bulk of Metro Water's property is used by other entities and recreationists for access to other areas of the canyon.

Questar Gas made an offer to purchase the easement from Metro Water on April 29, 2014. Questar Gas repeatedly attempted to discuss its offer to purchase an easement to no avail. Most recently, as shown in the June 5, 2014 email attached to Metro Water's Petition in Exhibit 4, Questar Gas specifically informed Metro Water "[i]f Metro Water is interested in negotiating Questar Gas' purchase of an easement, [Questar Gas] would be happy to have a meeting to discuss purchasing an easement." Metro Water did not respond to its request.

In order to continue progressing on its Feeder Line 6 replacement project, and to avoid additional delays due to Metro Water's refusal to negotiate, Questar Gas filed a condemnation action against Metro Water on July 15, 2014 in the Third District Court, Salt Lake County, Utah Case No. 140904841.

D. Questar Gas' Actions are Consistent with Existing Tariff Provisions.

In exercising its easement rights and its right to condemn, Questar Gas has simply utilized those statutory and contractual tools available to ensure that it is able to operate its facilities prudently and safely, that the facilities included in rate base and paid for by customers are not subject to premature or unreasonable relocation or replacement costs, and to ensure that the rights-of-way in which its natural gas facilities reside remain safe and accessible for future operation and maintenance. In Docket No. 07-057-13, the Commission reviewed and approved Section 7.05 of Questar Gas' Utah Natural Gas Tariff No. 400 (Tariff). Section 7.05 provides that new customers requesting service must

ensure that rights-of-way are adequately protected. In that case, the Company argued that the provisions set forth therein were necessary for the prudent and safe operation and maintenance of the natural gas facilities. The Commission agreed and deemed those provisions to be just and reasonable. Report and Order on Cost of and Rate Design, December 22, 2008, Docket No. 07-057-13.

The information contained in Exhibits 1 through 4 plainly show that Questar Gas' efforts in each of the conflicts outlined above were consistent with Section 7.05 of the Tariff. Metro Water's Petition seeks, in part, to revisit the reasonableness of Questar Gas' right-of-way requirements—requirements that the Commission has already deemed just and reasonable.

As discussed in greater detail below, the Commission should dismiss Metro Water's petition in its entirety.

II. ARGUMENT

This Commission should dismiss Metro Water's Petition because (1) the Commission lacks any specific grant of legislative authority to take the action requested by Metro Water; (2) the Third District Court of the State of Utah has already asserted jurisdiction over each matter; (3) the Utah Eminent Domain Code govern all matters related to condemnation and no rulemaking could supersede or modify those statutes; (4) this Commission has already set forth just and reasonable conditions for other activities within Questar Gas' easement that directly conflict with Metro Water's proposed regulations.

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A. The Commission Lacks Authority to Grant the Agency Action Requested in the Petition.

Metro Water cites to several general grants of authority in the Commission's enabling statute. For example, Metro Water contends that the broad grant of authority within Utah Code Ann. § 54-4-1 provides the Commission with jurisdiction here. Similarly, Metro Water relies on broad general language in Utah Code Ann. §§ 54-4-2, 54-4-7, and 54-4-14 for the proposition that the Commission has jurisdiction to address condemnation processes.

The Utah Supreme Court and this Commission have both made clear that the Commission's jurisdiction is not limitless. *In Re Utah Power and Light Company*, in Docket No. 87-035-26, Utah Associated Municipal Power Systems (UAMPS) filed a Petition for Agency Action asking the Commission to order Utah Power and Light Company to sell UAMPS an ownership interest in certain segments of its system. Like Metro Water, UAMPS cited Utah Code Ann. § 54-4-1 and other broad statutory language for the proposition that the Commission had jurisdiction to order such a sale. The Commission said:

Nowhere in the statute is such an authority specifically mentioned. Nonetheless, Sections 54-4-1 and 54-4-25 represent broad undefined grants of authority upon which the proposition is based that the Commission can make an order granting UAMPS Request. Plainly, if Section 54-4-1 were read literally, the Commission would have limitless authority to regulate and control every aspect of a public utility's operation. The Supreme Court has clearly stated on several occasions that Section 54-4-1 does not extend the Commission's authority beyond that which has been specifically granted by the Legislature, 'any reasonable doubt of the existence of any power must be resolved against the exercise thereof,' *Williams v. PSC*, 754 P.2d, 41, 50 (Utah 1988).

In Re Utah Power and Light Company, Docket No. 87-035-26, 1993 WL 601258 (Utah P.S.C), 2.

Like UAMPS, Metro Water would like to read the broad statutory language to include the power to both modify the existing condemnation statutes, and to declare that Questar Gas is subject to Metro Water's own regulatory scheme. This reading of Utah Code Ann. § 54-4-1, *et seq.* is impermissibly over-broad and the Commission should decline to act upon it. The Commission should, therefore, decline to take any agency action and, to the extent that the Petition constitutes some form of complaint, the Commission should dismiss the Complaint.

B. The State Courts have Already Asserted Jurisdiction Over these Matters.

The Commission need not grapple with whether it must accept jurisdiction over these issues because courts with competent jurisdiction are already addressing them. In its Petition, Metro Water re-raises issues that are the subject of current litigation before both the Third District Court of the State of Utah, and the Utah Court of Appeals. Metro Water has not challenged the jurisdiction of any of those courts. In fact, two of the three cases were initially filed *by Metro Water* in their own chosen forum.²

Even if the Commission had concurrent jurisdiction on these issues, it should decline to assert jurisdiction when the parties have already previously submitted to the jurisdiction of the Courts. To do otherwise would risk subjecting the parties to inconsistent orders. In the Westview Drive Case, Judge Faust clearly and unequivocally found in favor of Questar Gas. Exhibit 3. Metro Water is unsatisfied with the status of those court cases and, in Count I of the Petition, asks the Commission to provide a *different* and conflicting resolution to the case. In fact, Metro Water specifically “requests that the Commission issue an Order requiring Questar to comply with [Metro Water’s] Regulations unless there is a final decision of an appellate court holding those Regulations

² Questar Gas filed the third case, a condemnation case, in accordance with the Utah Eminent Domain Code, Utah Code Ann. §§ 78B-6-501 *et seq.*

to be invalid.” Petition at paragraph 92. Metro Water would have the Commission issue an order that directly conflicts with the district court decision. The Commission should decline to do so.

C. Metro Water seeks to amend the eminent domain process provided by statute.

Metro Water’s request would not only subject Questar Gas to conflicting orders, it improperly seeks to amend state condemnation statutes via the Commission’s rulemaking powers. Indeed, Metro Water says that “The procedure outlined in Utah Code Ann. § 78B-6-504(2)(c) *could be tailored* to address the primary concerns when a regulated public utility seeks to condemn property of a metropolitan water district.” Petition at p. 24, paragraph 90 (emphasis added). The Commission should decline to do so. “It is a long-standing principle of administrative law that an agency’s rules must be consistent with its governing statutes.” *Sanders Brine Shrimp v. Audit Div. of Utah State Tax Comm’n*, 846 P.2d 1304, 1306 (Utah 1993). Moreover, “an administrative rule out of harmony or in conflict with the express provisions of a statute would in effect amend the statute.” *Consolidation Coal Co. v. Utah Div. of State Lands & Forestry*, 886 P.2d 514, 532 (Utah 1994) (quoting *Olson Const. Co. v. State Tax Comm’n*, 361 P.2d 1112, 1113 (1961)). Metro Water petitions the Commission to impose requirements upon Questar Gas (and all other utilities) that are not consistent with the provisions of the controlling condemnation statute.

In the Corner Canyon Case, Questar Gas complied with, and filed its eminent domain suit against Metro Water pursuant to Utah Code Ann. §§ 78B-6-501 *et seq.*³ The

³ It is important to note that Questar Gas uses eminent domain as an option of last resort. When it does so, it only does so to obtain a right of way to provide a long-term, safe, cost-effective, way to serve its customers. In the Corner Canyon Case, Questar Gas was forced to condemn when Metro Water demanded a license agreement that would give Metro Water the right to operate Questar Gas’ Feeder Line 6, a high pressure feeder line that serves a large population of customers, in violation of 49 CFR Part 192. Metro Water’s

Eminent Domain Code required Questar Gas to make a reasonable effort to negotiate with Metro Water, to provide certain notices concerning Metro Water's rights under the code, and rights to notify the Utah Property Rights Ombudsman. As the emails and letters attached as Exhibit 4 to the Petition show, Questar Gas complied with these requirements. Questar Gas has repeatedly invited Metro Water to meet and negotiate the sale of an easement just as it would with any landowner from whom it is trying to acquire property rights. If Metro Water responded to Questar Gas' requests to negotiate, those responses did not concern an easement, but instead discussed only a limited license agreement according to terms dictated by Metro Water. (*See e.g.* email dated June 5, 2014 attached as Exhibit 4 to the Petition) Metro Water can certainly challenge the sufficiency of Questar Gas' efforts under the applicable condemnation statute in the pending condemnation case. Changing the requirements for advancing a condemnation in an agency action not only raises issues of jurisdiction but would create confusion and uncertainty both in the pending condemnation case, and in other right-of-way negotiations that Questar Gas is currently pursuing. For these reasons, the Commission should deny the relief requested in Counts II and III of Metro Water's Petition.

D. To the Extent that the Petition Is Considered a Customer Complaint, the Commission Should Dismiss the Petition because Questar Gas Has Not Violated Any Law, Rule or Order of the Commission.

Though Metro Water purports to bring its Petition pursuant to Utah Code Ann. § 54-7-9(1)(b), nothing in Metro Water's Petition suggests that Questar Gas has violated any applicable law, rule or order of the Commission.⁴ Metro Water's Petition centers on

proposed license agreement would also allow Metro Water the sole discretion to require Questar Gas to remove this high-pressure feeder line on 90-days' notice. Therefore, Questar Gas had no choice but to use its powers of condemnation to acquire an easement that would protect its facilities.

⁴ Utah Code Ann. § 54-7-9(2) provides, "The notice or request shall specify the act committed or omitted by the public utility that is claimed to be in violation of the law or a rule or order of the Commission."

the single claim that Questar Gas has failed to comply with *Metro Water's* regulations. Judge Faust of the Third Judicial District Court has determined that application of those regulations would improperly expand Metro Water's existing property right, to Questar Gas' detriment. The Court of Appeals is currently addressing the question of whether those regulations apply to Questar Gas at all. Because Metro Water has failed to allege that Questar Gas violated any applicable law, rule or order of the Commission, the Commission should dismiss the Petition.

III. CONCLUSION.

As more fully set forth above, the Commission does not have authority to promulgate regulations that conflict with or amend state condemnation statutes as requested in the petition; the issues raised in the Petition are properly before the Third Judicial District Court of the State of Utah, and the Utah Court of Appeals and the Commission should decline to hear or decide matters that are properly within the jurisdiction of those courts; the petition seeks to impermissibly utilize a rulemaking process to amend existing statutory requirements; and, finally, to the extent that the Petition is intended to serve as a customer complaint against Questar Gas it should be dismissed because the Company has not violated any applicable law, rule, or Commission order.

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IV. MOTION TO DISMISS

Based upon the foregoing, the Company respectfully requests that the Commission deny Metro Water's request for agency action and dismiss any associated customer complaint or other action embodied in the Petition.

RESPECTFULLY SUBMITTED this ____ day of July, 2014.

QUESTAR GAS COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Questar Gas Company's Response to Petition and Request for Agency Action and Motion to Dismiss was served upon the following persons by e-mail and U.S. Mail on July ____, 2014

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