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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of
QUESTAR GAS COMPANY for Approval
of a Natural Gas Processing Agreement

In the Matter of the Application of
QUESTAR GAS COMPANY for a
General Increase in Rates and Charges

In the Matter of the Applications of
QUESTAR GAS COMPANY to Adjust
Rates for Natural Gas Service in Utah

In the Matter of the Application of
QUESTAR GAS COMPANY to Adjust
Rates for Natural Gas Service in Utah

Docket No. 98-057-12
Docket No. 99-057-20
Docket No. 01-057-14
Docket No. 03-057-05

**INITIAL BRIEF OF THE UTAH
COMMITTEE OF CONSUMER SERVICES**

Pursuant to the August 26, 2003, order of the Public Service Commission of Utah (“Commission”) in these

dockets, the Utah Committee of Consumer Services (“Committee”) files this initial brief.

INTRODUCTION

On August 1, 2003, the Utah Supreme Court (“Court”) reversed, without remand, the Commission’s Order allowing Questar Gas Company (“Questar Gas” or “utility”) rate recovery of its coal seam gas processing costs (“CO₂ processing costs”) incurred under contract with a non-regulated Questar Corporation affiliate.

The Commission’s order allowed rate recovery on the grounds the costs paid for a “required result,” notwithstanding its conclusive determination that the utility failed to provide a sufficient record that demonstrated those costs were prudently incurred and not influenced by affiliate interests.

In its reversal, the Court rejected the rationale that a required result legitimized rate recovery, and concluded the Commission ultimately decided the outcome of these proceedings with its determination that the utility failed to provide a sufficient record to demonstrate its prudence. As if that determination were not sufficient, the Court went on to say it would reach the same reversal without remand result on the grounds the Commission “erred by failing to hold Questar Gas to its burden of showing that the [rate] increase was just and reasonable.”

Despite the unmistakable plainness and finality of the Court’s decision, Questar Gas now seeks to persuade the Commission to continue these proceedings for the unlawful purpose of allowing further evidence and findings into the record which it apparently believes will overcome the Court’s appellate denial of rate recovery. Further to that end, instead of properly returning to the Court for timely clarification of any words, or the absence thereof, in the Court’s decision it believes are unclear, the utility would have the Commission presume to alter what are unquestionably plain and binding words of an appellate court.

The utility’s urging and argument are without merit. The finality of the Court’s opinion speaks for itself. It remands nothing back to the Commission that would authorize or require further Commission proceedings beyond giving effect to the Court’s decision. Moreover, there is justice as well as finality in the Commission’s conclusive determination that Questar Gas failed to demonstrate its CO₂ processing costs were prudently incurred. There is justice

because that determination was not made until the end of plenary proceedings lasting almost two years and through two separate rate cases that gave the utility ample opportunity – and then some – to make its case for rate recovery.

According to Questar Gas:

[T]he CO₂ issue has been fully litigated in a general rate proceeding where every rate-related issue has been on the table for the parties and the Commission to examine comprehensively and completely . . .

I. THE COURT’S DECISION IS CLEAR AND FINAL ON ITS FACE

The utility’s view that the Court’s decision empowers the Commission to continue these proceedings is not based on any directive of the Court since its opinion and decision are utterly void of any remand or other words indicating an intent to remit such authority and jurisdiction back to the Commission. Questar Gas’ view must therefore be based on a belief that the Court did not really say what it said; that hidden behind its plain words is a meaning or unintended consequence understandable only to the fully schooled and initiated. Such legalism requires the very un-legal step of taking the Court’s words of reversal and rejection out of context from the reasoning and conclusions to which they relate.

*The Court’s Decision Addresses the Legal Justification for the Commission’s Order*A fundamental rule of interpretation, not only in law but for human communication generally, is statements or words not specifically defined mean what they say. So, the first order of business is to be clear about what the Court actually said. And, revealing words regarding the breadth and focus of the Court’s decision are found in the very first paragraph of its opinion.

There the Court states the subject of its review is not a contested stipulation or settlement, but a “[Commission] order . . . approving a gas rate increase:”

The Committee of Consumer Services (Consumer Services) seeks review of an order by the Utah Public Service Commission (the Commission) approving a gas rate increase. The increase was sought to cover costs resulting from the construction and operation of a carbon dioxide (CO₂) processing plant by an affiliate of Questar Gas Company (Questar Gas).

At the end of its review, the Court renders the following decision:

We reverse the Commission’s order and reject the rate increase proposed by the CO₂ Stipulation.

The Crux of the Court's Decision

As should be evident to the reader, this critical wording remands *nothing* back to the Commission for further findings or proceedings. The reason for such finality is found in the opinion itself.

Turning first to the Commission's rationale that a finding of a "required result" allowed it to impose CO₂ processing costs on ratepayers, the Court stated:

We hold that the Commission's safety rationale is neither an adequate nor a fair and rational basis for departing from its prudence review standard. While safety concerns may have necessitated the construction and operation of a CO₂ plant, they do not establish who should bear the cost of these measures.

The Court then directed its attention to the Commission's conclusion "that it need not rule on whether Questar Gas' decision to contract with its affiliate was prudent;" and, most specifically, the Commission's determination that:

[t]he record is insufficient to permit us to determine whether [Questar Gas]'s analysis of options prior to early 1998 was sufficiently objective and thorough, that is, to reach a conclusion whether options were ruled in or out as a result of the influence of affiliate interests. Nor can a sufficient record be developed.

The crux of the Court's analysis is its unequivocal conclusion that the Commission should have denied the utility's application to recover its CO₂ processing costs in rates upon making the above conclusive determination:

If the record had permitted, the Commission could have carried out its initial obligation to review the prudence of the CO₂ plant contract and its terms, holding Questar Gas to its burden of establishing that its decision to enter into the contract and the costs it agreed to were prudent and not unduly influenced by its affiliate relationship with Questar Pipeline. Since the Commission found that no such record was or could be made available, it should have refused to grant a rate increase that included CO₂ plant costs. We therefore overturn the Commission's decision to accept the CO₂ Stipulation and to grant the rate increase proposed therein. [Emphasis added]

The Decision is not about the CO₂ Stipulation

In the above-quoted statement, the Court is making *the ultimate and final decision* in these proceedings that it determined the Commission erroneously failed to make – a decision that inexorably follows from the Commission's own conclusive factual and legal determination. There is nothing narrow or procedural or inconclusive about the

decision. It certainly does not merely reverse the Commission’s acceptance of the CO₂ Stipulation, as Questar Gas would apparently now assert. The only reason the Court even mentions that settlement in its analysis is because it is the vehicle embodying the rate increase that it rejected.

The non-relevance of the terms of the CO₂ Stipulation in the Court’s analysis and decision can be further confirmed by examining the reasoning in the Commission’s Order that the Court focuses on. The Commission does not turn to an examination and analysis of the CO₂ Stipulation until *after* its conclusive determination of an insufficient record and further erroneous determination that a “required result” would allow CO₂ processing costs to be “legitimately” recovered in rates.” Moreover, the Commission did not find the stipulation acceptable as an adjunct to its legitimacy analysis. Nor did it find that settlement acceptable as an apportionment of Questar Gas’ entitlement to rate recovery based upon its being prudent, not prudent, or “not entirely prudent.” It instead grounded its approval of that settlement on the Division of Public Utilities’ assessment of costs the utility *might* have been allocated as a user of Questar Pipeline’s system had the controversy been submitted to the FERC.

In similar manner, the Court’s reversal does not derive from any analysis of the CO₂ Stipulation, but rather from an analysis and finding of error in the Commission’s antecedent legitimacy analysis. It is there the Court found the Commission erred in concluding it could allow rate recovery based upon the finding of a required result, or “safety exception,” as an acceptable alternative to a determination of prudence. And it was in that antecedent legitimacy analysis where the Court found the Commission erred in *not* denying Questar Gas rate recovery once it conclusively determined the utility failed to demonstrate its CO₂ costs were prudently incurred. That conclusive Commission determination decided these proceedings, and it had nothing to do with the CO₂ Stipulation’s terms or allocation of costs.

II. THE COURT’S DECISION LEAVES THE COMMISSION WITHOUT AUTHORITY OR JURISDICTION TO CONTINUE THIS CONTROVERSY

The Court is Limited in the Relief it May Grant

The Court is limited by the Utah Administrative Procedures Act in the appellate relief it can grant for

Commission error. It “may:”

- (i) order agency action required by law;
- (ii) order the agency to exercise its discretion as required by law;
- (iii) set aside or modify agency action;
- (iv) enjoin or stay the effective date of agency action; or
- (v) remand the matter to the agency for further proceedings.

As discussed above, the Court did not “remand the matter to the [Commission] for further proceedings.” It also did not “order agency action required by law;” “order the agency to exercise its discretion . . .” or “enjoin or stay the effective date of agency action.” There is nothing in the relief the Court granted that requires or empowers the Commission to do anything other than give effect to a final appellate court decision that set aside its order.

The Court’s Form of Remittitur

The Commission’s authority and jurisdiction regarding this controversy ceased when the Committee perfected its appeal and it only returns to the Commission to the extent the Court returns or remits it. The form of remittitur or mandate used by the Court to remit proceedings back to the Commission is brief and apparently contains similar wording regardless whether the Court is remanding a matter back to the Commission for further proceedings or not. In this case it states:

This cause having been heretofore argued and submitted, the Court being sufficiently advised in the premises, and the OPINION having been issued, the matter is hereby remitted.

Since the form of remittitur utilized by the Court does not specify the mandate of authority and jurisdiction returned to the Commission, one must refer to the opinion and decision referenced in the remittitur.

The Absence of Remand was Intentional and a Remand would Serve no useful Purpose

As Section I above makes clear, the Court’s opinion does not remand any authority and jurisdiction back to the Commission to continue these proceedings. The absence of such directive appears very intentional in light of the significant portion of the Court’s opinion devoted to the discussion of an earlier related case, which the Court *did*

remand back with explicit and detailed instructions to the Commission for further proceedings. The Court's juxtaposition and treatment of that earlier case with this case in its opinion makes it all the more untenable for the utility to try and argue that the Court's decision in this case did remand something back to the Commission that would allow further proceedings. Such remand of authority and jurisdiction for further findings and proceedings is plainly not there for the reason it would serve no useful purpose since, as the Court found, these proceedings were ultimately and finally decided by the Commission's conclusive determination of an insufficient record.

III. QUESTAR GAS HAS HAD ITS DAY IN COURT

_____Aside from whatever arguments Questar Gas might raise regarding the effect of the Court's reversal of the Commission's order, there is a further fundamental reason why these proceedings are over that is implicitly present in the Court's decision, but which nevertheless deserves further comment: *Questar Gas has had its 'day in court' – and a very ample day at that.* Because a party's evidence after plenary hearing or trial is ultimately found wanting is no justifiable reason to give the party another opportunity to make its case. Such logic would tend to make trial victors eventual losers and encourage unending litigation. "Due process contemplates that somewhere along the line a fair trial be had – not that there be two or three fair trials."

Determination of an Insufficient Record Was Made after Ample Opportunity to be Heard

In considering the Commission's determination of an insufficient record, it is important to bear in mind that determination was made *after* a plenary hearing on the prudence and reasonableness of Questar Gas' actions and inactions giving rise to its CO₂ processing costs was completed – a plenary hearing that extended through two separate case dockets. The CO₂ Stipulation was presented to the Commission at the end of that plenary hearing. In fact, as Questar Gas emphasizes in its post-hearing brief in Docket 99-057-20, that settlement was entered into only after each of the participating parties had made its case before the Commission, and in recognition of the uncertainties of "pressing on to an 'up-down' decision by [the] Commission:"

Questar Gas resolutely believes it undertook an appropriate and prudent course of action in dealing with the Btu-safety problem on its system. Nevertheless, it recognizes – as have the Division, the IGU and LCG – that there are litigation risks, costs and uncertainties in pressing on to an "up-down" decision by the Commission and the appellate courts.

Accordingly, the four entities, each for its own reasons, have agreed to terms and conditions that constitute the usual fabric of a reasonable settlement: no party is particularly satisfied with the outcome, but each recognizes the uncertainties of litigation and desirability of a final solution of the issue in which each side concedes something on which it held an earnest and strong view.

Questar Gas Has Already Had More than One Sufficient Opportunity to Make its Prudence Case

Questar Gas' efforts to demonstrate its CO₂ processing costs were prudently incurred began with the filing of its application for rate recovery in a 1998 Account 191 cost pass-through proceeding, Docket No.98-057-12; and its efforts continued throughout that earlier proceeding and into the utility's 1999 general rate case filing, Docket No. 99-057-20, where it petitioned the Commission to take official notice of the record of the 1998 proceeding in support of its petition for interim rate relief. Questar Gas' application in the 1998 proceeding is a litany of argumentative reasons why the costs at issue were prudently incurred and should be allowed into rates. The testimony of its principal witness accompanying that application expanded on those arguments and concludes with the following question and answer exchange:

Q. Why should the contract be approved?

A. The issues related to reduced Btu gas faced by Questar Gas' customers are real. The Company has analyzed the options available and selected the most reasonable, *prudent* course of action . . . The contract should be approved because it is the *prudent* solution to this issue. [Emphasis added]

The utility's contention that it acted prudently was immediately joined in the responsive testimony of Committee, Division of Public Utilities, and other party witnesses in that earlier proceeding; which testimony pointedly raised the issues of conflicting affiliate interests and affiliate control. The exchange and proffering of evidence on those issues was such that Questar Gas' principal witness later testified the issue of prudence was "the central element" before the Commission in the Docket 98-057-12 proceeding, even though the Commission did not rule on it at that time.

Having been so joined in the earlier proceeding, the issue of prudence entered the Docket No. 99-057-20 general rate case proceedings fully on the table before the Commission, only to be further supplemented by additional discovery evidence, testimony, rebuttal testimony, and cross-examination by Questar Gas and opposing parties. Near the end of a record built during the course of two separate rate proceedings, Division witness Lowell Alt, in Docket No. 99-057-20

summarized the issue of prudence as follows:

In sum, after extensive review of information in this case and No. 98-057-12, the Division believes that the actions of QGC were not entirely prudent. QGC's actions, or in-actions, appear to be influenced by affiliate relations more than the financial interests of its customers. [Emphasis added]

Before this definitive testimony by Division witness Alt – in fact, simultaneous with the filing of the utility's December 17, 1999 application in that case – the utility's principal witness testified in connection with the utility's petition for interim rate relief as follows:

The Commission has heard extensive evidence on the nature and amount of these costs and on the issue of prudence of the Company's decision to protect customers' safety by contracting for this processing . . .

And, even after this testimony in the later proceedings, the utility had the opportunity to still further supplement what it already described as “extensive evidence on the nature and amount of these costs, and on the prudence of the Company's decision . . .” It also had ample opportunity – during both the Docket 98-057-12 hearings and the Docket 99-057-20 hearings – to cross-examine opposing witnesses as it thought best in order to overcome the case other parties were making against its claim of prudence. It was further given every opportunity during discovery in both proceedings to document the decision-making process it went through in selecting the CO₂ Plant remedy and incurring affiliate contract gas costs, and to show how that decision-making process was prudent. Questar Gas' failure to produce credible evidence for the record showing its management decisions and actions were not controlled by affiliates with conflicting interests supports the Commission's conclusion that a record, demonstrating utility management decisions were not so influenced, could not be developed.

Questar Gas' Case Was Simply not Persuasive in Light of Opposing Evidence

That Questar Gas responded to opposing testimony and evidence in the record in a manner which ultimately failed to satisfy or persuade the Commission is not the result of any lack of opportunity to make its case, because – by its own admission – it had every opportunity to do so – and then some. It is rather the result of how the utility chose to respond and the evidence it failed to produce. For example, in the face of opposing evidence showing its actions were controlled by Questar affiliates with conflicting interests, the utility countered with arguments such as: (1) affiliate

intervention occurred simply to “help” the utility, and “the affiliate relationship with Questar Gas does not impose on Questar Pipeline the obligation to act against its own interests;” and (2) Questar Pipeline had no choice but to transport the increasing quantities of coal seam gas. Neither there nor elsewhere did the utility *ever* credibly confront the prudence issues of conflicting affiliate interests and control raised and substantiated by opposing parties in the record despite numerous opportunities to do so.

The record of these proceedings - extending through two separate rate cases – is a record of Questar Gas having been afforded every opportunity to demonstrate that the costs at issue were prudently incurred and not the result of the influence of affiliate interests. That it ultimately failed to do so simply means it had its fair ‘day in court’ to show it was entitled to recovery of those costs and finally lost.

SUMMARY

This issue would not be before the Commission had Questar Gas timely and appropriately petitioned the Court to clarify its decision. For reasons not that difficult to discern, the utility chose not to do that and is instead urging the Commission to assume authority it does not have to fundamentally alter – indeed ultimately reverse – a plainly-worded decision of the highest appellate court in this state.

It is difficult to see why the Commission would step into this play of Questar Gas’ making, facing the virtual certainty that it would be found to have arrogated authority it does not have. The far wiser course is to give effect to the plainly-worded decision of the Court that denies Questar Gas rate recovery of its CO₂ processing costs because it ultimately failed to demonstrate those costs were prudently incurred and not influenced by affiliate interests.

The Committee trusts the Commission will agree its mandate from the Court is clear. Its order allowing CO₂ processing costs into rates has been reversed by a final decision of the Court. There is not – in fact there never was – a lawful rate whereunder Questar Gas can legally recover its CO₂ processing costs from ratepayers. The Commission’s duty therefore is to implement the Court’s decision by adjusting Questar Gas’ 191 balancing account to remove and return to ratepayers the monies the utility has recovered and still is recovering for CO₂ processing costs.

Submitted this 25th day of September, 2003.

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CERTIFICATE OF SERVICE

I certify that I mailed or hand-delivered the foregoing **INITIAL BRIEF OF THE UTAH COMMITTEE OF CONSUMER SERVICES** in Docket Nos. 99-057-12; 99-057-20; 03-057-14 and 03-057-05 this _____ day of September, 2003.

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