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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	:	Docket No. 98-057-12
In the Matter of the Application of QUESTAR GAS COMPANY for a General Increase in Rates and Charges	:	Docket No. 99-057-20
In the Matter of the Application of QUESTAR GAS COMPANY to Adjust Rates for Natural Gas Service in Utah	:	Docket No. 01-057-14
In the Matter of the Application of QUESTAR GAS COMPANY to Adjust Rates for Natural Gas Service in Utah	:	Docket No 03-057-05

RESPONSE BRIEF OF QUESTAR GAS

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I. INTRODUCTION

Questar Gas Company ("Questar Gas" or "Company"), pursuant to the Scheduling Order issued in these dockets on August 26, 2003, submits its response to the Initial Brief of the Utah Committee of Consumer Services ("Committee Brief") dated September 25, 2003.

The Committee Brief provides no basis for a Commission refusal to resume its ratemaking function and determine the justness and reasonableness of the Company's proposed rate increase. The Committee of Consumer Service's ("Committee") position rests entirely on two errors: one legal and the other factual. The legal error is the ongoing assertion that the Commission, following the decision of the Utah Supreme Court in *Committee of Consumer Services v. Public Service Comm'n of Utah*, 2003 UT 29, 75 P.3d 481 ("*Decision*"), is precluded from resuming its ratemaking function and correcting the error observed by the court.[1] The factual error is the Committee's assertion that the Commission has already made a "conclusive determination" that Questar Gas did not and could not provide a sufficient record to demonstrate the prudence of the CO_2 processing costs.[2]

The Brief of Questar Gas on Jurisdictional and Refund Issues dated September 25, 2003 ("Opening Brief") demonstrated the abundance of legal authority in support of the Commission's power—indeed responsibility—to resume its ratemaking function following the *Decision*. This brief will refute the contrary authority cited in the Committee Brief. However, the Committee's principal support for its claim that the Commission cannot resume its ratemaking function rests on the Committee's factual error (that the Commission has already determined that Questar Gas failed to show prudence). Indeed, the Committee effectively concedes that the real reason it

[1] Correcting the error would require the Commission to make a prudence finding on the costs incurred by Questar Gas to remove carbon dioxide ("CO_2") from natural gas coming onto the Company's southern system ("CO_2 processing costs").

[2] *See, e.g.*, Committee Brief at 2.

believes the Commission cannot resume its ratemaking function is that the Commission has already finished, having made the "determination that [Questar Gas] failed to provide a sufficient record to demonstrate its prudence."[3] The Commission never made such a determination, and, if the Commission fails to re-open these proceedings to conclude its ratemaking function, Questar Gas will be denied recovery of its CO_2 processing costs without ever receiving a finding on whether any or all of those costs were prudently incurred. Such a result would be unfair and would deny Questar Gas due process of law.[4] The Commission should reject such a result and should resume these proceedings to conclude its ratemaking function.

II. ARGUMENT

A. THE COMMISSION DOES NOT NEED COURT APPROVAL TO CONTINUE ITS RATEMAKING FUNCTION. THE CLARITY OR LACK THEREOF IN THE *DECISION* IS NOT THE ISSUE.

As demonstrated in the Company's Opening Brief, the Commission's authority to resume its ratemaking function derives from the legislature, and does not depend on a court remand. *See, e.g., Beaver County v. Qwest, Inc.*, 2001 UT 81, ¶ 12, 31 P.3d 1147, 1150 ("We have consistently adhered to the legislature's intent in delegating adjudication of the rate making function to the PSC."); *see also Utah Dept. of Admin. Services v. Public Service Comm'n ("Wexpro II")*, 658 P.2d 601, 615 (Utah 1983) ("[T]he public authority empowered to regulate and 'supervise all of the business' of a public utility, U.C.A., 1953, § 54-4-1, is the Commission, not this Court."); *Mountain States Tel. & Tel. Co. v. Public Service Comm'n,* 155 P.2d 184, 188 (Utah 1945) (in setting aside a previous Commission decision "[w]e did not [determine that the rates charged by the utility were unjust, unreasonable or confiscatory] simply because that is not our function. Indeed, it is not a judicial function. It is legislative and is to be exercised by the

[3] *See id.*

[4] *See* Opening Brief at 25-27.

arm of legislature—the Public Service Commission.").[5] Thus, the statements in the Committee Brief about the purported finality and clarity of the *Decision*, as well as the dire prediction that if the Commission resumes its ratemaking function there is a "virtual certainty that it would be found to have arrogated authority it does not have"[6] are without merit. The actual holding of the *Decision* did one thing: it reversed the portion of the Commission's *Order*[7] approving the CO_2 Stipulation, because the Commission failed to determine whether the Company's CO_2 processing costs were prudently incurred.[8] The remainder of the substantive discussion in the *Decision* consists of dicta, largely the court explaining the basis for its holding. In arguing about the supposed clarity and finality of the *Decision*, the Committee would have the Commission erroneously determine that it is bound by such explanatory dicta. The Commission should reject the Committee's erroneous position and resume its ratemaking function.

B. THE COMPANY'S "DAY IN COURT" WILL NOT BE COMPLETE UNTIL IT RECEIVES A COMMISSION FINDING ON PRUDENCE. IT HAS NOT YET RECEIVED SUCH A FINDING.

The crux of the Committee's argument does not rely on any legal authority. Rather, it relies on the factual assertion that the Commission made a conclusive determination that Questar Gas did not and could not demonstrate prudence. The Committee Brief asserts that "Questar Gas has had its 'day in court'—and a very ample day at that."[9] In support of this statement, the Committee Brief cites statements made by Questar Gas at earlier stages in these dockets about the extensive evidence on the record to demonstrate prudence; and it draws the conclusion that there is "justice as well as finality in the Commission's conclusive determination that Questar

[5] *See also infra* notes 25, 27.

[6] *See* Committee Brief at 18.

[7] Report and Order, *In the Matter of the Application of Questar Gas Company for a General Increase in Rates and Charges*, Docket No. 99-057-20 (Utah PSC August 11, 2000) ("*Order*").

[8] *See Decision* at ¶¶ 14, 16.

[9] *See* Committee Brief at 11.

Gas failed to demonstrate its CO_2 processing costs were prudently incurred."[10] In all of this, however, the Committee sidesteps the real issue. The real issue is that the Commission has **never** made a finding on prudence. The Committee is correct in asserting that there was ample evidence on prudence and a substantial period over which the parties argued **about** the issue, and the Company stands by its statements to that effect cited in the Committee Brief. However, the Committee is incorrect in asserting that the Commission made the ultimate determination of the issue. There was never a Commission finding that any or all of the CO_2 processing costs were or were not prudently incurred. Instead, the case was truncated by the *Order* accepting the CO_2 Stipulation settling the case. The Utah Supreme Court determined that the absence of a finding on prudence was erroneous. The right course for the Commission to take from here is simple—the Commission should make the prudence determination it did not make the first time.

When an outcome such as the CO_2 Stipulation is accepted below, but that acceptance is overturned on appeal due to the lower tribunal's application of an erroneous legal standard (in this case, failure to make a determination on prudence), the result is not simply to reject the outcome and call it a "day in court"; the result is that the lower tribunal makes a new decision applying the correct legal standard.[11] This principle is demonstrated by the *Wage Case, Utah Dept. of Bus. Reg. v. Public Service Comm'n*, 614 P.2d 1242 (Utah 1980), where the court reversed because the Commission made the legal error of failing to make a finding that the proposed rate increase was just and reasonable. When the Division of Public Utilities argued in that case that as a result of the Commission's legal error the Commission's order was "invalid and void from its inception" and that "the amounts collected thereunder [should] be refunded," *id*. at 1250, the court disagreed, holding that:

[10] *Id.* at 3.

[11] *See, e.g.*,73A C.J.S. *Public Administrative Law and Procedure* § 258 (1983) (citations omitted).

> To undertake such a course would be tantamount to this Court engaging in rate-making, which is strictly a legislative power, for the P.S.C. in fixing and promulgating rates acts merely as an arm of the Legislature. The review by this Court of the orders of the P.S.C. is confined to the legal issues of whether there is substantial evidence to sustain the findings of the P.S.C.; whether the P.S.C. has exercised its authority according to law; and whether any constitutional rights of a complaining party have been invaded or disregarded. Any interference by this Court beyond the aforementioned limits would constitute an interference with the law-making power of this state.

Id. For the Commission, therefore, to now simply deny recovery of **all** CO_2 processing costs, without ever finding whether Questar Gas was prudent in incurring **any** of those costs, on the theory that the *Decision* somehow inferentially mandates such a result, would attribute to the court a position contrary to law generally and to its own precedent specifically.[12]

1. The Committee's Assertion About the Meaning of "No Record Could be Developed" Ignores the Broader Context of the *Order*, is Contrary to Prior Commission Authority, and Flouts Well-established Rules of Interpretation.

The Committee's argument that the Commission conclusively determined that Questar Gas could not demonstrate the prudence of incurring CO_2 processing costs relies on the Commission's statement in the *Order* that

> The record is insufficient to permit us to determine whether the Company'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**.

Order at 34.[13] In essence, the Committee wants the emphasized portion of the quote to read, "Nor can a sufficient record be developed [by Questar Gas to demonstrate prudence]." The context of the *Order*, however, does not permit the reading the Committee seeks.

The Commission's "nor can a sufficient record be developed" statement modifies its

[12] It also would be inequitable and a denial of due process. *See* Opening Brief at 26-27.

[13] *See* Committee Brief at 5-6.

immediately preceding statement regarding "the Company's analysis of options prior to early 1998." For the "nor can a sufficient record be developed" statement to have meant what the Committee wants it to mean, the Commission would have had to equate the prudence of the **entire** amount of CO_2 processing costs solely with the thoroughness and objectivity of "the Company's analysis of options prior to early 1998 ... as a result of the influence of affiliate interests." This would have been an improper equation.[14] The Commission never made the equation despite the Committee's argument to that effect.[15]

Further, for the Commission's statement to have meant what the Committee wants it to mean, the Commission's statement that immediately followed the "nor can a sufficient record be developed" statement would have been rendered nonsense. In the paragraph immediately following the "nor can a sufficient record be developed" paragraph, the Commission stated:

> The most troubling question is whether the contract between QGC and its unregulated affiliate, QTS, was prudently entered. ... Clearly, QGC has the burden to demonstrate the decision to enter the contract is a prudent one. Parties differ as to whether it did so successfully. But

[14] It would have been improper because, even assuming it was relevant to prudence, any alleged pre-1998 affiliate-interested decision-making certainly could not have been completely determinative of prudence. That is, even if the alleged undue affiliate influence did affect the Company's decision-making, the appropriate standard for determining prudence is whether actions taken were objectively reasonable, or what amount of recovery, if any, a prudent result would have allowed. *See* Order, *In the Matter of the Application of Mountain Fuel Supply to Adjust Rates for Natural Gas Service in Utah*, Docket Nos. 91-057-11 and 91-057-17 (Utah PSC September 10, 1993) ("The decisions must be judged in light of what [the utility] knew or reasonably should have known."); *In re Portland General Electric Co.*, UP 158, Order No. 99-498 at 3-4 (Or PUC Aug. 17, 1999) (prudence review "examines whether a 'reasonable utility manager, under the same circumstances and acting in good faith, would not have made the same decision'") (citation omitted). The Commission clearly understands and accepts this standard, as demonstrated by its past decisions on affiliate transactions (*see* Opening Brief at 21-23) and as demonstrated by counsel for the Commission during oral argument on appeal in this proceeding, where he noted that even if the Company's decision-making process was improper due to affiliate interest the Commission would still need to determine what the outcome of a prudent process would have been.

[15] The Committee has consistently in these proceedings tried to get the Commission to focus solely on the subjective "affiliate influences" in the Company's analysis of options when determining prudence. It has further erroneously suggested that prudence is an all-or-nothing proposition depending on whether those "affiliate interests" exist. The Commission has done nothing, in the *Order* or elsewhere, to indicate an acceptance of the Committee's position.

> **whether or not QGC met this burden, we can and do conclude that its decision to procure gas processing has yielded the required result**, that is, it has effectively protected the safety of its customers.

Order at 35 (emphasis added). If the Commission had actually made the supposed "conclusive determination," the emphasized portion of this quote would make no sense. Instead, in addition to refusing to give rate relief, the Commission would have had to say something like: "Parties differ as to whether [Questar Gas met its burden to demonstrate prudence] successfully. The Commission finds that it did not meet its burden. But ~~whether or not~~ notwithstanding the fact that QGC ~~met~~ did not meet this burden, we can and do conclude that its decision to procure gas processing has yielded the required result." This is not, however, what the *Order* said.

It is a fundamental principle of interpretation that all portions of an order need to be read together in a manner that gives effect to all and renders none meaningless or irrelevant.[16] Applying this rule to the *Order* compels the conclusion that the Commission did not believe its "nor can a sufficient record be developed" statement amounted to a conclusive finding that Questar Gas had not and could not meet its burden to establish that any of the CO_2 processing costs were prudent. The Committee Brief accuses Questar Gas of ignoring language in the *Decision*.[17] In fact, it is the Committee that ignores inconvenient language in the *Order* and violates these well-established rules of legal construction.

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[16] *See, e.g., Matter of Estate of Leone*, 860 P.2d 973, 975 (Utah App. 1993) ("Court orders are subject to the same rules of construction that apply to other written instruments."). Pursuant to those rules of construction, courts "presume that the legislature used each word advisedly and ... give effect to the term according to its ordinary and accepted meaning, and ... seek to render all parts of the statute relevant and meaningful." *State v. Huntington-Cleveland Irrigation Co*., 2002 UT 75, ¶ 13, 52 P.3d 1257, 1261 (quotations and bracketing omitted); *see also Arredondo v. Avis Rent A Car Sys., Inc*., 2001 UT 29, ¶ 13, 24 P.3d 928 (courts have a "fundamental duty to give effect, if possible, to every word") (quotation omitted); *Kraatz v. Heritage Imports*, 2003 UT App. 201, ¶ 26, 71 P.3d 188, 196 ("Contracts should be read as a whole, in an attempt to harmonize and give effect to all of the contract provisions.") (quotation omitted).

[17] *See, e.g*., Committee Brief at 3.

2. The Committee's Assertion About the Meaning of "No Record Could be Developed" is Also Implausible and Inconsistent With the History of These Proceedings.

The Committee seeks to persuade the Commission that in the *Order* the Commission both (1) declined to make a finding on whether Questar Gas was prudent[18] and (2) found that Questar Gas failed to demonstrate that it was prudent.[19] The Committee cannot have it both ways. If the Commission found that Questar Gas failed to demonstrate that it was prudent, the Commission did not decline to make a finding on prudence. Conversely, given that the Commission clearly did decline to make a finding on prudence,[20] it is illogical to argue that the Commission made a "conclusive determination" that Questar Gas failed to demonstrate prudence. It is also unreasonable to assume that the Commission would grant recovery if it determined that none of the CO_2 processing costs could possibly be shown to have been prudently incurred.[21] Such an interpretation is simply not consistent with the *Order*, the history of these proceedings before the Commission, or the Commission's argument before the court. Indeed, the Committee's current interpretation is not even consistent with the Committee's previous view in these proceedings. In response to questions from the Commission regarding whether a finding of prudence was necessary, counsel for the Committee argued during the

[18] *See, e.g., id.* at 8 ("[T]he 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.") (emphasis added).

[19] *See, e.g., id.* ("[T]he Court found the Commission erred in *not* denying Questar Gas rate recovery once it conclusively determined the utility failed to demonstrate its CO_2 costs were prudently incurred.").

[20] *See Order* at 35 ("[W]hether or not QGC met this burden, we can and do conclude that its decision to procure gas processing has yielded the required result ... .").

[21] Even then-Chairman Mecham, the only Commissioner not to vote unconditionally for recovery in rates of a portion of CO_2 processing costs, implicitly rejected the argument that Questar Gas could not show prudence. He merely sought the interim step of a FERC finding to assist the Commission in making a prudence determination. *Order* at 60. He also observed that he did "not believe it would be fair to simply deny the Company recovery of the CO_2 plant expenses." *Id.* at 61. Yet that is precisely what the Committee would have the Commission now do.

hearing in the general rate case that "if any CO_2 processing costs are allowed into rates, then you are at least implicitly ... making a prudence determination at that amount."[22] Thus, the Commission's approval of the CO_2 Stipulation amounted, in former Committee counsel's view, to a finding by the Commission that up to $5 million per year of CO_2 processing costs were prudently incurred.

3. Even If the Committee Is Correct That the Court Did Not Anticipate Further Substantive Proceedings, the Court's Understanding Does Not Preclude the Commission From Making a Finding On Prudence.

The Committee argues that the *Decision* "does not remand any authority and jurisdiction back to the Commission to continue these proceedings"[23] and, therefore, that the Commission has no authority to resume its ratemaking function.[24] The Committee is wrong. As Questar Gas demonstrated in its Opening Brief, the Commission's continued ratemaking authority does not depend on a remand order.[25] Further, even assuming the Committee is correct that the court assumed the Commission would find nothing further to do in the rate case because the Commission had already determined that Questar could not demonstrate prudence, the court's statements about whether or not the Commission thought a record could be developed were dicta—not intended to bind the Commission and unnecessary to the court's actual holding that the Commission erred in failing to make a prudence determination.[26] *See, e.g., Callahan v. Salt Lake City*, 125 P. 863, 864 (Utah 1912) (defining dictum as "an opinion expressed by the court, but which, not being necessarily involved in the case, lacks the force of an adjudication");

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[22] *See* Transcript (June 23, 2000) at 23 (Tingey).

[23] Committee Brief at 9.

[24] *See id.*

[25] *See* Opening Brief at 12-21. *See also infra* note 27.

[26] Indeed, the court's statements were dicta about dicta, since the Commission's underlying "nor can a sufficient record be developed" statement was itself dictum—being unnecessary to the Commission's finding that up to $5 million per year of CO_2 processing costs should be recovered in rates.

Black's Law Dictionary 1100 (7th ed. 1999) (defining obiter dictum as a statement "made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential").

While the Commission is bound to apply the rule of law set out by the court, the Commission is not bound[27] to follow the court's dicta.[28] Nor should the Commission infer court findings that were not expressly made, which if made would undermine constitutional separation of powers principles to which the court has always adhered.[29]

The Committee's attempt to turn the court's dicta into a mandate in this case fails. While the court observed in the *Decision* that "[s]ince the Commission found that no such record was or

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[27] *See, e.g., Rock Island Motor Transit Co. v. Murphy Motor Freight Lines*, 58 N.W.2d 723, 729 (Minn. 1953) (holding that when a court sets aside a commission order, "the matter stands before the commission exactly as if no order had been made and that, with or without an order remanding the case to the commission, the commission may take such further actions as it deems necessary, consistent with the law as it has been determined by the court * * * if the commission is permitted to proceed to determine the matter on the basis of the law as it has been determined by the courts on appeal, full relief will be available to every one."). Moreover, as Questar Gas noted in its Opening Brief, the Commission has continuing jurisdiction to review and modify its decisions "at any time." *See* Utah Code Ann. § 54-7-13; *see also Erie R. Co. v. United States*, 64 F. Supp. 162, 163 (S.D. Ohio 1945) (affirming commission action in reopening matter after court reversal, discussing similar statute and noting that "after an order of the Commission is suspended and set aside by a court, it is no longer effective. But neither expressly nor by necessary implication does it provide that after the court has set aside one of its orders the Commission can take no further action with reference to the subject matter of the order. In this case the construction contended for would result in the absurd conclusion that when a court has determined that the Commission erred in issuing an order not based on the evidence, the Commission is not empowered to acquiesce in the court's ruling and to reopen the case for the taking of evidence. Such a result is neither required nor authorized by statute.").

[28] *See, e.g., DeBry v. Valley Mortg. Co*., 835 P.2d 1000, 1003 (Utah App. 1992) (dicta does not constitute the law of the case); *Street v. Fourth Judicial Dist. Court*, 191 P.2d 153, 158 (Utah 1948) ("When we entertained the appeal from the interlocutory decree we had before us only those matters which had been litigated by [the lower] court. The question of what relief Graham was entitled to was not before us. Any expressions of opinion by us as to what relief Graham was entitled to were mere dicta—not the law of the case and not binding either upon us or upon [the lower] court.").

[29] *See, e.g*., *Wexpro II*, 658 P.2d at 614 and *Mountain States*, 155 P.2d at 187-88, both of which demonstrate that statements other than the holding in a prior decision are not binding on subsequent Commission action (or do not provide the support for subsequent erroneous Commission action, in the case of *Mountain States*), and both of which stress the importance of constitutional separation of powers as limiting the court's review function over the Commission. Indeed, these cases may support the Commission's departure from the language of a prior court decision even if that language may not strictly be considered dicta.

could be made available, it should have refused to grant a rate increase," that observation was simply an explanation of the rationale for the court's holding that the Commission erred in granting the stipulated rate increase without making a finding that all or some portion of the CO_2 processing costs were prudent. It was not a separate holding that the Commission could not (and cannot) find that the costs were prudent.[30]

Assuming, however, that the court thought the Commission had already determined that Questar could not meet its burden of proof and therefore that further proceedings by the Commission were unnecessary, what matters now is not what the court thought, in dicta, but rather what the Commission in fact found. It is for the Commission, not the court, to determine in the first instance the sufficiency of the evidence presented. As has been demonstrated, the Commission did not make a finding that Questar Gas failed to demonstrate prudence. It never made any determination on prudence at all.

The underlying issue in the general rate case—whether, or to what extent, Questar Gas will be allowed to increase its rates to include CO_2 processing costs—remains open. There has never been a full adjudication of that issue because the acceptance by the Commission of the CO_2 Stipulation led to an early conclusion of the rate case the first time, and the *Order* approving the CO_2 Stipulation was reversed.

Whether or not the Commission chooses to request additional evidence on prudence,[31] the Commission needs to make a finding on prudence. If it does not do so, Questar will be

[30] *Cf. People v. Flores*, 51 Cal.App.4th 1199, 1205, 59 Cal.Rptr.2d 637, 640 (1997) (Once the prior court "concluded there was no substantial evidence to support the verdict, the court's further discussion on what [jury] instructions should have been given was dicta.").

[31] Notwithstanding the fact that Questar Gas believes there is sufficient evidence on the record for the Commission to make a finding on prudence, several of the parties did cut short their presentation of evidence based on the CO_2 Stipulation. *See* Opening Brief at 20, n. 20. If these parties wish to present evidence that was withheld based on the stipulation, the Commission should afford them due process of law in doing so. *See* Opening Brief at 24-25.

denied recovery of its CO_2 processing costs without receiving its due process right to a concluded proceeding in which the prudence of its CO_2 processing costs is determined. *See, e.g., Empire Elec. Ass'n v. Public Service Comm'n*, 604 P.2d 930, 932 (Utah 1979) ("In proceedings before an administrative agency, it is requisite ... that a party be given the opportunity to ... have an adjudication in conformity with the law."). Continuing the rate case where it left off would simply allow proper conclusion of the case—allowing the Company to have its full "day in court."

C. THE AUTHORITY CITED IN THE COMMITTEE BRIEF PROVIDES NO SUPPORT FOR ITS LEGAL ARGUMENT.

As has been demonstrated, the Committee's position is based on a factual error—that the Commission made a "conclusive determination" that Questar Gas could not demonstrate prudence. What little legal authority the Committee cites in support of its argument is either irrelevant or unavailing.

1. The Committee's Reliance on Utah Code Ann. § 63-46b-17 as Limiting the Commission's Authority is Erroneous. Section 63-46b-17 Limits the Relief the Court Can Provide. It Has Nothing to do With the Commission's Authority.

The Committee's citation of Utah Code Ann. § 63-46b-17 adds no support to its argument that the Commission cannot resume its ratemaking function. While, as the Committee implies, the court's reversal would likely be considered a setting-aside of the Commission's *Order*, under Section 63-46b-17(1)(b)(iii), Questar Gas has already demonstrated that upon such a setting-aside an administrative agency is not precluded from resuming its legislative function. As *Corpus Juris Secundum* notes:

> A court decision annulling the administrative body's determination because it was reached without supporting evidence does not preclude the administrative body from reopening the proceeding and receiving further evidence to justify its determination, and an administrative body is not precluded from reopening the case for the taking of evidence and the issuance of another order where the first order has been set aside as not

> based on evidence. **Reversal of an administrative decision on the ground that the administrative body has misinterpreted the law does not prevent it from making the same decision on proper grounds on a subsequent application**.[32]

The Committee Brief does nothing to undercut the Company's position. It fails to provide any authority for its interpretation of Section 63-46b-17 that if the appellate court does not expressly remand the matter the administrative agency can proceed no further. The Company's Opening Brief provides ample, un-refuted authority to the contrary.[33] By its own terms, Section 63-46b-17 addresses the appellate court's—not the Commission's—authority to provide relief. The section does nothing to limit the Commission's authority.

2. The Committee's Reliance on the Appeal and Error Section of Corpus Juris Secundum is Also Misplaced.

The **only** other source of authority the Committee Brief supplies in support of its argument that the Commission has no continuing ratemaking authority following the *Decision* is the appeal and error section of Corpus Juris Secundum. The Committee's reliance on snippets from the appeal and error section is misplaced, however, because that section deals with the appellate treatment of judicial, not administrative, decisions. Judicial decisions do not implicate constitutional separation of powers and are therefore inapposite. In the proper administrative context, judicial authority[34] refutes the Committee's position. Indeed, C.J.S. itself refutes the

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[32] 73A C.J.S. *Public Administrative Law and Procedure* § 258 (1983) (emphasis added, citations omitted). *See also* 73B C.J.S. *Public Utilities* § 115 ("When an order is set aside and vacated on appeal, the matter stands before the commission as if no order has been made, and with or without an order remanding the case, the commission may take such further action as is consistent with the law.").

[33] *See, e.g.*, Opening Brief at 15-18. *See also supra* notes 25, 27.

[34] *See, e.g., Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952) ("The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part.' But that authority is not power to exercise an essentially administrative function.") (citation omitted); *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940) ("But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge."); *Wage Case*, 614 P.2d at 1250.

Committee's position.[35] Moreover, even if the appeal and error section of C.J.S. were the relevant one (i.e., even if this were a case of appeal from a judicial rather than administrative determination), the Committee still misunderstands the key point, which is found not in section 395 but in section 959. There, it is provided that "[t]he effect of a general and unqualified reversal of a judgment, order, or decree is to nullify it completely and to leave the case standing as if such judgment, order, or decree had never been rendered, except as restricted by the opinion of the appellate court."[36] This is consistent with the authority cited in the Company's Opening Brief[37] and inconsistent with the view espoused by the Committee, because the *Decision* contained no restriction forbidding the Commission to resume its ratemaking function.

D. THE COMMITTEE'S ARGUMENT THAT THE COURT DID MORE THAN REVERSE THE *ORDER* APPROVING THE CO_2 STIPULATION IS CONTRARY TO BINDING PRECEDENT.

The Committee Brief contends that the *Decision* did more than reverse the Commission's approval of the CO_2 Stipulation.[38] Although the point of the Committee's argument is difficult to discern,[39] Questar Gas will briefly respond because the argument is incorrect.

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[35] 73A C.J.S. *Public Administrative Law and Procedure* § 258 (1983), cited in the text at pages 12-13 *supra*. *See also* 73B C.J.S. *Public Utilities* § 115 ("When an order is set aside and vacated on appeal, the matter stands before the commission as if no order has been made, and with or without an order remanding the case, the commission may take such further action as is consistent with the law.").

[36] 5 C.J.S. *Appeal and Error* § 959 (1993).

[37] *See, e.g.,Phebus v. Dunford*, 198 P.2d 973, 974 (Utah 1948) ("A reversal of a judgment or decision of a lower court … places the case in the position it was before the lower court rendered that judgment or decision, and vacates all proceedings and orders dependent upon the decision which was reversed."); *Worley v. Travelers Indemnity Co.*, 173 S.E.2d 248, 250 (Ga. 1970) ("[R]eversal without direction results in a vacation of the judgment and trial de novo … .") (citations omitted); *Tucson Gas & Elec. Co. v. Superior Court*, 450 P.2d 722, 725 (Ariz. App. 1969) ("Upon a reversal, without instructions, generally a new trial is required … .").

[38] *See* Committee Brief at 6-8.

[39] To the extent the Committee is arguing that the Commission cannot allow cost recovery of CO_2 processing costs without first making a determination on prudence, Questar Gas agrees that this is the correct interpretation of the *Decision*. However, Questar disagrees that such a Commission determination has been made. To the extent the Committee is arguing that the court, not the Commission, made the ultimate determination on prudence, it is factually inaccurate and legally incorrect. While the Company

Authorities cited in the Company's Opening Brief make clear that the court's role on review of a Commission decision is limited. The court does not step into the shoes of the Commission in setting rates or making public policy determinations. It merely reviews the Commission's decisions for legal errors and substantial evidence. The only decision for which the Committee sought review was the portion of the *Order* approving the CO_2 Stipulation. The court cannot review a decision the Commission did not make and the Committee did not appeal. The Committee's own docketing statement affirms that the issue on appeal was the Commission's decision approving the CO_2 Stipulation.[40] Thus, the *Decision* held that in issuing the *Order* approving the CO_2 Stipulation the Commission erred in failing to make a finding on prudence—nothing more. The Committee errs to the extent it attempts to broaden the scope of the *Decision* beyond this.

E. THE COMMITTEE BRIEF PROVIDES NO AUTHORITY IN SUPPORT OF AN IMMEDIATE REFUND.

Finally, the Committee Brief contains a reference to the relief it seeks in this proceeding, an immediate refund of rates collected.[41] It cites no authority in support of that relief. The Company's Opening Brief dealt with the issue briefly, but did not explore it in depth because of the clear and binding authority in support of the position that the Commission should now conclude its ratemaking function by determining whether all or any portion of the CO_2

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certainly hopes that the Committee is not suggesting that the entire rate case has been reversed by the *Decision*, without further clarification the Committee's point is not clear.

[40] *See* Docketing Statement, Case No. 20000893-SC (Nov. 13, 2000) at ¶ 3 ("This Petition for Review is from a final order of the Public Service Commission of Utah issued August 11, 2000, which set general, distribution non-gas, rates for Questar Gas. The Committee seeks review only of the portion of the order that allows $5,000,000 into Questar Gas rates in connection with an affiliated CO_2 processing plant.").

[41] *See* Committee Brief at 16.

processing costs were prudently incurred. Because the Committee Brief does not argue the issue, Questar Gas does not expand upon that argument in this response brief.

III. CONCLUSION

The Committee's arguments against the Commission resuming its ratemaking function are erroneous and should be rejected. The arguments are not supported by any binding or persuasive authority, but rather rest on the factual error that the Commission has already made a conclusive determination that Questar Gas did not and could not provide a sufficient record to demonstrate that its CO_2 processing costs were prudently incurred. The Commission did not make such a determination, and the Committee's attempts at twisting the Commission's dictum about a record being developed into a "conclusive determination"—attributing to the statement meaning it did not have—cannot be the basis of a decision to now deny Questar Gas a simple and fair opportunity to receive a finding on prudence. The Commission did not previously make a determination on prudence. As a result of the court's *Decision*, the Commission should now resume its ratemaking function and make such a determination.

RESPECTFULLY SUBMITTED: October 23, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONSE BRIEF OF QUESTAR GAS** was served by electronic mail on the following on October 23, 2003:

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