

SHAWN E. DRANEY (4026)
SCOTT H. MARTIN (7750)
DANI N. CEPERNICH (14051)
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Telephone: (801) 521-9000
Facsimile: (801) 363-0400
E-mail: sed@scmlaw.com
shm@scmlaw.com
dnc@scmlaw.com
Attorneys for Petitioner

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION)	
OF METROPOLITAN WATER)	
DISTRICT OF SALT LAKE & SANDY)	
REQUESTING AN INVESTIGATION)	REPLY TO THE DIVISION OF PUBLIC
INTO PUBLIC UTILITY)	UTILITIES' RESPONSE TO REQUEST
CONDEMNATION PRACTICES AND)	FOR INVESTIGATION AND
INITIATION OF A FORMAL)	RULEMAKING PROCEEDING
RULEMAKING PROCEEDING.)	
)	Docket No. 14-2573-01
)	

Petitioner Metropolitan Water District of Salt Lake & Sandy (MWDSLs) submits this Reply to the Division of Public Utilities' Response to Request for Investigation and Rulemaking Proceeding.

RESPONSE TO THE DIVISION OF PUBLIC UTILITIES' BACKGROUND

MWDSLs's Petition contains a detailed description of the three disputes between itself and Questar that led MWDSLs to seek agency action from the Commission. The Division has provided a brief summary of the facts surrounding one of those disputes—the subject of *Metropolitan Water District of Salt Lake & Sandy v. Questar Gas Corporation*, Third District

Court No. 120905379 (SLA). In response to this summary, MWDSLS makes only two points. First, the Division indicates that Questar Gas disputed MWDSLS's claims and filed a motion for summary judgment. MWDSLS actually filed the motion for summary judgment; Questar did not. Second, the dispute discussed in the Division's Background is only one of three pending disputes that led to MWDSLS's Petition. While it was a motivating factor in MWDSLS filing the Petition, it is not the "subject" of the Petition in the sense that MWDSLS seeks any Commission decision or ruling on that particular dispute. MWDSLS simply included the facts surrounding the three disputes to put its requested actions in context for the Commission. These three disputes are emblematic of Questar's brazen approach to MWDSLS. This recent introduction of serial litigation is a clear indication to the Commission of Questar's new chartered path in its dealings with companion utilities and public rights and assets.

ARGUMENT

I. THE COMMISSION HAS JURISDICTION.

MWDSLS recognizes that "the Commission has no inherent regulatory powers other than those expressly granted or clearly implied by the statute." [*Mountain States Tel. & Tel. Co. v. Pub. Serv. Comm'n of Utah*, 754 P.2d 928, 930 \(Utah 1988\)](#). In its Petition, MWDSLS identified the broad grant of authority contained in [Utah Code § 54-4-1](#) as one basis of the Commission's jurisdiction. However, because this Section does not "extend the Commission's authority beyond that which has been specifically granted by the Legislature," *In re Utah Power & Light Co.*, 1993 WL 601258, at *3 (Utah P.S.C. 1993), MWDSLS cited other specific statutory grants of authority that establish the Commission's jurisdiction over the Petition:

- [Utah Code Ann. § 54-4-2](#), which grants the Commission authority to conduct an investigation when such investigation “is in the *public interest*” as to “*any act or omission to act, or of anything accomplished or proposed . . . of any public utility*”;
- [Utah Code Ann. § 54-4-7](#), which grants the Commission the authority to investigate the practices of a public utility and determine whether they are “unjust, *unreasonable, unsafe, improper, inadequate or insufficient,*” and to fix the same by order, rule, or regulation;
- [Utah Code Ann. § 54-4-14](#), which grants the Commission the authority to require “by general or special order, rules or regulations or otherwise . . . every public utility to construct, maintain and operate its line, plant, system, equipment, apparatus, tracks and premises *in such manner as to promote and safeguard the health and safety of . . . the public*”; and
- [Utah Code Ann. § 54-4-18](#), which grants the Commission authority to “fix just and reasonable . . . practices” and other conditions pertaining to the supply of regulated utilities’ product.

As the Utah Supreme Court has explained, “[t]he lack of explicit statutory authority to [do the thing requested] . . . is not dispositive of [whether the PSC has jurisdiction] because the PSC certainly has considerable latitude in performing its” authorized functions. [Kearns-Tribune Corp. v. Pub. Serv. Comm’n of Utah, 682 P.2d 858, 860 \(Utah 1984\)](#). “The question then, is whether the activity the Commission is attempting to regulate is closely connected to its [authorized functions] and whether the manner of the regulation is reasonably related to the legitimate purpose of [those functions].” [Id.](#) “What is called for . . . is a realistic appraisal of the

particular situation to determine whether the administrative action reasonably promotes or transgresses the pronounced legislative judgment.” *Id.* (internal quotation marks omitted).

The Division’s argument that the Commission lacks jurisdiction appears to be based on its understanding of MWDSLS’s Petition as seeking resolution of discrete property disputes. (See Division’s Resp. at 4 (explaining that, “[a]t its core, the dispute between MWDSLS and Questar Gas Company involves a dispute between two holders of non-exclusive property rights,” and that “the Commission’s jurisdiction has been found not to extend to real property matters generally”).) However, this is not the aim of MWDSLS’s Petition. Rather, MWDSLS seeks Commission oversight of regulated utilities’ compliance with metropolitan water districts’ rules and regulations, and over regulated utilities’ efforts to condemn property owned by metropolitan water districts. Each requested action is designed to protect the public interest and public health and safety, which have been called into question by Questar’s practices.

Through enactment of the Public Utility Code, the Legislature has made clear its intent that the Commission regulate public utilities in the manner set forth above to protect the public interest and ensure public health and safety. MWDSLS’s requested actions are closely connected to both of these functions. Central to MWDSLS’s requests are its Regulations for Non-District Uses of Salt Lake Aqueduct and Point of the Mountain Aqueduct Corridors. These Regulations were promulgated by MWDSLS’s Board of Trustees in an effort to provide protection for the critical public infrastructure MWDSLS holds in trust for the public. These are two of the primary drinking water arteries for the entire Salt Lake Valley. Questar’s repeated refusal to comply with these Regulations undermines the safety of not only MWDSLS’s Aqueducts, but Questar’s provision of natural gas throughout the state as well. MWDSLS’s

requested actions are designed to address this safety concern. Indeed, the Division of Public Utilities recognizes that “the Commission might arguably have jurisdiction to order a public utility to abide by another entity’s requests, rules, or policies if the company’s refusal jeopardize the company’s provision of safe, adequate, and reliable services.” (Division’s Resp. at 6.)

MWDSLS’s requested actions, both with regard to its Regulations and promulgation of a rule governing regulated utilities’ condemnation of property owned by metropolitan water districts, would further the public interest. As the three disputes described in MWDSLS’s Petition demonstrate, absent some oversight from the Commission, similar disputes over MWDSLS and Questar’s relative rights and interests are likely to persist. And, similar disputes between Questar and other metropolitan water districts are likely to arise. By establishing a forward-looking process that is fair and efficient, the Commission would be furthering the interests of the public served by both entities. For instance, the costs incurred with litigation over such disputes, which are passed through both entities to their customers, could be avoided.

MWDSLS recognizes the Division’s justified fear that, construed too broadly, the Commission’s jurisdiction could be invoked to micromanage the affairs of regulated utilities. Such a result would unduly burden the Commission and, as the Commission has previously expressed, impermissibly allow the Commission to “substitute its business judgment for that of the company.” [*Prows v. Mountain States Tel. & Tel. Co.*, 2000 WL 1643595 \(Utah PSC 2000\)](#). MWDSLS’s Petition, however, does not seek this type of micromanagement. Rather, MWDSLS requests that the Commission establish a forward-looking process that would govern the interaction between regulated utilities and metropolitan water districts throughout the state that is fair and efficient, and which reasonably protects the interests of the public served by both

entities. This is vastly different from directing which credit-reporting company a regulated utility must rely on, as at issue in [Prows](#).

MWDSLS requests that the Commission consider the vital public interest MWDSLS serves in providing a safe and secure water supply, and the ways in which Questar's actions have interfered and will continue to interfere with that function. The Sections of the Public Utility Code cited above grant the Commission the authority and jurisdiction to address these issues in the manner requested in MWDSLS's Petition.

II. COMMISSION INVOLVEMENT IS WARRANTED.

The Division argues that Commission involvement is not warranted and is not wise for three reasons: (1) because Questar is already subject to regulation by the Commission and the federal and state government; (2) because MWDSLS's Petition seeks to subjugate Questar's interests to MWDSLS's interests; and (3) because MWDSLS's Petition seeks a blanket rule that a regulated utility must yield to a metropolitan water district's rules, which is problematic in that (a) the regulated utility could simply use its condemnation powers to take what it needs from the metropolitan water district and (b) neither the regulated utilities nor the Commission have the ability to demand changes to the metropolitan water districts' rules. When viewed in context of the true aim of MWDSLS's Petition, none of these arguments cautions against the Commission instigating an investigation as requested by the Petition.

First, although it is true that the Commission and federal and state governments have promulgated statutes and rules designed to ensure the safety of Questar's operations and facilities, this fact alone does not establish that no further regulation is necessary or somehow preclude any such further regulation. MWDSLS's Petition identifies an aspect of Questar's (and

other regulated utilities’) operation that is not presently regulated: their interaction with non-regulated utility providers, such as metropolitan water districts. The Division has failed to explain why Commission regulation or oversight of this previously unregulated aspect of regulated utilities’ operations is unwise or would fail to promote the public interest and public health and safety.

Second, contrary to the Division’s apparent belief, MWDSLS’s Petition does not seek resolution of its property rights relative to Questar or to subordinate Questar’s rights to MWDSLS’s. MWDSLS is not asking the Commission to resolve any particular property dispute between itself and Questar. And, specifically, MWDSLS is in no way “asking the Commission to allow MWDSLS to condemn Questar Gas’ interest in the co-occupied property, acquired by a franchise from Salt Lake County.” (Division’s Resp. at 8.) Rather, with regard to its Regulations, MWDSLS merely requests that the Commission require regulated utilities, including Questar, to comply with the rules and regulations of metropolitan water districts until those rules or regulations have been held invalid, much as they must comply with statutes, ordinances, and other municipal regulations until they have been held invalid.

In doing so, MWDSLS in no way means to imply that it “is more important than a Commission regulated public utility,” or that “the water service MWDSLS provides is more important than the gas service that Questar Gas provides.” (Division Resp. at 7, 8.) The fact is that the Legislature has seen fit to grant local districts,¹ including metropolitan water districts, the authority to “adopt and enforce rules and regulations for the orderly operation of the local

¹ MWDSLS has limited its requests contained in its Petition to metropolitan water districts. However, similar arguments could be made that the requested rules should apply equally to all local districts.

district or for carrying out the district’s purposes.” [Utah Code Ann. § 17B-1-301\(2\)\(i\)](#). Neither the Utah Code nor the Commission’s Rules grant regulated utilities, such as Questar, similar regulatory authority. While metropolitan water districts’ regulatory authority does not make them more “important” than a regulated utility, it does establish that metropolitan water districts have, in some respects, greater power and authority than do regulated utilities. In this sense, metropolitan water districts are akin to cities, which unquestionably have the authority to regulate through ordinance or otherwise. By requiring that regulated utilities comply with metropolitan water districts’ valid rules and regulations, the Commission would no more be “subjugating” the rights of the regulated utility to the metropolitan water district than it would in requiring the regulated utility to comply with valid city and county ordinances. The difference is, Questar recognizes the latter regulatory scheme whereas it refuses to recognize the former.²

Finally, neither of the problems the Division identifies with requiring compliance with metropolitan water districts’ rules and regulations is a reality. First, the Division appears to argue that such a rule would be futile because the regulated utility could simply condemn the property it needs. This assertion ignores the fact that the metropolitan water district would continue to have regulatory authority. A regulated utility cannot condemn around a metropolitan water district’s regulations any more than it can, for instance, condemn around a city’s zoning ordinance. Any condemned property would remain subject to the regulations just as it would remain subject to the zoning ordinance. Second, the Commission and all affected regulated

² MWDSLS recognizes that Questar has every right to challenge MWDSLS’s regulatory authority, as it has done in Case Nos. 120905379 (SLA) and 140900286 (POMA). As is clear from MWDSLS’s Petition, if there is a final decision from an appellate court holding that MWDSLS lacks the regulatory authority it claims, MWDSLS naturally would not expect any entity, including regulated utilities, to be required to comply with its Regulations to the extent they are declared invalid.

entities—and any other affected person or entity for that matter—are very much able to challenge MWDSLS’s Regulations. The Regulations themselves establish an administrative process for challenging any decision under the Regulations. And, there is nothing to prevent an affected person from challenging in court either MWDSLS’s authority to promulgate the Regulations or the validity of the Regulations. Indeed, Questar is challenging the former in two proceedings at this time.

The Division has failed to identify any reason why the Commission should exercise its discretion and refuse to conduct an investigation into Questar’s practices identified in MWDSLS’s Petition.

CONCLUSION

For the foregoing reasons, MWDSLS requests that the Commission consider its Petition and grant the relief requested therein.

DATED this 5th day of February, 2017.

SNOW, CHRISTENSEN & MARTINEAU

/s/ Shawn E. Draney

Shawn E. Draney
Scott H. Martin
Dani N. Cepernich
10 Exchange Place, 11th Floor
Post Office Box 45000
Salt Lake City, Utah 84145
Attorneys for Petitioner MWDSLS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY TO THE DIVISION OF PUBLIC UTILITIES' RESPONSE TO REQUEST FOR INVESTIGATION AND RULEMAKING PROCEEDING** was served upon the following persons by e-mail and U.S. Mail on the 5th day of August, 2014:

Edwin C. Barnes
Perrin R. Love
CLYDE SNOW & SESSIONS
One Utah Center
201 South Main Street, 13th Floor
Salt Lake City, Utah 84111
ecb@clydesnow.com
prl@clydesnow.com

Colleen Larkin Bell
Jennifer Nelson Clark
J.D. Kesler
Questar Gas Company
333 South State Street
P.O. Box 45433
Salt Lake City, Utah 84145
Colleen.Bell@questar.com
Jennifer.Clark@questar.com
JD.Kesler@questar.com

Brent Coleman
Patricia E. Schmid
Assistant Attorney General
160 East 300 South, 5th Floor
P. O. Box 140857
Salt Lake City, UT 84114-0857
brentcoleman@utah.gov
pschmid@utah.gov

Chris Parker, Director
Division of Public Utilities
Heber Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84111
chrisparker@utah.gov

/s/ Shelly Deal
