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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In re QUESTAR GAS COMPANY	Docket Nos. 04-057-04, 04-057-09, 04-057-11, 04-057-13 and 05-057-01

RESPONSE OF QUESTAR GAS COMPANY IN OPPOSITION TO REQUESTS FOR RECONSIDERATION OF REPORT AND ORDER AND REQUEST FOR RECONSIDERATION OF ORDER ON REQUEST TO INTERVENE

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Questar Gas Company ("Questar Gas" or the "Company") hereby responds in opposition to the "Request of Petitioners Roger Ball and Claire Geddes for Reconsideration of the Report and Order of the Utah Public Service Commission, Issued January 6, 2006, Approving a Gas Management Cost Stipulation" ("Ball and Geddes Request") and the "Request of Petitioners for Reconsideration of the Report and Order of the Utah Public Service Commission, Issued January 6, 2006, Approving a Gas Management Cost Stipulation" ("Other Petitioners Request") (the Ball and Geddes Request and Other Petitioners Request together the "Request"), filed February 6, 2006 in this matter. The Request seeks reconsideration of the Report and Order ("2006 Order") issued in this matter on January 6, 2006.

Questar Gas hereby also responds in opposition to the "Request of Petitioners Roger Ball and Claire Geddes for Reconsideration of the Report and Order of the Utah Public Service Commission, Issued January 6, 2006, Denying Them Intervention as Parties in These Dockets" ("Intervention Request") filed February 6, 2006 in this matter. The Intervention Request seeks reconsideration of the Order on Request to Intervene ("Intervention Order") issued January 6, 2006 in this matter.

For the reasons set forth below, both the Request and the Intervention Request should be denied.

I. INTRODUCTION

A. THE 2003 SUPREME COURT DECISION AND THE 2004 COMMISSION ORDER

The Request contends that the Order was inconsistent with a prior Commission decision and at least implies that it was inconsistent with a prior decision of the Utah Supreme Court. The Request quotes extensively from the Court's decision in *Committee of Consumer Services v. Public Service Comm'n*, 2003 UT 29, 75 P.3d 481 ("2003 Decision") and the Order of the

Commission issued August 30, 2004 ("2004 Order").[1] These contentions are without merit and should be rejected.

The 2003 Decision reversed an order of the Commission in Docket No. 99-057-20 (the Company's 1999 general rate case) approving the CO_2 Stipulation entered into by Questar Gas and the Utah Division of Public Utilities ("Division"), but opposed by the Utah Committee of Consumer Services ("Committee"). The CO_2 Stipulation provided for partial rate recovery of the costs incurred by Questar Gas commencing in 1999 under its contract with Questar Transportation Services Company ("Questar Transportation") for operation of a plant located in Castle Valley, Utah ("CO_2 Removal Plant") that removes carbon dioxide ("CO_2") from natural gas produced from coal seams ("coal bed methane") in the Ferron area of Emery County, Utah. The basis for the court's reversal was that the Commission had failed to hold Questar Gas to its burden of demonstrating that the CO_2 removal costs provided for in the stipulation were prudent and not unduly influenced by affiliate relationships.[2]

Following issuance of the 2003 Decision, the Committee requested a reduction in rates to remove CO_2 removal costs and a refund of CO_2 removal costs recovered previously pursuant to the terms of the CO_2 Stipulation. Questar Gas, on the other hand, requested an opportunity to demonstrate the prudence of the CO_2 removal costs based on the evidence presented in Docket No. 98-057-12 (a case in which Questar Gas had sought to include CO_2 removal costs in its 191 Gas Cost Balancing Account) and in the 1999 general rate case. This evidence was based on circumstances in the pre-1999 timeframe involving coal bed methane, and the Company's decision to contract with Questar Transportation to build and operate the CO_2 Removal Plant in

[1] Order, Docket Nos. 03-057-05, 01-057-14, 99-057-20, 98-057-12 (Utah PSC Aug. 30, 2004) ("2004 Order").

[2] *Committee of Consumer Services*, 2003 UT 29 at ¶¶ 13-15, 75 P.3d at 486.

1998. The Committee responded that the 2003 Decision had disposed of the issue and that no further proceedings, except to change rates and order a refund, were permissible. Following extensive briefing, the Commission concluded that it had never made a decision whether recovery of the CO_2 removal costs as provided in the CO_2 Stipulation was prudent, and it therefore afforded the parties an opportunity to marshal the evidence from prior proceedings in support of their positions.[3]

The parties filed lengthy briefs marshalling the evidence and submitting argument in support of their positions. Contrary to the false assertion in the Request,[4] however, no new evidence was introduced. Thus, the Commission was considering evidence originally submitted, at the latest, in 2000, about whether the Company had been prudent in its actions prior to the decision to undertake CO_2 removal in 1998. The Commission was not considering the prudence of the Company's actions after that time. After oral argument, the Commission entered the 2004 Order in which it concluded that Questar Gas had not met its burden to demonstrate that the decision to enter into a contract with Questar Transportation to build and operate the CO_2 Removal Plant was prudent and not the product of undue affiliate influence. The Commission said:

> One would expect a prudent gas distribution company faced with the risk of safety issue of the magnitude faced by Questar's distribution customers to clearly identify its objective; to identify alternatives to meet the objective, to define the method and criteria by which it would evaluate the alternatives and to record or document the process in support of the ultimate decision. . . .
>
> In making this determination, we believe that ratepayers are best served by reserving wide latitude to utilities' managerial experience and technical expertise. We therefore do not

[3] Order, Docket Nos. 98-057-12, 99-057-20, 01-057-14, 03-057-05 (Utah PSC Dec. 17, 2003).

[4] Other Petitioners Request at 23, 36.

> promulgate a checklist of actions which, if followed, might inoculate a utility's action against a finding of imprudence. Instead, we simply require substantial evidence that the utility's decision-making process, under the totality of the circumstances, was not the product of a conscious or unconscious favoring of affiliate over ratepayer interests. The utility's and its customers' interests must be paramount and affiliate interests subordinate.[5]

However, recognizing that most customers had not yet inspected and, if necessary, adjusted their appliances to safely burn gas supplies within the heat content range specified in the Company's tariff, including coal bed methane without CO_2 removal, the Commission specifically stated that:

> We will also address, in a separate docket, how to craft a long-term solution to the compatibility of customer appliances with natural gas containing coal-seam gas consistent with the utility's obligation to provide safe commodity and service to its customers.[6]

Furthermore, in response to the Company's request for reconsideration and clarification, the Commission clarified the period covered by the 2004 Order, stating:

> The [2004 Order] addressed only Questar's failure to substantiate approval of the CO_2 Stipulation in these proceedings and our necessary rejection of the Stipulation, which would have permitted recovery of some processing costs through May of 2004. Our reference to the May 2004 end date was dictated by the Stipulation's terms and was not intended to have any other preclusive effect on recovery by Questar. **In regards to Questar's requests for clarification and reconsideration, we state that our Order does not preclude Questar from seeking recovery of CO_2 processing costs in other dockets**. We cannot opine, here, on the likelihood of success for rate recovery of CO_2 processing costs coming in other dockets. However arduous or facile the task may be to support or oppose recovery in other proceedings, it will be that of the participants. We will not prejudge the outcome. We will need to wait for Questar to make whatever arguments and present whatever evidence it deems appropriate in seeking

[5] 2004 Order at 23-24 (footnotes omitted).

[6] 2004 Order at 38-39.

> recovery of these costs, whether incurred pre- or post-May 2004, in whatever dockets Questar may raise the issue.[7]

The 2004 Order did not, as repeatedly misrepresented in the Request, find that Questar Gas could never demonstrate the prudence of CO_2 removal. Rather, the 2004 Order simply found that the Company had not carried its burden in that case, mostly because it had not followed a process in its decision-making during the pre-1999 timeframe that allowed the Commission to evaluate prudence and exclude potential affiliate conflicts.

B. PROCEDURAL HISTORY OF THESE DOCKETS

Questar Gas filed pass-through gas cost applications on May 5, 2004 in Docket No. 04-057-04, on September 17, 2004 in 04-057-11, and on December 9, 2004 in Docket No. 04-057-13. Each of these applications sought recovery of the costs Questar Gas was incurring for CO_2 removal at the CO_2 Removal Plant on a going-forward basis.

Following the issuance of the 2004 Order (wherein the Commission determined to open a new docket to address how to "craft a long-term solution to the compatibility of customer appliances with . . . coal-seam gas"), the Commission issued a notice of scheduling conference on September 8, 2004, in Docket No. 04-057-09, "to set dates for technical conferences to discuss the long-term solution to Questar Gas Company's gas quality."[8] The parties, including the Committee with Mr. Ball as its staff director, reached agreement on dates and subjects for a series of technical conferences to explore various aspects of the issue. These technical conferences commenced on October 13, 2004 and continued, with some adjustments in schedule agreed upon by the parties, through January 19, 2005.

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[7] Order on Request for Reconsideration or Clarification, Docket Nos. 98-057-12, 99-057-20, 01-057-14 and 03-057-05 (Oct. 20, 2004) at 4-5 (emphasis added).

[8] Notice of Scheduling Conference, *In the Matter of the Investigation of Questar Gas Company's Gas Quality*, Docket No. 04-057-09 (Utah PSC Sep. 8, 2004).

Six public technical conferences were held, each lasting many hours, and each with vigorous discussion among the participants. The topic, as the Commission indicated in its 2004 Order, was clearly focused on what to do about continued increasing production of coal bed methane that was becoming an ever more important component of the Company's gas supplies. The Committee, the Division, the Commission staff and other interested participants all questioned the Company about its proposals for dealing with the heat-content compatibility issues associated with coal bed methane and customers' current appliance settings and provided their own proposals, input and direction on issues where they felt further attention was warranted.

Questar Gas expressly framed its discussion points in the technical conferences and its internal analysis to address the guidelines for establishing prudence set forth in the Commission's 2004 Order and ensure that each step outlined by the Commission in that order was fulfilled. Indeed, the Company's decision-making process was transparent and open for review by all parties and interested participants, including the Committee and its staff, each step of the way throughout the technical conferences. Questar Gas actively and repeatedly solicited input by the other parties on how to best address the long-term solution to these issues. Members of the Committee's staff were present for every one of the technical conferences and actively participated in the discussion. Mr. Ball, himself, was present for all or almost all of the technical conferences. He also participated in other meetings directly between Questar Gas and Committee staff on these issues during this time period. Presumably, he also fulfilled his role as director behind the scenes in ensuring that the Committee staff vigorously pursued its responsibilities and kept informed about the progress of the docket.

The technical conferences demonstrated that processing to remove CO_2 was the most cost-effective and reliable method to deal with increasing quantities of coal bed methane being produced in close proximity to the Company's system and being purchased by Questar Gas to meet its customers' needs. No party disputed that conclusion. Following the conclusion of the technical conferences, Questar Gas filed an application on January 31, 2005, in Docket No. 05-057-01, again seeking recovery of its ongoing CO_2 removal costs—not the $25 million in costs disallowed by the 2004 Order and absorbed by Questar Gas, but rather ongoing costs incurred commencing at the earliest date allowed by law in light of the 2004 Order.[9] This public filing included as exhibits essentially every hand-out that had been introduced in the six technical conferences. Even before the application was filed, settlement discussions had commenced between the parties, including the Committee with the personal knowledge of Mr. Ball.

The Commission gave notice on February 22, 2005 of a scheduling conference to schedule further proceedings in this matter. At that conference held on March 1, 2005, the parties agreed upon a schedule under which Questar Gas would file testimony on April 15 supporting the prudence of its ongoing CO_2 removal expenditures and the Division, Committee and any intervenors would file responsive testimony on August 15. Hearings were scheduled to commence on October 6, 2005. Mr. Ball was intimately familiar with all of this contemplated procedure, and from the language of the Request to Intervene filed in these dockets on November 17, 2005, it appears that Ms. Geddes was also.

As contemplated by the established schedule, Questar Gas filed extensive testimony in support of its application on April 15, 2005. The Division and Committee requested an

[9] Questar Gas had already preserved its right to seek ongoing expenses via its pass-through applications in Dockets 04-057-04, 04-057-11, and 04-057-13, but by filing the application in Docket No. 05-057-01, it formally sought these costs in the context of an adjudicative proceeding.

extension of their testimony filing date, however, in part because the parties were involved in settlement discussions. An order amending the schedule was issued August 24, 2005, setting the new testimony filing date for September 20. No testimony was filed on September 20, again because the parties were in settlement discussions. On October 11, 2005, after extensive and difficult settlement discussions, at which not only the parties but others who expressed an interest in the matter (including industrial customer representatives) participated, the parties filed their Gas Management Cost Stipulation ("Stipulation"). On the same day, even though no public hearing is required for the approval of a settlement among all parties to a case,[10] the Commission gave notice of public hearings on approval of the Stipulation. The hearings were set for October 20, 2005, giving more than adequate notice.

The hearings were held on October 20 as scheduled. Each of the parties provided a witness in support of approval of the Stipulation. In addition, as provided in the Stipulation, the parties moved the Commission to take notice of information provided in the technical conferences and the Company's January 31 application and to admit into evidence the sworn testimony of Questar Gas filed on April 15 in support of the approval of the Stipulation.[11] The Commission did so. No one other than the parties appeared at the hearing to question the witnesses, to present testimony or to object to the motion regarding the record. The Commission asked questions regarding the motion and the Stipulation, which were answered by the witnesses.

Two persons appeared and offered sworn testimony at the public witness hearing scheduled at 4:30 p.m. on the same day. Although one of these persons represented an industrial customer that regularly participates in Commission proceedings involving Questar Gas, the other

[10] *See* Utah Code Ann. § 54-7-1(3)(c) and (3)(e)(ii)(C).

[11] The information provided in the technical conferences and the application was largely incorporated into the sworn testimony of Barrie L. McKay filed April 15, 2005.

was an individual who does not regularly participate in such proceedings. His presence demonstrated that the Commission's notice was effective as to the public generally. At the conclusion of the public witness hearing, the Commission took the matter under advisement.

Sometime following conclusion of the hearings, Mr. Ball and Ms. Geddes contacted the Commission, implausibly complaining that they were not aware of the hearings and requesting the opportunity to file statements. Although the hearings were properly noticed, the Commission informed them that they could still file statements. They filed affidavits on November 4, 2005. The Commission notified the parties that they could respond to the affidavits if they wished to do so. Questar Gas filed a response on November 11, stating that it did not object to the Commission considering the affidavits as unsworn public witness testimony and further stating that the affidavits provided no basis for the Commission to reject the Stipulation.

On November 15, 2005, Mr. Ball and Ms. Geddes filed a Request to Intervene, which contained essentially the same information and argument that was included in their affidavits. In support of the Request to Intervene, Mr. Ball and Ms. Geddes filed Statements in Support of Intervenor Status for Roger J. Ball signed by approximately 365 individuals or couples claiming to be customers of Questar Gas. Questar Gas, the Division and the Committee all filed responses in opposition to the Request to Intervene. Mr. Ball and Ms. Geddes filed a response to the oppositions on December 13, 2005.

On January 6, 2006, the Commission issued the Intervention Order, denying the request of Mr. Ball and Ms. Geddes to intervene. On the same day, the Commission issued the 2006 Order, approving the Stipulation.

The Ball and Geddes Request adopts by reference the Other Petitioners Request filed by 42 individuals, couples and businesses, most of whom also filed statements in support of the

Request to Intervene. The Request seeks reconsideration of the 2006 Order on grounds almost identical to those argued in the response of Mr. Ball and Ms. Geddes to the oppositions to their Request to Intervene.

On February 6, Mr. Ball and Ms. Geddes also filed their Intervention Request seeking reconsideration of the Intervention Order. It also adopts by reference the Other Petitioners Request, as well as "Petitioners' Response to Opposition of Questar Gas Company, the Utah Division of Public Utilities, and the Committee of Consumer Services to Request for Intervention" ("Intervention Response") filed by Mr. Ball and Ms. Geddes on December 13, 2005.

C. THE 2006 ORDER

In the 2006 Order, the Commission briefly reviewed the prior proceedings related to coal bed methane and discussed its findings from the 2004 Order.[12] After reviewing the procedural history of this case, the Commission reviewed the terms of the Stipulation, the testimony introduced in support of the Stipulation, the technical conference process in Docket No. 04-057-09 and the public witness testimony and statements including the statements of Mr. Ball and Ms. Geddes.[13] The Commission then reviewed the applicable legal standards on approval of settlements, prudence review and potential conflicts of interest.[14] The Commission clearly noted that the Stipulation only required it to assess the prudence of the Company's actions going forward from February 1, 2005.[15]

[12] 2006 Order at 1.

[13] *Id.* at 2-26.

[14] *Id.* at 26-29.

[15] *Id.* at 28, 33, 40.

The 2006 Order addressed procedural objections raised by Mr. Ball and Ms. Geddes. With respect to allegations regarding procedural defects in the notice of the hearing, the Commission concluded that that the notice of hearing complied with all legal requirements, particularly in light of the fact that the purpose of the hearing was to consider an unopposed settlement.[16] With respect to argument that the Commission should not have taken notice of the technical conferences in Docket No. 04-057-09, the Commission noted that the technical conferences were properly noticed and open to the public, that the written presentations provided in the conferences were attached to the application in Docket No. 05-057-01, that the technical conferences were described at length in the application and the written testimony and that no one challenged or questioned the authenticity or substantive content of the application.[17] The Commission also noted that reliance on the factual assertions in the technical conference was not required in order to reach its decision.[18] With respect to allegations regarding the written testimony admitted into evidence, the Commission noted that the testimony was sworn and was admitted into evidence only after parties were given the opportunity to object to its admission and to conduct cross examination.[19] Therefore, the Commission concluded that the procedural objections were without merit.

The Commission addressed the prudence of use of the CO_2 Removal Plant after February 1, 2005 and the recovery of costs associated with use of the plant. The Commission specifically noted that its prior decision on prudence from the 2004 Order was relevant only to the extent the same conditions existed in 2005 as existed prior to the decision to undertake CO_2 removal in

[16] *Id.* at 30-31.

[17] *Id.* at 32.

[18] *Id.* at 32, n.18.

[19] *Id.* at 32-33.

1998 that was at issue in the 1999 general rate case. The Commission found that the conditions at issue in the 1999 rate case were no longer the conditions at issue in the current timeframe.[20] In reviewing the changed conditions, the Commission placed great emphasis on the undisputed fact that coal bed methane has become a substantial source of low-cost gas for Questar Gas and that its availability has provided significant savings to customers (which had not been addressed in the prior case).[21] The Commission found that the provisions in the Stipulation assured that the interests of the Company's customers were placed first even though the potential affiliate conflicts remained.[22] The Commission found that the option of going to the Federal Energy Regulatory Commission ("FERC") to keep coal bed methane off the system, an issue that the Commission found had not been adequately considered in the earlier decision, had now been properly explored and rejected.[23] Finally, the Commission noted that the thorough and transparent process of examining alternatives demonstrated that the CO_2 Removal Plant was the preferred alternative to manage the gas supply during a transition period in light of increased volumes of coal bed methane on the system.[24] Accordingly, the Commission concluded that the use of the CO_2 Removal Plant from and after February 1, 2005 is prudent and that the partial recovery of CO_2 removal costs provided in the Stipulation is reasonable and in the public interest.[25]

[20] *Id.* at 33.

[21] *Id.* at 10, 14, 34.

[22] *Id.* at 14, 34-35, 40.

[23] *Id.* at 11, 35.

[24] *Id.* at 11-12, 17-24, 37-38.

[25] *Id.* at 40.

The Commission reviewed the cost allocation provided in the Stipulation and concluded that it should be modified. With that modification, the Commission concluded that rates resulting from the Stipulation would be just and reasonable.[26]

Finally, the Commission reviewed the process through which the parties had reached agreement. It noted that the Division and Committee were assisted in their analysis by separate, retained experts and that the settlement had only been achieved after extensive technical conferences, filing of sworn testimony, discovery and arms-length negotiations. Therefore, the Commission concluded that the interests of customers had been adequately represented and that the Stipulation resulted in rates that are just and reasonable and in the public interest.[27]

D. THE REQUEST

The Ball and Geddes Request is simply a one-paragraph adoption of the Other Petitioners Request, including the statement that Mr. Ball and Ms. Geddes are customers and the baseless assertion that Mr. Ball is a *de facto* party in this matter. The Other Petitioners Request, on the other hand, although 77-pages long and replete with erroneous statements of law and mischaracterizations of fact and prior Commission rulings, is in reality largely repetitive of the Intervention Response previously filed by Mr. Ball and Ms. Geddes.

In an apparent attempt to avoid the fact that only parties to a case and persons, such as shareholders, who are "pecuniarily interested" in a public utility[28] may seek reconsideration of a Commission order affecting that utility, the Other Petitioners Request claims that three of its 42 petitioners are "Questar Stockholders." The Other Petitioners Request does not attempt to explain how any shareholder of Questar Gas could be injured by the 2006 Order, which provides

[26] *Id.* at 39.

[27] *Id.* at 39-40.

[28] *See* Utah Code Ann. § 54-7-15.

partial rate recovery for CO_2 removal costs to the advantage of shareholders. Rather than argue that the 2006 Order is contrary to the interests of shareholders because it allows only partial rate recovery of CO_2 removal costs, the Request argues that the 2006 Order is in error because it allows rate recovery of CO_2 removal costs at all.

E. THE INTERVENTION ORDER

The Intervention Order briefly reviewed the prior proceedings related to recovery of CO_2 removal costs and reviewed in greater depth the procedural history of these dockets.[29] The Commission reviewed the applicable legal standards on intervention.[30] The Commission reviewed the basis for Mr. Ball's and Ms. Geddes's claim that they should be granted intervention and the arguments of Questar Gas, the Division and the Committee in opposition.[31] The Commission noted Mr. Ball's and Ms. Geddes's prior experience in Commission proceedings and in particular Mr. Ball's participation in these dockets in his role as director of the Committee's staff.[32] The Commission stated that Mr. Ball and Ms. Geddes had provided no explanation for not being aware of the proceedings until reading about the October 20 hearings in the newspaper and found that their lack of involvement was due to their own inattention and lack of diligence.[33]

The Commission also addressed the argument that the Division and Committee had failed to represent customers' interests. The Commission noted that Mr. Ball and Ms. Geddes had provided no evidence to support the argument and that their claim was actually, therefore, that they disagreed with the positions taken by the Division and Committee. The Commission

[29] Intervention Order at 1-6.

[30] *Id.* at 2, 6.

[31] *Id.* at 6-8.

[32] *Id.* at 7.

[33] *Id.* at 6-7.

observed that if Mr. Ball and Ms. Geddes were allowed to intervene to represent those interests after proceedings had already been concluded, others who disagreed with their positions might equally seek even later intervention. The Commission found that disagreement with positions reached by the Division and Committee could not serve as a basis for allowing late intervention, particularly where it was apparent that Mr. Ball and Ms. Geddes had not availed themselves of the opportunity to review information considered by the Division and Committee and their experts.[34]

The Commission reviewed the roles and responsibilities of the Division and Committee and discussed the procedural morass that would occur if every customer were allowed to intervene in utility matters to assert his or her unique perspective. With respect to the Committee, the Commission discussed the fact that staff of the Committee is responsible to implement the policies and directives of the Committee. It noted that the members of the Committee had not changed since Mr. Ball's termination and that the only noteworthy change was the retention of expert assistance which Mr. Ball had blocked during his tenure as director of the staff.[35] The Commission concluded that it had no authority over the Committee or its workings and could not address Mr. Ball's and Ms. Geddes's complaints on those issues.[36]

The Commission also noted the undisputed evidence in the record that the Division and Committee had thoroughly analyzed the issues in the case, had conducted significant discovery, had scrutinized the testimony filed by Questar Gas and had negotiated at arms length, achieving

[34] *Id.* at 7-8.

[35] *Id.* at 8-10.

[36] *Id.* at 10.

significant concessions and compromises from Questar Gas to the benefit of customers. All of this was done by the Division and Committee with the assistance of separate retained experts.[37]

The Commission reviewed the policy in favor of settlement of disputes and discussed the late intervention in that context. The Commission concluded that it is not appropriate to grant tardy intervention when it would eviscerate the work already done and subject all parties, the regulatory process and the state's and customers' interests to starting over.[38] The Commission stated that it had already considered the objections of Mr. Ball and Ms. Geddes to the Stipulation, expressed in their public witness testimony, and that they had offered no indication that their proposed reopening of the proceedings would be anything more than a fishing expedition.[39]

The Commission concluded that it had provided adequate notice of all proceedings and that granting intervention to Mr. Ball and Ms. Geddes after proceedings were already concluded would impair the interests of justice and the orderly and prompt conduct of proceedings. The Commission also concluded that granting intervention in these circumstances would create a debilitating precedent.[40]

F. THE INTERVENTION REQUEST

The Intervention Request is simply a one-paragraph adoption of the Other Petitioners Request and of the Intervention Response with one minor exception.[41] The Intervention

[37] *Id.* at 10-12.

[38] *Id.* at 12-13.

[39] *Id.* at 13-15.

[40] *Id.* at 15.

[41] The exception is that Mr. Ball and Ms. Geddes are apparently withdrawing a misguided argument in the Intervention Response that the notice of hearing did not satisfy the technical requirements under the Commission's rules. *See* Intervention Response at 18-19, n. 5.

Request, like the Request, also asserts that Mr. Ball is a *de facto* party in this matter, apparently to the end that intervention is not needed for him in any event.

II. STATEMENT OF FACTS

The premise of the Request is that the question before the Commission in this matter is whether the Company's decision in 1998 to enter into a contract with Questar Transportation to build and operate the CO_2 Removal Plant was prudent. This is not the issue before the Commission, however, and its repeated invocation by petitioners leads them down an erroneous path with no basis in law or fact. As the Commission appropriately made clear in the 2006 Order, the question to be considered in this case is whether it is prudent to operate the CO_2 Removal Plant from February 1, 2005 going forward in order to provide reliable, comparatively low-cost gas to customers while the inspections and adjustments necessary to allow appliances to safely burn gas within the heat-content range currently provided in the Company's tariff are completed.

Contrary to the assertions in the Request, numerous facts supporting a finding of prudence were clearly established by competent evidence in this proceeding. These facts were sufficient to demonstrate that the circumstances at issue in the 1999 general rate case addressed in the 2004 Order are not the circumstances at issue today, that the Company has unequivocally demonstrated prudence in its handling of coal bed methane since February 1, 2005, and that the partial rate recovery provided in the Stipulation is just and reasonable.

Specific facts, established through competent and appropriate evidence, demonstrating prudence include the following:

1. The record in these dockets overwhelmingly indicates that the Company's customers have benefited from the shipment of coal bed methane by Questar Pipeline, and indeed coal bed methane has become an important component of Questar Gas's purchased gas

supplies. In addition, the uncontroverted record shows that coal bed methane is becoming an increasingly important source of gas in all parts of the Rocky Mountain region. While no evidence was introduced in the 1999 general rate case to show that Questar Gas made any purchases of coal bed methane in the early 1990s when Questar Pipeline began transporting the gas, the same cannot be said of present proceeding. Mr. Walker's testimony established that since 2002 Questar Gas has purchased from 12.4 to 13.3 million decatherms annually amounting to 21 to 27 percent of the gas supply purchased by the Company to meet the needs of its customers. The testimony of Messrs. Conti, Lamarre, Walker and Dr. Reid established that coal bed methane both from the Ferron area and elsewhere will likely become an increasingly important source of supply for Questar Gas in the future. Therefore, it is irrelevant why coal bed methane was initially present on Questar Pipeline. The fact is that the development of coal bed methane has been beneficial to Questar Gas and its customers and that Questar Gas has found it advantageous to purchase coal bed methane itself to meet its customers' needs. Regardless of whether Questar Pipeline's decision to transport the coal bed methane originally may or may not have been in conflict with the interests of Questar Gas, coal bed methane is now an important source of gas for Questar Gas and its availability has saved customers much more than the cost incurred by Questar Gas in processing it to remove CO_2.

2. As Mr. McKay's testimony demonstrated, and as no party contested, having the CO_2 Removal Plant owned and operated by Questar Transportation does not result in any prejudice to Questar Gas or its customers. The costs incurred by Questar Gas are the same as if the plant were owned and operated by Questar Gas. The provisions in the Stipulation that allow only 90% of non-fuel costs, fuel costs limited to 360,000 Dth/year, the sharing of revenues from processing for third parties in excess of $400,000 per year to be included in the 191 Account and

not allowing any costs of additional plant facilities used for third-party services to be included in the 191 Account assure that the interest of customers of Questar Gas are given priority in this arrangement.

3. As demonstrated in the testimony of Mr. Conti and Mr. McKay, and as confirmed under specific questioning by the Commission of Mr. Powell, Mr. Gimble, and Mr. McKay at the hearing, no party believes it would be reasonable to pursue actions at the FERC to attempt to keep coal bed methane off of Questar Pipeline or to change tariff standards in an effort to shift the costs of CO_2 removal to some other party. Therefore, the fact that Questar Gas did not pursue these potential actions prior to 1999, which gave rise to concerns about affiliate conflicts in prior proceedings, does not give rise to the same concerns in the current context. Indeed, the evidence demonstrates that pursuing such actions would be detrimental to Questar Gas and its customers given the gas quality issues surrounding Company-owned gas that other Questar Pipeline customers would be able to raise at the FERC in such a proceeding.

4. Separate and apart from their value in supporting the factual conclusions appropriately reached by the Commission, the technical conferences in these dockets transparently demonstrated that the Company followed the Commission's expectations from the 2004 Order for carefully analyzing options and protecting against affiliate influence. Merely the contemporary documentation coming from those technical conferences, included with the Company's application and sworn testimony, supported a Commission finding that the Company followed the appropriate process. The live expert testimony from the hearing, under examination from the Commission and available for cross examination from other interested persons, also confirmed the efficacy of the process.

Thus, contrary to the dogged but mistaken belief of petitioners, the Commission was correct to find that the clock did not stop in 1998 with regard to coal bed methane. The gas would have been produced regardless of what the Company did or did not do in the 1990s and will continue to be produced in the future. The production and availability of this gas raises ongoing issues that a prudent utility must address on an ongoing basis, and therefore requires the Commission to assess prudence on an ongoing basis. The Stipulation provided a reasonable approach to handling these ongoing issues over the near-term future, and the 2006 Order was unquestionably correct in approving the Stipulation.

III. SUMMARY OF ARGUMENT

The Request attacks the 2006 Order based on revisionist history and a misstatement of the issue before the Commission. The Request must be denied for several reasons. First, none of the persons filing the Request was a party to the proceeding giving rise to the 2006 Order or is acting in the interests of a person truly "pecuniarily interested" in Questar Gas. Therefore, they have no standing to file the Request. This ground alone requires denial of the Request. Second, the arguments asserted in support of reconsideration are the same arguments asserted in the public witness statements of Mr. Ball and Ms. Geddes and in favor of their intervention prior to issuance of the 2006 Order. The Commission has already considered and rejected the arguments for sound reasons, and there is no reason to reconsider them. Third, the doctrine of res judicata has limited application in rate proceedings precisely because an expense that may have been imprudent in one set of circumstances may be entirely prudent in another set of circumstances. Fourth, the 2006 Order was supported by competent, substantial—indeed, overwhelming—evidence demonstrating beyond question that the partial recovery of CO_2 removal costs is just and reasonable and in the public interest. Affiliate interest issues were addressed transparently and appropriately and, therefore, can no longer be a looming specter automatically polluting any

action involving them. Fifth, the Commission was correct not to address Utah Code Ann. § 54-4-26 or the 1994 Planning Guidelines. These provisions did not require filing and pre-approval of the contract between Questar Gas and Questar Transportation, and, as noted above, the 2006 Order thoroughly considered potential affiliate conflicts in any event. Sixth, the process complied with all due process requirements and was fair. The notice of proceedings was both adequate and appropriate given the fact that all parties in the case entered into the Stipulation. Petitioners suffered no prejudice as a result of the fact that the Stipulation was not accompanied by an unnecessary motion for approval. Chairman Campbell was not required to recuse himself given the fact that the question before the Commission was not the same question as that presented in the prior proceeding, and in any event, petitioners must take the case as it existed at the time they chose to start participating and cannot question procedural decisions made prior to their participation. This latter point illustrates the reason persons cannot wait until after a proceeding is concluded to attempt to participate.

The Request offers no valid basis for the Commission to reconsider its carefully reasoned 2006 Order. It should be rejected.

The Intervention Request is baseless, failing to identify any grounds supporting revisiting the decision to deny Mr. Ball's and Ms. Geddes's untimely attempt to intervene. Mr. Ball and Ms. Geddes cannot shift the burden to the parties or the Commission to identify grounds for reconsideration by cavalierly adopting other pleadings by reference. This is particularly the case where the arguments in the other pleadings are generally irrelevant to the Intervention Order. The Intervention Order was based first and foremost on the fact that Mr. Ball and Ms. Geddes did not seek intervention until after proceedings were concluded and offered no reasonable justification for such tardy intervention. Therefore, allowing them to intervene would have

impaired the interests of justice and the orderly and prompt conduct of the proceeding. The Intervention Request does nothing to undermine this conclusion and should be denied.

IV. ARGUMENT

A. PETITIONERS LACK STANDING TO SEEK RECONSIDERATION.

Seeking review of an administrative order requires party standing, and petitioners bear the burden of proof that they have such standing.[42] Standing is typically obtained through appropriate intervention,[43] which none of the petitioners pursued in this case. And although section 54-7-15 does contain what might be interpreted as an additional grant of standing to non-parties, if the person seeking reconsideration is a "stockholder, bondholder, or other person pecuniarily interested in the public utility,"[44] that grant is neither sufficient to confer standing on petitioners in this case nor have petitioners even attempted to argue why they satisfy the requirements of section 54-7-15 sufficient to acquire standing. Rather, they have completely left it to the Commission to assume the basis for standing and have failed to do anything to attempt to meet their burden.[45]

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[42] *See, e.g., KERM, Inc. v. F.C.C.*, 353 F.3d 57, 59 (D.C. Cir. 2004) ("A petitioner [for review of agency action] bears the burden of establishing its standing."); *Redwood Gym v. Salt Lake County Commission*, 624 P.2d 1138, 1145 (Utah 1981) ("In the instant case, plaintiffs have not shown, by stipulation, affidavit, or otherwise, that any one of the massage parlors seeking declaratory relief below employed 25 or more individuals. Therefore, plaintiffs have failed to demonstrate standing to challenge the application of the Anti-discrimination Act, as it does not appear that any of their number is an 'employer' for purposes of the statute.").

[43] *See* Utah Code Ann. § 63-46b-9; Utah Admin. Code R746-100-7.

[44] Utah Code Ann. § 54-7-15(1).

[45] *See, e.g., Bord v. Banco de Chile*, 205 F.Supp.2d 521, 523 (E.D. Va. 2002) ("The burden of proving that standing exists rests with the Plaintiff and must be supported by sufficient evidence."); *Harris v. Zoning Comm'n of Town of New Milford*, 788 A.2d 1239, 1246 (Conn. 2002) ("It is . . . fundamental that, in order to have standing to bring an administrative appeal, a person must be aggrieved. . . . Aggrievement presents a question of fact for the trial court and the party alleging aggrievement bears the burden of proving it.").

Based on Appendix A of the Other Petitioners Request, all but three of the 42 petitioners do not even purport to be shareholders or to have any interest in Questar Gas beyond their interest as customers. Petitioners appear to assume (again, without argument) that such an interest is "pecuniary" sufficient to trigger standing under the statute. But the interest of customers is limited to receiving just and reasonable rates and service—it is not a pecuniary interest in Questar Gas of the type addressed in section 54-7-15. The three petitioners who do purport to be "Questar Stockholders," on the other hand, provide no actual evidence of that status. Moreover, while apparently seeking to assert standing based on their alleged status as shareholders, the injury these three assert clearly arises out of their status as customers rather than their alleged pecuniary interest in Questar Gas. Such an alleged injury is insufficient to warrant standing.

The Other Petitioners Request should be seen for what it is—an attempt by Mr. Ball and Ms. Geddes to sneak-in through the back door what their untimely attempt at intervention prevented them from accomplishing through the front door. If petitioners were allowed to seek reconsideration in these circumstances, the Commission would lose the ability to appropriately and efficiently manage its dockets and ensure that issues are raised for its consideration in a timely manner—not after the matter is completed and a final order has already been entered. The tardy would-be intervenors are merely using the 42 petitioners in an attempt to manufacture another chance to be heard.

1. Mr. Ball and Ms. Geddes Were Appropriately Denied Intervention; the Remaining Petitioners Have Not Even Attempted to Intervene or Demonstrate Their Standing.

Mr. Ball and Ms. Geddes were appropriately denied intervention, and the Intervention Request should be denied for the reasons set forth below. But the 42 other petitioners have not even attempted to intervene, even at this late date, as they seek to effectively act as parties in this

proceeding (or at least, as Mr. Ball and Ms. Geddes seek to use their names as parties). The absence of party status to these petitioners that have not even attempted intervention, and for whom intervention is far too late in any event, is fatal to their attempt to obtain reconsideration unless they have some other statutory right potentially applicable in this situation. But they have failed to argue what that statutory right is and, thus, have not met their burden to establish their standing. Moreover, for the reasons set forth below, there is no statutory right applicable to the 42 petitioners in this case.

2. All But Three of 42 Petitioners Do Not Purport to Have any Interest Beyond Their Interest as Customers; That Interest Is in Rates and Service and Is Not a Pecuniary Interest in Questar Gas.

The Request does not argue that Questar Gas customers have a pecuniary interest in the Company such that they have a right to seek reconsideration. However, statements made during arguments on discovery, along with the very fact petitioners are even pursuing reconsideration when they are not parties, appear to indicate that petitioners view their status as customers as satisfying any necessary pecuniary interest to pursue reconsideration under section 54-7-15. If this is a correct statement of petitioners' view, their view is erroneous. A pecuniary interest is a financial interest,[46] and that interest must be a financial interest in the public utility,[47] not merely in the services provided by that utility. The Legislature knows how to use the term "customer" when it chooses to do so,[48] and the absence of that term in section 54-7-15, as well as the presence of the terms "stockholder" and "bondholder" establishing the types of things that make up the list of pecuniary interests, precludes a finding that customers are "pecuniarily interested"

[46] *See, e.g., Merriam-Webster's Collegiate Dictionary*, 856 (10th ed. 1998) ("pecuniary 1: consisting of or measured in money 2: of or relating to money.").

[47] *See* Utah Code Ann. § 54-7-15(1) (". . . any party, stockholder, bondholder, or other person pecuniarily interested **in the public utility** . . .") (emphasis added).

[48] *See, e.g.*, Utah Code Ann. §§ 54-2-1(15)(e); 54-3-1; 54-4-14; 54-4-25(5); 54-4-37; 54-4a-6.

in the utility for the purposes of the statute.[49] This interpretation is consistent with that reached in other cases interpreting similar statutory provisions,[50] and is the only interpretation that makes sense—one does not acquire a pecuniary interest in a grocery store by purchasing groceries, or an auto dealership by purchasing a car, or in a city by being a municipal utility customer. Likewise, petitioners do not become pecuniarily interested in Questar Gas by virtue of their customer interest in just and reasonable rates; and in the absence of such a pecuniary interest, petitioners lack standing to seek reconsideration.

3. The Three Remaining Petitioners Have Not Demonstrated Their Status as Holding a Pecuniary Interest in Questar Gas, Nor Have They Demonstrated any Injury to Their Interest Even Assuming They Hold One.

As noted above, petitioners have the burden of proof to establish their standing, which in this case means appropriately demonstrating their status as stockholders, bondholders, or holders of some other pecuniary interest in Questar Gas. They have failed to do so. Thus, there is no substantial evidence in support of a Commission finding that petitioners hold a pecuniary interest

[49] *See, e.g., State ex rel. A.T.*, 2001 UT 82, ¶12, 34 P.3d 228, 232 ("The doctrine of ejusdem generis applies in instances where an inexhaustive enumeration of particular or specific terms is followed by a general term or terms that suggest a class. The doctrine declares that in order to give meaning to the general term, the general term is understood as restricted to include things of the same kind, class, character, or nature as those specifically enumerated, unless there is something to show a contrary intent.") (citations omitted).

[50] *See, e.g., In re Citizens Util. Co.*, 11 CPUC 2d 667 (Cal. PUC Jun. 1, 1983) ("The assertion that the Committee has standing as it is 'pecuniarily interested' in Citizens because of its ratepayer relationship is without merit. If we had considered the pleading to be an application for rehearing, it would have been dismissed for lack of standing and for untimeliness.") (citation omitted); *In re SoCal Gas Co.*, 1982 WL 196731, *1 (Cal. PUC May 4, 1982) ("Every customer shares an interest in reasonable rates based on reasonable costs but the Legislature did not intend to grant to every customer the standing to apply for rehearing on that account.") California Pub. Util. Code § 1731(b) provides that "[a]fter any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. . . ."

in the Company, and no basis to conclude that petitioners have met their burden of establishing standing.

Even if the three petitioners had demonstrated that they hold a pecuniary interest in Questar Gas, they would have no basis to pursue the Request. Standing requires a showing of a distinct and palpable injury.[51] While the precise level of necessary injury may not be clear from the face of section 54-7-15, the person holding a pecuniary interest in the public utility must at least be "dissatisfied" with the order at issue. Further, the provisions of section 54-7-15 must be read in harmony with other applicable law.[52] To pursue agency rehearing, section 63-46b-12 requires that one be an "aggrieved party";[53] and to pursue an appeal, section 63-46b-16 requires that one be "substantially prejudiced" by agency error.[54] Thus, a showing of injury is mandatory.

But showing the possibility of just any injury is not alone enough to establish standing. Rather, the injury must be suffered **within the capacity** of a protected interest.[55] In this case, the

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[51] *See, e.g., National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 913 (Utah 1993).

[52] *See, e.g., Miller v. Weaver*, 2003 UT 12, ¶17, 66 P.3d 592, 597 ("We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.") (citations omitted).

[53] *See* Utah Code Ann. § 63-46b-12(1)(a); *see also* Utah Admin. Code R746-100-11.F (showing the applicability of section 63-46b-12 to Commission proceedings).

[54] *See id.* at § 63-46b-16(4). Admittedly, section 63-46b-16 deals with appellate review rather than agency reconsideration; but it is relevant here because the consideration of issues that would warrant reversal by an appellate court should provide direction to an agency about the types of issues it should focus on in addressing requests for reconsideration.

[55] *See, e.g., Goldin v. Dept. of Environmental Protection*, No. 03-P-1168, 2004 WL 74466,*1 (Mass. Ct. App. Jan. 16, 2004) ("[F]or the plaintiff to have standing, the **injury alleged must fall within the area of concern of the statute or regulatory scheme under which the injurious action has occurred**.") (quotation omitted); *Sadloski v. Manchester*, 668 A.2d 1314 , 1319 (Conn. 1995) ("The plaintiff's status as a taxpayer does not automatically give her standing to challenge alleged improprieties in the conduct of the defendant town. . . . The plaintiff must also allege and demonstrate that the allegedly improper municipal conduct cause[d][her] to suffer some pecuniary or other great injury. . . . It is not enough for the plaintiff to show that her tax dollars have contributed to the challenged project[,] . . .

statutorily protected interest is the interest of a shareholder, bondholder, or other person with a pecuniary interest in the utility. The injury petitioners must allege in order to establish standing, therefore, must have been suffered in their capacity as holders of a pecuniary interest in the Company, not as customers. Otherwise, the specific grant of standing to a shareholder (or equivalent) would be meaningless.

The three purported shareholder petitioners do not allege any injury in their capacity as shareholders. Rather, the entire premise of the Request is petitioners' concern about it "cost[ing] them more when gas rates increase."[56] In other words, they are alleging injury to their interests as **customers**, not their interests as shareholders. Indeed, the Request's overheated rhetoric leaves nothing to the imagination regarding the interests petitioners seek to represent. On the approximately 39 pages of the Other Petitioners Request where either the 2006 Order, specifically, or rate recovery for CO_2 removal costs more generally is attacked,[57] not once is there any indication of an intent to protect the interests of shareholders. Rather, the Request states things such as: "If the Utility has mismanaged in the selection of means, then shareholders, not ratepayers, will—and rightly should—bear the cost of this imprudence";[58] "[t]o rule otherwise [than saying recovery is barred by the prudence language of the 2003 Decision] would mean that a regulated utility could hold ratepayers hostage, . . .";[59] that ratepayers are "the

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the **plaintiff must prove that the project has directly or indirectly increased her taxes . . . or, in some other fashion, caused her irreparable injury in her capacity as a taxpayer**.") (citations and quotation omitted).

[56] Other Petitioners Request at 2.

[57] *See, e.g*, *id* at 2, 3, 12, 13, 14, 15, 18, 19, 22, 24, 26, 27, 28, 29, 30, 35, 36, 37, 38, 39, 43, 44, 45, 46, 47, 48, 52, 53, 54, 56, 57, 63, 64, 65, 66, 70, 74, 75, 76.

[58] *Id*. at 22.

[59] *Id*. at 45.

real parties in interest" affected by the Stipulation;[60] that the Commission "surely must now permit the ratepayers to retain their own attorneys [i.e., counsel for petitioners] and champion their own and the public interests when all other advocates have abandoned them";[61] and, finally, that the 2006 Order "is the most egregious Commission gift to Questar's shareholders since the sly accounting for dry wells which resulted in Wexpro I."[62] Clearly, the three purported shareholders are not in this case to protect and shareholder interest. As one of the three purportedly stated in discussing his participation in the Request:

> Young said he purchased his Questar shares in November after it became clear to him that natural gas prices and the company's profits were going up. "I thought if they're going to be making money maybe I should buy some shares to help offset their rising rates. **But I'd have to own thousands of shares before I could make up from their dividend payments all of the money I'm now having to pay in higher heating bills**."[63]

The interests of shareholders protected under the statute cannot possibly have been harmed by the Commission's allowance of partial rate recovery for CO_2 removal costs (at least not from the direction pursued by petitioners, where they seek to deny all rate recovery rather than alleging insufficient recovery). Thus, in their capacity as shareholders, the three petitioners lack any showing of injury, while in their capacity as customers they are not entitled to seek reconsideration under the provision of section 54-7-15. Either way, they lack standing.

This is precisely as it should be. The relevant language in section 54-7-15 was obviously intended to offer a level of special protection to people with a pecuniary interest in a public

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[60] *Id*. at 65.

[61] *Id*. at 74.

[62] *Id*. at 76.

[63] Overbeck, Steven, "Utahns face utility's inquiry – Questar subpoenas customers and shareholders, irked by high heating bills, to talk to its lawyers," *The Salt Lake Tribune*, Feb. 26, 2006, A7 (emphasis added).

utility, allowing them to seek reconsideration in certain circumstances where others cannot. If parties were not required to demonstrate injury in their capacity as shareholders, they could assert their status as shareholders in order to seek reconsideration for the very purpose of **undermining** shareholder interests (exactly as petitioners seek to do in this case). Indeed, they could even acquire a nominal amount of stock with the very intent of using that stock to gain shareholder status under section 54-7-15 in order to undermine shareholder interests if an order favorable to shareholders were issued. In other words, they could deliberately become shareholders for the very purpose of harming shareholders. Such an interpretation of the statute would be absurd,[64] allowing a person to acquire and use shareholder status as a club for harming the very people the statute is intended to protect.[65]

The three purported Questar shareholders have no basis to be "dissatisfied" under section 54-7-15, to claim to be "aggrieved parties" under section 63-46b-12, or to be "substantially prejudiced" by the 2006 Order under section 63-46b-16 in their capacity as shareholders unless they seek full rate recovery of CO_2 removal costs. No reasonable person with a pecuniary interest in Questar Gas could in good faith believe it favorable to that interest for the Commission to deny all rate recovery for CO_2 removal costs as petitioners argue, and petitioners do not even pretend to be forwarding any shareholder or other pecuniary interest in Questar Gas. Rate recovery is necessarily favorable to those with a pecuniary interest in the Company, and

[64] *See, e.g., Millett v. Clark Clinic Corp*, 609 P.2d 934, 936 (Utah 1980) ("[S]tatutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and that interpretations are to be avoided which render some part of a provision nonsensical or absurd.") (citations omitted).

[65] One of the frustrating aspects of the Request, of course, is that the terms for cost recovery in the Stipulation and the provision for the ongoing availability of low-cost coal bed methane are clearly in the interest of the Company's customers. Were they not, the Commission, Division, and Committee would not have approved of the Stipulation. Petitioners, therefore, in joining Mr. Ball's and Ms. Geddes's misguided continuing attempt to portray CO_2 removal as merely the Company's affiliates foisting bad gas on the Company's customers, are pursuing a course of conduct detrimental to their own interests.

there would be no legitimate basis for a person holding such an interest to pursue denial of rate recovery through reconsideration or appeal.

4. Conclusion on Standing

In the absence of standing to seek reconsideration of the 2006 Order, the Request must be denied. No shareholder or other person holding a pecuniary interest in Questar Gas has asserted any injury to that interest. Thus, because no actual party to the case or person pecuniarily interested in Questar Gas sought reconsideration within the time required by statute, reconsideration cannot be granted.[66] In light of this fact, it is respectfully submitted that the Commission should deny reconsideration on this ground without reaching any of the other arguments raised by petitioners. Nonetheless, in the balance of this memorandum, Questar Gas will demonstrate that the other arguments raised by petitioners also do not warrant reconsideration of the 2006 Order.

B. THE COMMISSION HAS ALREADY APPROPRIATELY REJECTED THE ISSUES RAISED BY PETITIONERS.

In challenges to agency actions, "the party challenging the action carries the burden of demonstrating its impropriety."[67] In order to warrant rehearing or reconsideration once the Commission has issued a final order, a petitioner should demonstrate that there was some essential legal or factual error by the Commission, or that previously undiscoverable evidence has been located that would support a different outcome.[68] Rehearing or reconsideration is not

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[66] *See* Utah Code Ann. § 54-7-15.

[67] *Kelly v. Salt Lake City Civil Service Comm'n*, 2000 UT App 235, ¶ 30, 308 P.3d 1048, 1056 (quoting *SEMECO Indus. v. State Tax Comm'n*, 849 P.2d 1167, 1174 (Utah 1993) (Durham, J., dissenting)).

[68] *See, e.g., Taylor, Taylor v. Public Service Comm'n*, No. 20030694-CA, 2005 WL 615164, *1 (Ut. Ct. App. Mar. 17, 2005) (upholding the Commission's refusal to grant rehearing where "[appellant] provided no explanation as to why the 'new' evidence or similar evidence was not available at the May 29, 2003 hearing, or why he could not have introduced this material during the May hearing."); *Garner v. Thomas*, 78 P.2d 529, 530 (Utah 1938) ("As a general rule courts will not grant rehearings to consider

warranted, however, where the petition merely seeks to reargue issues without establishing error.[69] The Request provides little new insight and establishes no Commission error. Rather, it essentially re-argues the points made by Mr. Ball and Ms. Geddes in their previous affidavits and in their argument in the Intervention Response. This re-argument does not provide any meaningful basis for the Commission to reconsider the 2006 Order. The 2006 Order was correct when it was issued and remains correct today. Nothing in the Request undermines that conclusion in the least.

C. NEITHER RES JUDICATA NOR ANY OTHER LEGAL DOCTRINE WOULD APPLY TO PRECLUDE THE CONCLUSIONS REACHED IN THE 2006 ORDER.

Res judicata has only limited application to rate-related proceedings because in setting rates on an ongoing basis the Commission is necessarily continuing to evaluate changing circumstances as it determines what is just and reasonable. Even where res judicata might theoretically apply, all of its elements must be met in order for it to have either a claim preclusive or issue preclusive effect. Finally, although the Commission or a court can also establish a binding legal conclusion through a doctrine such as stare decisis or the law of the case, in the absence of doing so the Commission is free to evaluate each case on its merits, consistent with the law but otherwise without pre-determined constraint.

In this case, res judicata has no applicability. In issuing the 2006 Order, the Commission considered factual circumstances that had never been addressed before in any of the previous

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questions which could have been urged in the first hearing but were not") (Wolfe, J., Concurring); Order No. 23,543, *In re LOV Water Co.*, DW 99-119, 2000 WL 1531619 (N.H. P.U.C. Aug. 11, 2000) ("We are not required to grant a rehearing so that a party has a second chance to present evidence that it could have presented earlier.").

[69] *See, e.g.*, Order No. 23,766, *In re Holiday Acres Water and Wastewater Services*, DW 01-027, 2001 WL 1568405 (N.H. P.U.C. Aug. 24, 2001) ("The fact that the Parties are unhappy with [the order] or disagree with the Commission is not sufficient good reason for reconsideration or rehearing, nor does it follow that we erred in our findings and rulings on the law.") (internal quotation omitted).

coal bed methane-related dockets. Petitioners' attempt to portray this case as turning on the issues from the 1999 rate case and before rather than contemporary evidence of today's circumstances is baseless. Coal bed methane continues to be produced every day, and every day the Company must decide how best to respond to the availability of coal bed methane. Nothing the Company did or did not do in the 1990s has in any way foreclosed the options available to the Company to handle coal bed methane today. Rather, the fundamental question that the Company, the Division and Committee, and ultimately the Commission, appropriately asked and answered in this case is how should the Company prudently respond today to the production of coal bed methane near the Company's southern system. That question was addressed transparently and appropriately in this case, and res judicata has no applicability to bar what was otherwise the clearly correct answer that the Commission and parties reached.

1. Nothing in the 2004 Order Barred the Commission from Reaching the Findings and Conclusions Reached in the 2006 Order.

The Request falsely portrays the 2004 Order as precluding the Company from recovering CO_2 removal costs. The 2004 Order, however, did nothing of the kind. Rather, in the 2004 Order, the Commission determined that Questar Gas had not met its burden to establish that the costs of CO_2 removal at issue in the CO_2 Stipulation from the Company's 1999 general rate case had been prudently incurred. No one is seeking to re-litigate that issue. Rather, the facts the Commission relied on in issuing the 2006 Order were the facts applicable to current circumstances, not circumstances relative to the 1999 general rate case.

a. The claim preclusion branch of res judicata is not implicated in this proceeding.

The claim preclusion branch of res judicata deals with previously adjudicated claims and causes of action, and bars the re-litigation of any claim or cause of action that has been the

subject of a prior final judgment on the merits.[70] Three elements must be present in order for a claim to be precluded: "First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits."[71] Petitioners assert that claim preclusion applies based on the 2004 Order, but that assertion is transparently incorrect. The second requirement of claim preclusion is missing from this case. The "claim" for recovery rejected by the Commission in the 2004 Order was the claim for partial recovery of CO_2 removal costs incurred from the building of the CO_2 Removal Plant up through, at the latest, May of 2004. The claim at issue in this case is partial recovery of costs incurred since February 2005. The two are simply not the same claim or cause of action.

This is consistent with rate-related proceedings generally because "[b]y their very nature, public utility rates are inescapably subject to constant circumspection and justification. The Commission is charged with the responsibility of establishing rates as are 'just and reasonable' and the propriety of such rates is forever subject to challenge upon complaint by interested parties who are entitled to a hearing and to introduce evidence."[72] Thus, "[w]hat constitutes a just and reasonable rate of return, the cost of capital, **and the various expense** and revenue **amounts** cannot be decided on the basis of a prior rate proceeding, but must be determined anew" in each case.[73] Even if an expense is of a type involving a legal determination that has

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[70] *See, e.g., Macris & Associates, Inc. v. Neways, Inc.*, 2000 UT 93, ¶¶ 17-20, 16 P.3d 1214, 1219.

[71] *See id.* ("All three elements must be present for claim preclusion to apply.") (citation omitted).

[72] *Utah State Bd. of Regents v. Utah Public Service Comm'n*, 583 P.2d 609, 611 (Utah 1978).

[73] *Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1251 (Utah 1992)

been previously adjudicated (and, therefore, may implicate stare decisis), the mere difference in the level of the expense from year to year is sufficient to prevent the application of res judicata.[74]

The costs that the Company seeks to recover in this case are **not** the same costs covered by the 2004 Order. The costs addressed by the 2004 Order have already been borne by Questar Corporation shareholders, and no one is suggesting that those costs can now be revisited. Thus, again, the second requirement for claim preclusion is missing—the 2006 Order did not address the same claim for recovery that was previously denied in the 2004 Order. Rather, as the 2006 Order expressly stated, "Questar Gas will not recover any gas management operations costs incurred prior to February 1, 2005."[75] The claim preclusion branch of res judicata is simply not implicated in this proceeding.

b. The issue preclusion branch of res judicata is not implicated in this proceeding.

The issue preclusion branch of res judicata[76] prevents any issue directly adjudicated or necessarily involved in the determination of a prior action from being relitigated in any future action between the same parties or their privies. Four elements are required to establish issue preclusion: "(1) The issue decided in the prior adjudication must be **identical** to the one presented in the action in question; (2) there must be a final judgment on the merits; (3) the party against whom the plea is asserted must be a party in privity with a party to the prior adjudication; and (4) the issue in the first action must be **completely, fully, and fairly litigated**."[77] Thus, for

[74] *See id*.

[75] 2006 Order at 40.

[76] Utah is the only state of which Questar Gas is aware where "issue preclusion" is referred to as a part of *res judicata*, rather than being referenced separately as the doctrine of collateral estoppel. Nonetheless, because Utah case law refers to both claim preclusion and issue preclusion under the combined heading of *res judicata*, Questar Gas uses that convention herein. *See, e.g., Macris & Associates*, 16 P.3d at 1219.

[77] *Career Service Review Bd. v. Utah Dept. of Corrections*, 942 P.2d 933, 938 (Utah 1997).

issue preclusion to apply, the identical factual or legal issue that a party seeks to raise in this proceeding must have already been completely and conclusively established in a prior proceeding.

In this case, the first and fourth elements of issue preclusion are missing. The issues resolved by the 2006 Order were not the "identical" issues resolved by the Commission in the 2004 Order as required to invoke the first element. Nor were the issues addressed by the 2006 Order litigated at all in the 1999 rate case, let alone "completely and fully" litigated as required to invoke the fourth element. Here the Commission was neither addressing the issue of whether the costs covered by the CO_2 Stipulation from the 1999 rate case were prudently incurred nor was it otherwise remotely addressing costs incurred during the period covered by the 2004 Order. The issue addressed in this case—whether CO_2 removal costs incurred **since February 1, 2005** were prudently incurred sufficient to warrant partial rate recovery—was not addressed in the 2004 Order or at any other previous time.

Petitioners seek to escape this problem by asserting that because the Commission did not find Questar Gas to have been prudent in incurring the costs associated with CO_2 removal in the 1999 rate case, as concluded by the 2004 Order, from thenceforth and forever the Commission can never find Questar Gas to have prudently incurred any costs associated with CO_2 removal and that although the Commission did not focus on the circumstances at play in the 1990s in the 2006 Order, it should have done because those circumstances continue to control. But this assertion is devoid of merit. It is the equivalent of saying that because the Commission denied rate recovery in a prior case for the costs associated with providing electricity from a new power plant (for example, because the new resource built by a utility's affiliate was unnecessary at the time the plant was constructed), the Commission can never allow rate recovery for electricity

from that plant in the future, regardless of how necessary or cost-effective that electricity is in future circumstances. There is simply no basis in any ratemaking principle that would support such a view of issue preclusion.

The costs and actions considered by the Commission in the 2006 Order were not the costs and actions considered in the 2004 Order. Whether or not coal bed methane was necessary or beneficial to customers in prior to 1999 has nothing to do with whether it is necessary and beneficial today. And nothing the Company did or did not do in the 1990s has foreclosed its options available for dealing with coal bed methane today. To the contrary, just as the Company established when transparently setting forth available options in this case, diverting pipelines can still be built, FERC actions can still be instituted and the gas could still be shut-in. The problem is not that these options are not available, it is that none of them is as desirable and beneficial to the Company's customers as CO_2 removal.

Petitioners seek to characterize the Commission's rate disallowance of CO_2 removal costs as being tied to the Company's contract with Questar Transportation or to the latter's ownership of the CO_2 Removal Plant, but the prior contract between Questar Gas and Questar Transportation no longer has any force for ratemaking purposes (in light of the disallowance of rate recovery in the 2004 Order). No party pursued any request for a transfer of ownership of the CO_2 Removal Plant in this case because that ownership is irrelevant—the cost of CO_2 removal to the Company's customers is tied to the terms and amounts approved in the 2006 Order, not any contractual terms between Questar Gas and Questar Transportation; and Questar Gas demonstrated that having Questar Transportation process the coal bed methane is a prudent means of accomplishing the necessary CO_2 removal. Customers will pay no more with Questar Transportation owning and operating the Plant than they would pay if Questar Gas owned and

operated the Plant. In addition, even if it assumed that ownership had some bearing on this issue, by virtue of Questar Transportation's ownership, the costs of owning and operating the Plant beyond those covered in the Stipulation will not separately find their way into rates paid by the Company's customers.

Petitioners real argument regarding issue preclusion, therefore, is not that the Commission **actually** decided differently issues that were foreclosed by contrary determinations in the 2004 Order. Nothing in the 2006 Order would support such a view. The Commission clearly stated that it was addressing new circumstances. Rather, petitioners argue that the Commission **should** have focused on the pre-1999 circumstances decided in the 2004 Order, and that **if** the Commission had focused on those circumstances it would have found the 2004 Order to bar recovery. Petitioners' issue preclusion argument, therefore, is really just another way of stating their ill-founded argument about what evidence is actually relevant to a finding of prudence, where in petitioners' view (or at least Mr. Ball's and Ms. Geddes's view) no evidence about the prudence of dealing with coal bed methane—whether now or 20 years from now—can ever post-date the construction of the CO_2 Removal Plant in 1999 or overcome the Commission's finding in the 2004 Order that the Company had failed to demonstrate prudence for recovery of the costs at issue in the 1999 rate case.

All of this raises a significant irony of which petitioners seem to be unaware (or perhaps an attempted Catch 22 of which Mr. Ball and Ms. Geddes are all too aware). Under petitioners' theory of issue preclusion, the Company can never recover CO_2 removal costs because of the supposedly preclusive effect of the issues from the 1999 general rate case resolved in the 2004 Order. Yet nothing in that order purported to foreclose the possibility of pursing pipeline options, propane injection, shutting-in the gas, or the various other alternatives Questar Gas has

now transparently presented for addressing the presence of coal bed methane in close proximity to the Company's southern system. Thus, Questar Gas could seek cost recovery for implementing one of these other solutions without running afoul of res judicata, because there is no supposedly issue-preclusive order in the way; yet it is now known through the evidence submitted in this matter that such other options would result in higher costs to customers and are less reliable than CO_2 removal. So, under petitioners' theory, either Questar Gas must pursue an **inferior** option to avoid issue preclusion and obtain rate recovery, or (perhaps more likely) Mr. Ball and Ms. Geddes would oppose rate recovery for any other alternative for dealing with coal bed methane on the cynical ground that other options are more expensive and less effective than the CO_2 removal that is conveniently barred by their own private theory of res judicata.

c. Res judicata is aimed at parties, not the Commission.

One final point should be made about res judicata, whether focusing on the claim preclusion or issue preclusion branch, and that is that the doctrine applies to **parties**. It is not a bar to the Commission re-addressing issues previously resolved (if there were any such issues relevant in this case). To the contrary, although parties cannot collaterally attack final Commission orders,[78] the Commission has express statutory permission to "at any time, upon notice to the public utility affected and after opportunity to be heard, rescind, alter, or amend any order or decision made by it."[79] Thus, the repeated implication in the Request about the Commission being somehow barred by the 2004 Order is baseless. The Commission could not fulfill its legislative mandate to ensure just, reasonable, safe, and adequate service and rates if it were forced to operate under such a constraint.

[78] *See* Utah Code Ann. § 54-7-14.

[79] *Id*. at § 54-7-13.

As argued above, however, no party has sought to re-litigate any previously litigated claim or issue. Nor is the Commission being asked to revisit any conclusion from the 2004 Order. The fundamental point that the Commission appropriately focused on in this case is the fact that coal bed methane continues to be produced, that it would have been—and will continue to be—produced regardless of what Questar Gas or its affiliates did in the 1990s and regardless of what they do now, and that Questar Gas must make ongoing decisions about how to respond to the presence of such gas in close proximity to its system. It now has been demonstrated that coal bed methane is a desirable, inexpensive source of supply for the Company's customers. It would be imprudent for a local distribution company not to attempt to take advantage of that supply, and the most prudent way to take advantage of the supply is through CO_2 removal.

The Company's and Commission's ongoing assessments of such issues are precisely the types of things addressed in rate-related proceedings that must be reassessed anew on an ongoing basis. They do not lend themselves to the applicability of claim or issue preclusion. Thus, the Commission correctly concluded in closing the prior proceedings that the 2004 Order had no preclusive effect on future issues regarding coal bed methane, that the Commission should conduct further proceedings in a separate docket (this case) to address a long term solution to coal bed methane delivered to customers, and that the Company's ability to obtain rate recovery would depend on its ability to demonstrate prudence. As the Commission stated in clarifying the 2004 Order:

> The [2004 Order] addressed only Questar's failure to substantiate approval of the CO_2 Stipulation in these proceedings and our necessary rejection of the Stipulation, which would have permitted recovery of some processing costs through May of 2004. Our reference to the May 2004 end date was dictated by the Stipulation's terms and was not intended to have any other preclusive effect on recovery by Questar. **In regards to Questar's requests for clarification and reconsideration, we state that our**

> **Order does not preclude Questar from seeking recovery of CO_2 processing costs in other dockets**. . . . We will need to wait for Questar to make whatever arguments and present whatever evidence it deems appropriate in seeking recovery of these costs, whether incurred pre- or post-May 2004, in whatever dockets Questar may raise the issue.[80]

Neither branch of res judicata has any applicability in this proceeding. The relevant claims and issues the Commission considered in this matter are simply not the same claims and issues addressed in the 2004 Order.

d. No other preclusive legal doctrine is implicated in this proceeding.

Petitioners fail to fully flesh out an argument that some other preclusive legal doctrine apart from res judicata may bar recovery, but they intimate as much in citing *Questar Gas v. Public Service Comm'n*, 2001 UT 93, 34 P.3d 218, 224, and the 2003 Decision, and in implying that the Commission is somehow acting "contrary to prior practice, [and] failing to follow an established principle or procedure"[81] in this case.

The only other apparent legal doctrines that could operate as petitioners imply would be the doctrine of the law of the case and the doctrine of stare decisis. But neither doctrine has any application here. The law of the case applies during a single proceeding and any appeal or remand therefrom.[82] It has no application in a later, independent proceeding such as the current case. Stare decisis, on the other hand, does have some applicability to Commission proceedings and could play a role in a subsequent proceeding, as the Utah Supreme Court recognized in the *Salt Lake Citizens Congress* case. But its applicability is limited to establishing the precedential

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[80] Order on Request for Reconsideration or Clarification, Docket Nos. 98-057-12, 99-057-20, 01-057-14 and 03-057-05 (Utah PSC Oct. 20, 2004) at 4-5 (emphasis added).

[81] Other Petitioners Response at 48.

[82] *See, e.g., Jensen v. IHC Hospitals, Inc.*, 2003 UT 51, ¶ 67, 82 P.3d 1076, 1091 ("The 'law of the case' doctrine specifies that when a legal decision is made on an issue during one stage of a case, that decision is binding in successive stages of the same litigation.") (quotation and bracketing omitted).

legal rules the Commission will apply in future cases, in the absence of a reasoned explanation for departure from such rules.[83] Thus, in *Salt Lake Citizens Congress* the court held that the Commission could not reverse its prior legal ruling on the recoverability of a certain type of expense without properly justifying the departure from its prior precedent.[84]

But in this case the Commission has never said that CO_2 removal costs were of a type that could not, as a matter of law, be recoverable; nor would there have been any legal justification for the Commission to make such a determination in light of the similarity of CO_2 removal costs to other allowable expenses incurred to maintain a safe and adequate gas supply. Thus, stare decisis has no application in this case.

No preclusive legal principle would bar the rate recovery provided in the 2006 Order, and petitioners' express and implied assertions to the contrary do nothing to undermine this conclusion.

D. THE COMMISSION'S FINDING OF PRUDENCE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Petitioners concede that the appropriate question for the Commission to ask in assessing prudence is whether "a reasonable utility, knowing what the utility knew or reasonably should have known at the time of the action, would reasonably have incurred all or some portion of the expense, in taking the same or some other prudent action."[85] As the 2006 Order makes clear, that is precisely the question the Commission asked in this case. Petitioners also assert that the

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[83] *See, e.g., Salt Lake Citizens Congress*, 846 P.2d at 1253 ("[Stare decisis] does not mean . . . that a rule of law established in adjudication can never be changed by the agency that established it. Administrative agencies must, and do, have the power to overrule a prior decision when there is a reasonable basis for doing so.").

[84] *See id*. at 1253.

[85] *See* Utah Code Ann. § 54-4-4(4); Other Petitioners Request at 3 (while uncertain about the applicability of the new legislation, "[n]evertheless, Section 54-4-4(4) appears largely to codify existing rules respecting prudence review at the Utah Commission."); *see also id*. at 49.

Commission was required to consider the subjective intent issues associated with potential affiliate conflicts, consistent with its approach in the 2004 Order.[86] Again, as the 2006 Order makes clear, the Commission did so.

Thus, there is really no question that the Commission applied the appropriate legal standard for determining prudence. Petitioners' real challenge is to the evidentiary basis for the Commission's finding of prudence. They principally attack the evidentiary basis through their repeated argument that the Commission relied on evidence from the wrong time frame. But they also attack the technical competency of the evidence the Commission relied upon. Neither line of attack has merit.

1. The Commission Considered Evidence from the Appropriate Time Frame.

Under petitioners' view, a Commission finding that the Company failed to demonstrate prudence in dealing with coal bed methane pre-1999 leads inexorably to the finding that the Company still will not be able or allowed to demonstrate prudence in dealing with coal bed methane in 2099 (or at least as long as the CO_2 Removal Plant happens to be around). But this is really just another way of phrasing petitioners' res judicata argument, and the argument bears no more sway in the context of considering what evidence was relevant to the Commission's determination than it does in the context of assessing claim or issue preclusion.

As indicated above, it is simply not true that all things related to coal bed methane became frozen in time when the Company decided to have the CO_2 Removal Plant built. The prudence or imprudence of the Company having the plant built in 1998 has no real bearing on the question of prudence today, except insofar as the plant may be an even more attractive option at this point in light of the fact that the Company's customers have not had to pay for any of the

[86] *See id.* at 35-37.

first six years of its use. Whether or not the CO_2 Removal Plant was in existence, however, geological fact and market forces would mean that coal bed methane would continue to be produced. The proximity of large quantities of the gas to the Company's system and its increasing prevalence as a source of supply throughout the Intermountain West and the nation would mean the Company would be required, on an ongoing basis, to assess the prudence of accepting the gas and how to deal with the heat-content compatibility issues associated with the gas. As now has been shown, coal bed methane is a low-cost, desirable, and important source of supply for the Company's customers that any prudent utility would want to have. It is telling that even the Company's former antagonist on this issue, the Committee, in its role as the principal consumer advocate in the state, reached this same conclusion once Mr. Ball ceased to be an obstruction to obtaining qualified, independent expert advice on how to best approach ongoing coal bed methane production.[87]

There is simply no basis to accept petitioners' "water from the poison well" position. Rather, the Commission is required to "focus on the reasonableness of the expense resulting from the action of the public utility judged as of the time the action was taken."[88] The expenses being evaluated for reasonableness in this case were CO_2 removal costs incurred since February 1, 2005. The action leading to those expenses was the Company's removal of CO_2 from coal bed methane it purchased since February 1, 2005. The Commission used appropriate evidence "judged as of the time the action was taken" to establish the Company's prudence.

[87] *See, e.g.*, Intervention Order at 9-10.

[88] *See* Utah Code Ann. § 54-4-4(4)(a)(ii).

2. The Evidence the Commission Relied on Was Competent.

The Request makes the sweeping assertion that "every scrap" of evidence in the record is hearsay.[89] By "hearsay" in the context used in the Request, petitioners must mean "evidence we don't like," because they certainly do not support any claim that the evidence was all hearsay under relevant evidentiary standards. They cannot, for example, fault sworn testimony of persons personally familiar with facts and the opinions of qualified experts available for cross examination as hearsay; and that is precisely what much of the evidence consisted of in this case. Moreover, to the extent any of the evidence was hearsay, there is nothing improper in that fact as long as the Commission did not rely solely on such hearsay in reaching its findings, which it did not.[90]

Petitioners also attack the Commission for taking administrative notice of the technical conferences, and assert that evidence from such conferences is impermissible hearsay.[91] But what they fail to acknowledge is that the Commission expressly found that "absent any reliance on the noticed material, the overwhelming weight of evidence admitted in these proceedings, including testimony on the Stipulation, pre-filed testimony, and the facts asserted in the application, support both our conclusion that Questar Gas has acted prudently in evaluating and choosing among the available alternatives and our approval of the Stipulation."[92] Further, they fail to acknowledge that a critical aspect of the technical conferences does not implicate hearsay in any manner. That aspect is the "paper trail" demonstrating the Company's decision-making process, consideration of the various alternatives, and acknowledgment of potential affiliate

[89] *See* Other Petitioners Request at 34.

[90] *See* Utah Admin. Code R746-100-10.F.1.

[91] *See* Other Petitioners Request at 57-58.

[92] 2006 Order at 32, n.18.

influence issues. Such information is not offered for the proof that the Company chose the best option. It is offered to establish what issues were being considered and discussed along the way, and is responsive to the Commission's directives from the 2004 Order on how a utility should establish the prudence of its decision-making.[93]

Petitioners also challenge the testimony of the three expert witnesses presented at the hearing on the Stipulation, as not truly being expert testimony but rather being "policy" testimony.[94] This, again, is a baseless assertion. If what petitioners mean by "policy" testimony is the conclusion reached by experts from the Company, Division, and Committee that the Stipulation was reasonable, they are mistaken in asserting that such a conclusion is not within the appropriate purview of expert testimony. It is entirely permissible for an expert to opine on the reasonableness of the Stipulation,[95] as long as the testimony is grounded on a sufficient factual basis for the expert to reasonably draw the conclusion presented to the Commission.[96]

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[93] Petitioners wrongly claim that under Utah Code Ann. § 63-46b-8(b), the Commission may only take administrative notice of "facts in a record from other proceedings where those facts could be judicially noticed under the Utah Rules of Evidence." (Other Petitioners Request at 58; quotations omitted). This is an obvious misreading of the statute, however, which actually states: "(b) On his own motion or upon objection by a party, the presiding officer . . . (iv) may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of technical or scientific facts within the agency's specialized knowledge." Thus, while petitioners improperly argue that the three identified aspects of notice must **all** be satisfied for notice to be appropriate, in fact the subsection identifies three independent grounds for taking administrative notice, one of which is "the record of other proceedings before the agency."

[94] *See* Other Petitioners Request at 59.

[95] Even if the technical rules of evidence were applicable to this proceeding (*see contra* Utah Code Ann. § Utah Admin. Code R746-100-10.F.1), under Utah R. Evid. 704(a) "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

[96] *See, e.g., Re U S WEST Communications, Inc*., Docket No. 95-049-05, 1996 WL 523851, *3 (Utah PSC June 6, 1996) ("Even if the study had been opposed, Rule 703 of the Utah Rules of Evidence states that the facts or data upon which an expert relies in giving his testimony and opinions need not be admissible, if they are of the type normally relied on by experts in the field. That is so because the witness has independent expertise to validate the underlying data or study relied upon, *TK-7 Corp. v Estate of Barbouti*, 993 F.2d 722 (10th Circuit, 1993). Furthermore, it is our view that the study could have been admitted as a Rule 803 (6) exception to the hearsay exclusion, had it been contested.").

Here, Dr. Powell testified, among other things, that the Company had presented and analyzed numerous alternatives for addressing coal bed methane and that Division had conducted and documented its own analysis of the alternatives presented by Questar Gas and other alternatives and engaged an independent consultant to assist in that evaluation. The Division concluded that operation of the CO_2 Removal Plant during a transition period was a reasonable way to meet the defined objectives.

Mr. Gimble testified that the circumstances had changed from the prior dockets in which the Committee opposed recovery of CO_2 removal costs and that coal bed methane is now a significant source of the supply purchased by Questar Gas for its customers. In addition, Mr. Gimble testified that evidence supported a finding that CO_2 removal was the most effective remedy for dealing with the safety risk associated with coal bed methane until customer appliances are inspected and, if necessary, adjusted to the new heat-content range in the Company's tariff. Finally, Mr. Gimble provided an exhibit that outlined why the Committee believed the partial recovery of CO_2 removal costs as provided in the Stipulation was reasonable. His exhibit showed that for estimated costs from January 1, 2003 through 2008, 59% would be offset by costs borne by Questar Gas without rate recovery or by estimated benefits resulting from the third-party use of the plant and assistance to low income customers contemplated in the Stipulation.

Mr. McKay testified that the two alternatives identified in the technical conferences as being the preferred alternatives, precision blending with CO_2 removal as a backup and year-round operation of the CO_2 Removal Plant, had essentially identical costs over the anticipated transition period. Based on additional analysis and information received from third parties following the technical conferences and filing of testimony, Questar Gas determined that with

physical adjustments to the CO_2 Removal Plant and operational cooperation from third parties, the CO_2 Removal Plant could provide processing to third parties on an increased basis. This increased processing for third parties results in the possibility of lower processing costs to the Company's customers. Operating the plant year round and providing processing service to third parties, accordingly, became the preferred alternative because of potential benefits to the utility's customers stemming from revenue sharing and cost savings. He testified that this alternative was prudent. Mr. McKay also presented an exhibit that showed the estimated costs associated with approval of the Stipulation that would be included in rates and testified that the resulting rates would be just and reasonable.

Of course, the expert testimony identified above was only a part of the testimony given by these experts at the hearing, and is in addition to the pre-filed, sworn, fact and expert testimony provided by Mr. McKay, Charles Benson, Larry Conti, Bob Lamarre, Alan Walker, and Robert Reid, Ph.D., supporting CO_2 removal at the CO_2 Removal Plant as the most prudent alternative for dealing with coal bed methane at this time. In total, there was an enormous amount of competent fact and expert testimony, relying on facts of a type reasonably relied upon by experts in the particular fields at issue in this case (and, certainly in the case of witnesses such as Mr. McKay, Mr. Conti and Mr. Walker, relying on first-hand knowledge of the factual bases underlying their opinions). It was completely appropriate and consistent with its rules and past practice for the Commission to rely on such testimony in this case.

3. The Company Carefully and Transparently Followed the Commission's Directives Regarding Prudence and Potential Affiliate Conflicts from the 2004 Order and Overwhelmingly Demonstrated Prudence; the Commission Was Correct to Find Such.

The Commission gave the Company guidance in the 2004 Order on the way the Commission would expect a utility to demonstrate prudence in circumstances such as those

surrounding recovery of CO_2 removal costs. As noted above, the Commission said that it expected a utility to "clearly identify its objective; to identify alternatives to meet the objective, to define the method and criteria by which it would evaluate the alternatives and to record or document the process in support of the ultimate decision. . . ." It also directed that the utility provide "substantial evidence that the utility's decision-making process, under the totality of the circumstances, was not the product of a conscious or unconscious favoring of affiliate over ratepayer interests. The utility's and its customers' interests must be paramount and affiliate interests subordinate."[97]

From the outset of this proceeding, Questar Gas scrupulously focused on ensuring that these Commission directives from the 2004 Order regarding prudence and affiliate influence were followed. The Company did exactly what the Commission contemplated—provide a thorough analysis on gas management and evidence regarding new circumstances that were not present on the 1998-era record addressed by the 2004 Order.

The Company transparently presented 14 alternatives that were proposed by the Company and the Division in this case (and the Division and Committee in prior proceedings) for dealing with the presence of coal bed methane and just as transparently identified potential affiliate conflict issues associated with each potential option—beginning with the Company's Decision Making Matrix presented to the parties in the second technical conference on October 21, 2004. Those technical conferences were open to the public, and the information presented therein was included with the Company's publicly-filed application and its sworn testimony. The Commission was clearly correct to find prudence in this case in light of the evidence

[97] 2004 Order at 23-24 (footnotes omitted).

presented and in light of the way Questar Gas carefully followed the Commission's prior directives.

All of petitioners' scrambling for evidentiary defects in the 2006 Order and underlying proceeding amounts to nothing. The sum and substance of their Request is the erroneous notion that the Commission should have been assessing evidence from the 1999 general rate case and before rather than contemporary evidence about what a prudent utility would do to address coal bed methane today. Substantial evidence supports the Commission's conclusion to accept the Stipulation and approve partial rate recovery.

E. THE COMMISSION DID NOT ERR IN FAILING TO CONSIDER UTAH CODE ANN. § 54-4-26 OR THE 1994 PLANNING GUIDELINES.

The Request argues that the 2006 Order was in error because it failed to consider whether continued operation of the CO_2 Removal Plant would be in derogation of Utah Code Ann. § 54-4-26 and the 1994 Planning Guidelines promulgated by the Commission.[98] This argument is based on a misinterpretation of both section 54-4-26 and the 1994 Planning Guidelines and on a fundamental misunderstanding of this case and regulatory practice.

The Request asserts that by failing to consider section 54-4-26 and the 1994 Planning Guidelines, the Commission did not comply with the requirements for approval of settlements in section 54-7-1. Specifically, the Request cites the requirements that the Commission must find that the settlement is just and reasonable in result, that the evidence in the record must support a finding that the proposal is just and reasonable in result and that the Commission must consider

[98] *See* Final Standards and Guidelines for Integrated Resource Planning for Mountain Fuel Supply, *In the Matter of an Integrated Resource Plan for Mountain Fuel Supply Company,* Docket No. 91-057-09 (Utah PSC Sep. 26, 1994) ("1994 Planning Guidelines").

the significant and material facts related to the case.[99] The Request then implies that the Commission has subverted the Public Utilities Code by approving the Stipulation.

The linkage between petitioners' argument on requirements for approval of settlements and their argument that the Commission erred in failing to consider section 54-4-26 and the 1994 Planning Guidelines is difficult to understand. The 2006 Order clearly found that the settlement is just and reasonable in result and that the evidence in the record supported such a finding. The petitioners therefore must argue that affiliate interests addressed in section 54-4-26 and the 1994 Planning Guidelines are "significant and material facts related to the case" which were overlooked by the Commission. However, again the 2006 Order does address affiliate interest issues. Therefore, the argument has no merit on its face.

In any event, the Request's argument regarding section 54-4-26 and the 1994 Planning Standards is misguided. Section 54-4-26 provides:

> Every public utility **when ordered by the commission** shall before entering into any contract for construction work or for the purchase of new facilities or with respect to any other expenditures, submit such proposed contract, purchase or other expenditure to the commission for its approval; and, if the commission finds that any such proposed contract, purchase or other expenditure diverts, directly or indirectly, the funds of such public utility to any of its officers or stockholders or to any corporation in which they are interested, or is not proposed in good faith for the economic benefit of such public utility, the commission shall withhold its approval of the contract, purchase or other expenditure, and may order other contracts, purchases or expenditures in lieu thereof for the legitimate purposes and economic welfare of such public utility.[100]

The Request ignores the operative words in the statute "when ordered by the [C]ommission." A public utility is only required to submit a contract to the Commission for pre-

[99] Request at 51, citing Utah Code Ann. § 54-7-1(3)(d)(i)-(ii).

[100] Utah Code Ann. § 54-4-26 (emphasis added).

approval when the Commission has ordered it to do so. The policy behind this qualification is sound. Public utilities enter into hundreds, if not thousands, of business arrangements each year. If the Commission were required to review and pre-approve each of them, the utility could not operate efficiently nor could the Commission. Furthermore, if the Commission were required to pre-approve every utility expenditure, it would improperly intrude upon the role of utility management contrary to well-established principles of law.[101]

Petitioners argue that the 1994 Planning Guidelines amount to a "Commission order" requiring Questar Gas to submit its prior contract with Questar Transportation for pre-approval.[102] The only portion of the guidelines cited by the Request in support of this argument is a statement regarding ongoing concerns about the possibility that affiliate relationships might constrain acquisition decisions.[103] That statement is:

> Affiliate relations remain a concern of this Commission. We do not presume that affiliate transactions are biased and not in the customers' best interests. However, the Commission puts the Company on notice that with regard to cost recovery of [the

[101] *See Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'm*, 262 U.S. 276, 289 (1923) ("'The Commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation . . . .'") (quotation omitted); *Utah Dep't of Admin. Services v. Public Service Comm'n*, 658 P.2d 601, 618 (Utah 1983) ("the Commission is normally forbidden from intruding into the management of a utility") (citing *Logan City v. Public Utilities Comm'n*, 296 P. 1006, 1008 (Utah 1931)).

[102] The 1994 Planning Guidelines arose out of an integrated resource planning process initiated in Docket No. 89-057-15. Pursuant to that process, Questar Gas submitted its first integrated resource plan ("IRP") on September 30, 1991. The Commission issued an Order on Draft Standards and Guidelines for IRP ("Draft") on December 16, 1991 in Docket No. 91-057-09. In the Draft, the Commission requested comments from interested parties through February 21, 2001 and noticed a technical workshop for January 17, 1992. Various interested parties submitted comments and participated in the technical conference. Questar Gas submitted updated IRPs on October 14, 1992 and September 27, 1993. Several public meetings regarding the IRPs were held. On February 24, 1994, the Commission issued a memorandum summarizing parties' positions and providing preliminary conclusions. The memorandum requested additional comments and suggestions, which were provided. The 1994 Planning Guidelines were issued on September 26, 1994. They provided that the Company would submit new IRPs every other year (erroneously referred to as "biennially" in the guidelines) and that it would submit an update to the new IRPs in off years.

[103] Request at 52.

> Company's] expenditures, we will view [the Company's] customers' interests as primary. Such interests shall not be subordinated to those of the corporate affiliates. All planning options that potentially benefit [the Company's] ratepayers shall be investigated, whether or not they benefit subsidiaries of the Questar Corporation.[104]

The Request then takes the incredible leap to assert that this statement of Commission concern about affiliate issues equates to an order that all contracts with affiliates must be submitted for pre-approval under section 54-4-26. The Commission's language says no such thing.

Any implication in the Request that affiliate relationships were not considered and scrutinized in this case would be misleading. One of the specific factors carefully considered in the technical conferences and discussed in the evidence was the need to carefully examine affiliate interests involved in all alternatives considered and to assure that the interests of customers were placed first. That is precisely what was done here. Affiliate interests were fully disclosed and explored. As the Commission concluded in the 2006 Order:

> The record also establishes that having the CO_2 Removal Plant owned and operated by Questar Transportation does not result in any prejudice to Questar Gas or its customers. The costs incurred by Questar Gas are the same as if the plant were owned and operated by Questar Gas. The provisions in the Stipulation that permit recovery of only 90% of non-fuel costs, limit fuel costs to 360,000 Dth/year, require the sharing of third-party processing revenues in excess of $400,000 per year, and prohibit recovery of costs for additional CO_2 Removal [P]lant facilities assure that the interests of Questar Gas's customers are given priority in this arrangement.
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> * * * *
>
> The Company carefully considered potential conflicts between affiliates and placed the interests of its customers before those of its affiliates. This process satisfies the concerns outlined in our 2004 Order. We therefore conclude that a reasonable, unaffiliated utility, knowing what Questar Gas knew or reasonably should have known, could reasonably have acted the way Questar Gas has

[104] 2004 Planning Guidelines at 3.

> acted in choosing to use the CO_2 Removal Plant since February 2005 and thereafter.[105]

The Request further argues that Questar Gas has conceded that the 1994 Planning Guidelines require the submission of the prior contract with Questar Transportation for pre-approval because the Company requested approval of the contract in Docket No. 98-057-12. Again, the petitioners are playing fast and loose with the facts. Questar Gas sought approval of the contract in Docket No. 98-057-12 in connection with its request that the costs incurred under the contract be included in the 191 Gas Cost Balancing Account. The docket was commenced after the contract was executed, not before it was executed based on any "order" of the Commission requiring pre-approval of affiliate contracts. There was no reference to either section 54-4-26 or the 1994 Planning Guidelines in the application.

Petitioners complain that the contract between Questar Gas and Questar Transportation is not on the record in this docket. While petitioners are correct in this observation, the absence of an inoperative contract has no bearing on approval of the Stipulation. The Stipulation provides the terms and conditions upon which Questar Gas will receive rate recovery for CO_2 removal costs. As discussed above, it does not matter what the prior arrangement between Questar Gas and Questar Transportation provided, nor does it matter what the current arrangement will be; Questar Gas will only receive rate recovery in accordance with the terms of the Stipulation and the Commission will retain jurisdiction over Questar Gas and its rates to ensure that this takes place.

The Request concludes this point by arguing that contracting with Questar Transportation is, by definition, diverting funds from Questar Gas to an affiliate contrary to section 54-4-26. As noted above, the Commission already considered whether the CO_2 removal arrangement was

[105] Order at 34-35, 37-38.

contrary to the interests of customers and appropriately concluded that it was not. The concerns expressed in the 2004 Order about the contract in effect in 1998 were fully explored and answered by the evidence in this docket regarding the current arrangement from February 2005 going forward. Furthermore, this argument, if upheld, would amount to a prohibition on any dealings with affiliates. That has never been the law or the policy of the Commission. The Commission has repeatedly allowed expenses incurred in transactions with affiliates in rates after subjecting them to a higher level of scrutiny than other expenditures. If petitioners' argument were correct, there would be no need to scrutinize such expenses at all; they would simply be disallowed because they result in payments to affiliates.

F. DUE PROCESS WAS MET.

1. The Notice and Process in this Case Was Entirely Adequate, and Petitioners Have Failed to Demonstrate any Prejudice from the Notice or Process Provided.

Petitioners have attempted to create a parade of procedural horrors in an effort to persuade the Commission that it should ignore 18 months of proceedings and work and start over. This attempt is deficient for several reasons. Petitioners' notice and due process claims suffer from the same defect that is fatal to the rest of their claims—petitioners lack standing to assert their arguments because they failed to intervene as parties and do not qualify to seek reconsideration under section 54-7-15. Thus, there is no basis for them to be heard. Petitioners' notice and due process claims suffer from an additional defect, however, in that petitioners have failed to allege any prejudice to themselves arising from the procedural problems they assert. Finally, the Commission followed appropriate procedures and complied with all requirements of due process. Petitioners argument is simply incorrect.

a. Petitioners took the case as they found it, and have not alleged any prejudice from the supposed procedural errors.

Petitioners claim that the Commission's "docketing system is a shambles,"[106] without ever asserting that any of them actually tried to use it; that its "website is confusing and difficult to navigate,"[107] without ever alleging that any of them tried to navigate it; that not all "interested parties" were mailed notice as allegedly required,[108] without ever claiming that any of them (other than Mr. Ball, as an alleged *de facto* party via his former employment at the Committee) was such an "interested party" entitled to notice; and that the notice provided of the hearing in this matter was insufficient,[109] without ever saying that any of them (seemingly other than Mr. Ball and Ms. Geddes—whose own notice arguments are baseless) would have sought to attend the hearing had the notice not been deficient. Somewhat incredibly, they even go on to complain that there was no "motion" submitted for Commission approval of the Stipulation[110]—again without any allegation of harm to petitioners.

Essentially all of petitioners' procedural arguments read like counsel (or perhaps Mr. Ball or Ms. Geddes) nitpicking through the record after the fact looking for any technical glitch or potential procedural problem to attack, rather than a substantive argument that any of the petitioners were actually harmed by any alleged procedural defects. But petitioners are not entitled to make such generalized and untimely procedural attacks. "When intervention is permitted, the intervenor must accept the pending action as he finds it; his right to litigate is only

[106] Other Petitioners Request at 63.

[107] *Id*.

[108] *Id*. at 69.

[109] *Id*. at 64.

[110] *Id*. at 66.

as broad as that of the other parties to the action."[111] This means that petitioners "must join subject to the proceedings that have occurred prior to [their] intervention; [they] cannot unring the bell."[112]

Section 54-7-15 may potentially allow persons who were not parties to the proceeding to seek reconsideration, but nowhere does it indicate that merely by virtue of having a pecuniary interest in the utility (which petitioners cannot avail themselves of to complain of a non-shareholder injury) and thereby being allowed to seek reconsideration, the person doing so is allowed to challenge every procedural issue that may have arisen over the course of the proceeding, even though such procedural issues have long since come and gone. Nor does section 54-7-15 indicate that a person seeking intervention can assert grounds for reconsideration without alleging "substantial prejudice" to that person resulting from the alleged error.

The rules requiring a later participant to take the case as he or she finds it, and not "unring the bell" are all the more important to enforce in a case such as this where the late participation by petitioners is so transparently driven by Mr. Ball and Ms. Geddes, apparently seeking customer names to use in opposition to the 2006 Order and attempting an end run (via section 54-7-15) around their own failure to seek timely intervention. Mr. Ball and Ms. Geddes have absolutely no basis to complain about the notice or process provided in this matter, however; and there was nothing stopping either of them from seeking customer support for their positions months ago. The likely fact that petitioners are here only because Mr. Ball and

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[111] *Lima v. Chambers*, 657 P.2d 279, 284-85 (Utah 1982) (citation omitted).

[112] *See* 7C Charles Alan Wright, et al., *Federal Practice and Procedure*, § 1920 (2nd ed. 1986) (quoting *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153); *see also Paradise v. Prescott*, 585 F.Supp. 72, 76 n.4 (M.D. Ala. 1983) (intervenors "not allowed to challenge prior orders, judgments, and decrees"); *Galbreath v. Metropolitan Trust Co. of California*, 134 F.2d 569, 570 (10th Cir. 1943) (intervenor "bound by all prior orders and adjudications of fact and law as though he had been a party from the commencement of the suit.").

Ms. Geddes sought them out supports the conclusion that petitioners were not harmed by any deficiency in the Commission's notice or process.

b. The notice provided was more than adequate.

Petitioners complain that nine days of notice was insufficient to allow an interested person to participate in the hearing of this matter; but their complaint puts too much weight on the last procedural notice issued by the Commission. There was ample notice prior to that time of the matters at issue in this case, and a truly interested person would not have waited until the very last minute (when the hearing was noticed) to seek to participate. When the initial scheduling order was issued in this matter, on March 28, 2005, the Company's complete application seeking cost recovery for CO_2 removal had been on public file for nearly two months and it had been public information for ten months (since the Company's petition in Docket No. 04-057-04) or at least six months (since the Company's petition for reconsideration and the Commission's order on reconsideration, following the 2004 Order) that Questar Gas would be seeking recovery for ongoing CO_2 removal costs. As the Commission noted in its order on reconsideration:

> The [2004 Order] addressed only Questar's failure to substantiate approval of the CO_2 Stipulation in these proceedings and our necessary rejection of the Stipulation, which would have permitted recovery of some processing costs through May of 2004. Our reference to the May 2004 end date was dictated by the Stipulation's terms and was not intended to have any other preclusive effect on recovery by Questar. **In regards to Questar's requests for clarification and reconsideration, we state that our Order does not preclude Questar from seeking recovery of CO_2 processing costs in other dockets**. . . .[113]

Such statements were obviously in response to the Company's expressed desire to recover ongoing CO_2 removal costs. It is disingenuous, therefore, for petitioners to argue that an

[113] Reconsideration Order at 4-5 (emphasis added).

interested person reading such language from the Commission's order on reconsideration would assume that the 2004 Order had resolved the question of rate recovery for CO_2 removal costs once and for all. Rather, the hypothetical interested person talked about in the Request would have had many months prior to the hearing in this matter to ascertain that rate recovery for ongoing CO_2 removal costs was not foreclosed, and that the Company was in fact seeking such recovery. Those facts alone would have put petitioners' hypothetical interested person on inquiry notice to familiarize himself or herself with this case and determine whether he or she wanted to attempt to participate. If such a person was not stirred into action during those many months, the Commission's hearing notice coming on October 1, or even September 1, rather than October 11, would have made no difference. It was not the filing of the Stipulation that suddenly put rate recovery concretely at issue in this case, it was the filing of the Company's application (and applications in earlier dockets) and its filing of sworn testimony many months earlier; and it is not the Commission being "hyper-technical" or "Pharisaic" about notice—it is petitioners, by niggling about the specific amended notice of hearing issued for a hearing on October 20 when notice of a hearing on the Company's application for rate recovery had been contemplated for October for more than six months.

As to the specific sufficiency of the actual notice of hearing, notice was provided on October 11, 2005, nine days in advance of the hearing date. Commission Rule R746-100-10.A specifies that the Commission will normally give notice at least five days in advance of a hearing unless a shorter period is deemed reasonable by the Commission. Rule 6(d) of the Utah Rules of Civil Procedure also indicates that notice of a hearing should be given not less than five days before the hearing unless otherwise ordered. The Commission went above and beyond the notice requirements of its rules and its statutory notice responsibility under section 54-7-1. The

Commission was clearly correct, therefore, to conclude that its notice was sufficient.

Petitioners' notice and process arguments are merely grasping attempts at after-the-fact scrutiny of procedural details that caused them no injury as an excuse for Mr. Ball and Ms. Geddes to attempt to re-embark on an 18-month odyssey. It is wise policy for would-be intervenors to be required to take the case as they find it. Otherwise, the ability of a non-party to seek reconsideration under section 54-7-15 would lead to a procedural nightmare. Nothing in that statute can appropriately be read as allowing petitioners to completely unwind this proceeding in the manner they seek to accomplish.

2. Mr. Ball Is Not a *De Facto* Party.

In another effort to find a loophole to excuse Mr. Ball's and Ms. Geddes's failure to participate in this matter when they had so much notice and opportunity to intervene, the Request claims that Mr. Ball was a *de facto* party as a result of his prior involvement in the case as head of the Committee staff and that failure, therefore, to mail him notice of the hearing was a fatal error. This far-fetched claim relies on a mischaracterization of case law and of the positions of the Commission and the parties.

The relevant cases do not hold that anyone participating in any capacity in an administrative proceeding without objection is a *de facto* party. Rather, they hold that an agency cannot seek to block appeal by an entity that was allowed to participate in a proceeding as a party without objection on the ground that the entity never sought intervention in the proceeding. In such a case, the party was a *de facto* party and the agency and other parties waived any objection to the party's standing.[114]

[114] *See, e.g, Utah Ass'n of Counties v. Tax Comm'n*, 895 P.2d 825, 827 (Utah 1995) ("Counsel for UAC and the Counties conducted a cross-examination of [one witness] and a portion of the direct examination of [another witness]. Neither the Commission nor [MCI] objected to this participation at the hearing. **While we commend to the Commission the observance of the statutes and its own rules**

Mr. Ball's participation in the case prior to his filing of an affidavit on November 4, 2005, was solely in his capacity as head of the staff of the Committee, not as a separate party. Indeed, it would clearly have been unethical for Mr. Ball to represent his own interests as a Questar Gas customer while appearing to all concerned to be acting on behalf of the broader interests of residential and small commercial customers as staff director of the Committee. Moreover, Mr. Ball never stated, suggested or implied that he was separately appearing in his own interests as a customer.

The party in this case was the Committee, not Mr. Ball. He was simply one of the representatives of the Committee. In the *Counties* case cited by petitioners, the Utah Association of Counties ("UAC") appeared as UAC.[115] Its attorney cross examined witnesses, presented argument and filed pleadings advocating the positions of UAC.[116] Mr. Ball did none of these things on his own behalf in this case. Nor indeed did he do anything in the case following his termination from the Committee staff. If Mr. Ball had been a *de facto* party, he would have continued participating after leaving the Committee. Likewise, he would not have felt the need to later petition to intervene.

Petitioners also suggest that the arguments made by other parties in **opposition** to Mr. Ball's tardy attempt to intervene and the Commission's agreement with those arguments as one basis for denying intervention concede that he was a *de facto* party in the case. This is a mischaracterization of the arguments made by the parties and the position of the Commission. The parties cited Mr. Ball's prior involvement as a Committee employee solely to demonstrate

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regarding intervention, we conclude again that there has been a waiver of any objection to UAC's and the Counties' participation and that they adequately intervened on a de facto basis.") (emphasis added)) ("*Counties* case").

[115] *See id.*

[116] *See id.*

that he had no excuse for attempting to intervene in such an untimely manner. He was well aware of the case and the issues under consideration, he was (contrary to the argument in the Request) well aware that the Committee was considering changing its prior position of opposition to recovery of CO_2 removal costs based on changed circumstances, and he was intimately familiar with Commission practices and procedures pursuant to which notices are given. In these circumstances, he could offer no plausible excuse for attempting to intervene so late in the proceeding. That is hardly a concession that Mr. Ball was a *de facto* party that had been allowed to participate actively and fully in the proceeding in his own interests without requiring intervention. Rather, as the Commission concluded, it was an indication that Mr. Ball had only his own inattention and lack of diligence to blame for not attempting to participate earlier.[117]

3. Chairman Campbell Was Not Required to Recuse Himself and It Is Too Late to Raise the Argument in any Event.

It is perhaps fitting that petitioners close the Request with an attack on the impartiality of Chairman Campbell. This attack further demonstrates (1) the Request's lack of merit and repeated theme of grasping at any wisp of an argument to seek reversal of the Order, and (2) the baseless fixation of the Request on the events at issue in the Company's 1999 general rate case.

Chairman Campbell's tenure as director of the Division ended nearly five years ago, and the drawn-out conclusion to the Company's 1999 general rate case ended 18 months ago with the 2004 Order. That order was not appealed and that case became forever final and un-appealable thirty days after the Commission issued its order on reconsideration.[118] Upon its rejection by the 2004 Order, the CO_2 Stipulation also ceased to have any force or effect. Thus, there is nothing

[117] Intervention Order at 6-7, 13.

[118] *See* Utah Code Ann. § 63-46b-14(3)(a).

whatsoever remaining from Chairman Campbell's participation, as Division director, in the 1999 rate case. No plausible reading of the cases cited by petitioners would support their conclusion that he should have recused himself in this matter. This is simply not the same case, nor a related case to the 1999 proceeding. Despite petitioners' unceasing attempts to stop the clock in 1999 on all things related to coal bed methane, neither Chairman Campbell's participation nor the partial rate recovery provided by the Order in this case have any poison in them from petitioners' proverbial well.

Moreover, Chairman Campbell's participation in this matter is one of the issues that petitioners must take as they have found it. Mr. Ball and Ms. Geddes certainly knew about Chairman Campbell's earlier participation in the case. So would any person, for example, who attended any of the six technical conferences in Docket No. 04-057-09 or who read the Commission's scheduling order issued March 28, 2005, setting the schedule for proceedings on the Company's application in Docket No. 05-057-01 (including the original notice of hearing, set for October 6, 2005). Chairman Campbell participated actively in the technical conferences and signed the scheduling order. The Chairman has actively participated throughout this proceeding. There was nothing improper about that participation; and, in any event, it is too late for petitioners to complain about it now. The Commission could not efficiently manage its dockets if a non-party could come in after a final order has been issued and criticize such matters, when it is too late to change the past and any corrective measures would involve starting the entire case over. Due process cannot conceivably impose such a requirement in circumstances such as the present case.

G. THE INTERVENTION REQUEST IS INADEQUATE AND PROVIDES NO BASIS TO RECONSIDER THE INTERVENTION ORDER.

Given the cavalier approach of Mr. Ball and Ms. Geddes with respect to the Intervention Request, it is appropriate for Questar Gas to simply adopt by reference the argument set forth in the Opposition of Questar Gas to Request to Intervene filed November 21, 2005, the Opposition of the Utah Division of Public Utilities to Request to Intervene filed November 22, the Response of the Utah Committee of Consumer Services to Request to Intervene filed November 28 and the foregoing response to the Request. However, it is also worthwhile to note that Mr. Ball and Ms. Geddes's cavalier approach is inadequate to justify reconsideration for other reasons.

1. The Intervention Request Fails to Specify Grounds for Reconsideration

As discussed above, parties challenging a Commission order bear the burden of demonstrating that there was some essential legal or factual error by the Commission, or that previously undiscoverable evidence has been located that would support a different outcome. Section 54-7-15 specifically states that "[a]n applicant [for reconsideration] may not urge or rely on any ground not set forth in the application in an appeal to any court."[119] The reason it is necessary to specifically identify issues in a petition for reconsideration to preserve them for appeal is that the principle of exhaustion of administrative remedies requires that the agency have an opportunity to correct its own error before it is reviewed by a court.[120]

It is inappropriate for the Intervention Request to refer to a 77-page request for

[119] Utah Code Ann. § 54-7-15(2)(b). *See also Utah Assoc. Mun. Power Sys. v. Public Service Comm'n*, 789 P.2d 298, 300 (Utah 1990) ("[A]n issue is not preserved for consideration on appeal unless it has been specifically raised in a petition for rehearing before the commission.").

[120] *See, e.g., Williams v. Public Service Comm'n of Utah*, 754 P.2d 41, 48 (Utah 1988) ("Requiring parties to PSC proceedings to file a petition for rehearing prior to seeking judicial review provides the PSC an opportunity to correct any manifest errors in its own decisions. The PSC's expertise and experience in public utility regulation place it in the best position to review and expeditiously resolve any problems with its own decisions, orders, or rules. This process also conserves judicial resources by allowing some parties to obtain a resolution of their conflicts without involving the expense and time of formal appellate review.").

reconsideration of a different order for the grounds upon which reconsideration of the Intervention Order is sought. Mr. Ball and Ms. Geddes are essentially asking the Commission and the parties to sift through 77-pages to attempt to ascertain which if any of the arguments made may apply to reconsideration of the Intervention Order. If Mr. Ball and Ms. Geddes are not willing to put forth the effort to identify their grounds for reconsideration of the Intervention Order, there is no reason others should do so. Furthermore, a review of the arguments in the Request indicates that they do not apply to the Intervention Order. Accordingly, the Intervention Request should be denied.

2. The Commission Has Already Appropriately Rejected the Issues Raised by Mr. Ball and Ms. Geddes in Their Response on Their Request to Intervene.

As previously discussed, reconsideration of an order is not warranted where the petition merely seeks to reargue issues without establishing error. The Intervention Request provides no new insight and establishes no Commission error. Rather, it essentially re-argues the points made by Mr. Ball and Ms. Geddes in their previous affidavits and in their Intervention Response. Such re-argument does not provide any meaningful basis for the Commission to reconsider the Intervention Order. The Intervention Order was correct when issued and remains correct today. Nothing in the Intervention Request undermines that conclusion in the least.

3. None of the Arguments Advanced by Mr. Ball and Ms. Geddes Justifies Their Tardy Intervention.

Without reiterating all of the various arguments Mr. Ball and Ms. Geddes attempt to incorporate in the Intervention Request by mere reference, the fact is that none of those arguments justifies the fact that they did not seek to intervene in this proceeding until 18 months after it commenced, more than ten months after Questar Gas specifically requested rate recovery of its CO_2 removal costs in the specific context of an adjudicative proceeding and after all

proceedings in the matter were concluded. Clearly, Mr. Ball and Ms. Geddes have no basis to overcome the Commission's compelling conclusion that their intervention at this late-stage of the proceeding would materially impair "the interests of justice and the orderly and prompt conduct" of the proceeding.[121]

The only argument incorporated in the Intervention Request that deals with the issue of late intervention is the argument that Mr. Ball and Ms. Geddes did not have adequate notice of the hearing on October 20, 2005. That argument has been addressed and refuted earlier. Whether or not Mr. Ball and Ms. Geddes had notice of the public hearing, they certainly had every opportunity **before** that time to participate in this case; and by the time the public hearing was held it was already too late to participate in discovery, to submit testimony and rebuttal testimony, and to re-chart the entire course of the proceeding as they now wish to do. In short, by the time the public hearing was held, it was too late to intervene as parties without materially impairing the interests of the other parties who had already gone to significant effort and expense to conclude the pre-hearing functions.[122] The excuse about not receiving notice of the hearing (even if factually accurate) cannot bear the weight of explaining Mr. Ball's and Ms. Geddes's earlier failure to seek intervention.

The Commission's notice of the public hearing was more than adequate, and the excuse that Mr. Ball and Ms. Geddes did not receive actual notice of the hearing offers no justification for their failure to seek intervention long before that time if they were interested in directing the

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[121] Utah Code Ann. § 63-46b-9(2)(b).

[122] *Cf., e.g.*, 7C Charles Alan Wright, et al., *Federal Practice and Procedure,* § 1916 (2d. ed. 1986) ("The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case. Thus an application before the existing parties have joined issue in the pleadings has been regarded as clearly timely, whereas an application made after the trial has begun or just as it is about to begin may be denied on that ground.").

course of this proceeding. Even under the original procedural schedule cited in Mr. Ball's and Ms. Geddes's public witness statements and their Request to Intervene, intervention after the time scheduled for major events and hearing would have been too late.

V. CONCLUSION

For the reasons set forth above, the Request should be denied. Petitioners lack of standing to file the Request is a sufficient reason to deny the Request without addressing their other incorrect arguments. Questar Gas respectfully suggests that the Commission should deny the Request on that ground. If the Commission chooses to address the arguments in the Request, this response has demonstrated that they are without merit and that the Request should be denied in any event.

For the reasons set forth above, the Intervention Request should also be denied. Mr. Ball's and Ms. Geddes's cavalier approach to the Intervention Request demonstrates the lack of any basis to reconsider the Intervention Order.

RESPECTFULLY SUBMITTED: February 21, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONSE OF QUESTAR GAS COMPANY IN OPPOSITION TO REQUESTS FOR RECONSIDERATION OF REPORT AND ORDER AND REQUEST FOR RECONSIDERATION OF ORDER ON REQUEST TO INTERVENE** was served upon the following by electronic and first-class mail, on February 21, 2006:

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