

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

-----  
In the Matter of the Application to Remove )  
GSS and EAC Rates from Questar Gas ) DOCKET NO. 06-057-T04  
Company's Tariff ) DECISION AND ORDER  
 ) DESIGNATING ORAL  
 ) PRESENTATION AS ARGUMENT  
 )  
-----

ISSUED: April 2, 2007

By The Commission:

A public hearing was held in this docket March 27, 2007, to consider the merits of a stipulation between Questar Gas Company (Questar), the Division of Public Utilities (Division), the Committee of Consumer Services (Committee), and some of the other parties participating in this docket. The hearing process the Commission desired to follow was to allow proponents and opponents of the stipulation to have their witnesses provide an oral summary of their prefiled written testimony (if desired), provide live rebuttal testimony (if any) to the prefiled testimony of other parties, and then respond to questioning from the Commission, cross-examination from other parties and re-direct examination. Mr. Roger Ball as an opponent of the stipulation, had submitted prefiled written testimony and participated at the hearing without separate counsel.

While the Commission allows individuals and entities to participate in its administrative proceedings through self-representation, without a retained attorney, difficulties can arise when such attempt to make their presentations to the Commission. Attendant with the passion and intentions of achieving the end goal that usually accompany a representation effort is the juxtaposition of a participant's means to achieve that end with a tribunal's need to conduct

its proceedings in an appropriate manner. As noted in the Preamble to the Utah Standards of Professionalism and Civility, “Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.” Some means to achieve an end that some individuals may use in other settings have no place in proceedings of this Commission. To use the phrase, ‘they need to take it outside,’ outside of their documents submitted to the Commission and outside of their presentations made at Commission hearings. We intend to conduct our proceedings consistent with and encourage participants to follow the Utah Standards of Professionalism and Civility. To paraphrase from those standards: “Participants shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another.” “Participants shall not, without adequate factual basis, attribute to other participants improper motives, purpose, or conduct. Participants should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions or oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.” “Participants shall never knowingly attribute to other counsel a position or claim that another participant has not taken or seek to create such an unjustified inference or otherwise seek to create a ‘record’ that has not occurred.”

In addition, attorneys, pursuant to their ethical rules, are not to appear as evidentiary witnesses in adjudicative proceedings in which they also appear as a counsel or an

advocate for a party participating in the proceeding. Utah Supreme Court Rules of Professional Practice, Chapter 13, Rule of Professional Conduct 3.7. Under the traditional advocate role of an attorney participating in a proceeding, the arguments made by counsel are not given evidentiary value; counsel's arguments are to be based on the evidentiary foundation made by the witnesses. Application of this distinction becomes difficult, if not impossible, when an individual appears before the Commission in both roles of witness and counsel/advocate. The distinctive treatment between speech of a witness giving testimonial evidence, and those of an attorney participating as counsel for a party, and what bearing that distinction has in an adjudicated proceeding, is often misunderstood, or not even recognized, by individuals who have no legal training or no or little experience regarding the legal concepts or principles attendant to an adjudication. *See*, Comment, Rule of Professional Conduct 3.7, *supra* ("The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof."). Our experience with self-representation in our proceedings has also shown that there is often no or limited ability to apprehend and fully comprehend the application of numerous rules of evidence to what people may wish to present to the Commission, nor the evidentiary rule based objections that may be raised to the whole or portions of their intended presentation.

Such was the case for Mr. Ball's presentation at the March 27, 2007, hearing. As Mr. Ball made his presentation, counsel for a number of the parties raised various objections; e.g., that if intended as a summary of his prefiled testimony, it exceeded the scope of his prefiled direct testimony and was different evidence; if intended as rebuttal testimony, it exceeded the scope of the direct testimony to which it was ostensibly rebuttal; as testimony, many portions were objected to as lacking foundation, as hearsay, was irrelevant as character evidence when character was not an issue, was inflammatory (impugning integrity, ethics and motive), its prejudicial value outweighed its probative value; if intended as argument, it lacked an evidentiary basis, etc. Due to his lack of familiarity with the rules of evidence, Mr. Ball had difficulty in responding to the specific objections. Mr. Ball acknowledged that he had intertwined his witness presentation with argument, but felt the Commission would know how to make the distinction. Rather than have Mr. Ball's presentation interrupted by frequent objections, the Commission Chairman, as presiding hearing officer, directed that Mr. Ball would be permitted to make his presentation and then the parties would be given opportunity to parse the presentation and make their evidentiary rule objections and responses and, where appropriate, the record could be remedied by striking that which had been erroneously presented.

Subsequent to Mr. Ball's presentation, counsel for the Committee, Mr. Paul Proctor, suggested an alternative for consideration. Mr. Proctor argued that Mr. Ball's presentation be treated as argument. Mr. Ball's prefiled direct testimony had already been received in evidence and treatment of Mr. Ball's oral presentation at the March 27, 2007, hearing as argument might provide some limited immunity or privilege for portions of his presentation

which some individuals may view as defamatory. In addition, Mr. Proctor essentially argued that because much of the presentation so intertwined argument with what Mr. Ball apparently thought was witness evidence, that striking portions of the record would likely result in a presentation that would make little sense when read.

We agree and conclude that we will treat Mr. Ball's presentation as argument. Treating it as argument allows it to be retained in its entirety without the laborious effort of the parties and the Commission to try to remove objectionable portions which could be precluded from the record and still retain something that makes some sense relative to the purpose for which Mr. Ball made the effort, i.e., that he opposes approval of the stipulation. We recognize the potential tension between allowing unrepresented individuals to participate in an administrative proceeding and have what some consider 'having their day in court' with compliance with statutes and rules relating to the presentation and admission of evidence, the conduct of an adjudicative proceeding and consideration of the due process interests of those involved. We believe that our conclusion and the order we issue herein is an appropriate resolution of that tension in these circumstances.

Wherefore, we enter this DECISION AND ORDER, wherein we will treat Mr. Ball's March 27, 2007, presentation made before the Commission as argument and not evidentiary testimony on whether the Commission should or should not accept and approve the stipulation presented for consideration.

DOCKET NO. 06-057-T04

-6-

DATED at Salt Lake City, Utah, this 2<sup>nd</sup> day of April, 2007.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary  
G#52874