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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITION OF INTEGRATED WATER MANAGEMENT LLC FOR A DECLARATORY ORDER	DOCKET NO. 11-999-08 PETITIONER'S REPLY TO THE RESPONSES OF QUESTAR GAS, EL PASO MIDSTREAM, AND THE DIVISION OF PUBLIC UTILITIES
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Petitioner Integrated Water Management, LLC (IWM) respectfully submits this reply to the responses of Questar Gas Company, El Paso Midstream Investment Company, LLC, and the Utah Division of Public Utilities in IWM's request for a declaratory order from the Public Service Commission.

I. INTRODUCTION

In July 2011, IWM petitioned the Commission for a declaratory ruling under the prospective scenario that if IWM were to tap a natural gas pipeline owned by El Paso that runs across the IWM property and purchase natural gas from it via a transaction with Questar Gas at the tariff rate that it would not subject El Paso to regulation by the Commission as a statutory gas corporation.

Questar Gas and El Paso each petitioned for and were granted intervention in the action. Each, along with the Division of Public Utilities, filed a response in opposition to the petition on September 29 and September 30.

This reply will first address issues in common with all three responses, followed by replying to the particulars of each specific response.

II. ARGUMENT

As a preliminary matter, IWM wishes to reiterate what it is asking the Commission to decide. Each of the responses suggests the Respondents have read more into Petitioner's request than is actually there. Petitioner is asking the Commission for a declaratory ruling that, by its nature, is prospective in nature, advisory, and based on a contemplated hypothetical scenario. This is consistent the purpose of §63G-4-503 Utah Code Ann. as implemented by R746-101 Utah Administrative Code.¹

IWM is *not* asking the Commission to approve an agreement nor bind or require Questar or El Paso (or anyone) to do (or not do) anything. Although IWM's petition included the actual names of the gas pipeline owner and Gas Corporation, it could have used fictional names with the same effect.

A. Reply to Questar Gas Company's Response

Although IWM does not object to Questar Gas Company's participation in this action, it is at a loss to explain why it has chosen to participate. Currently, the Commission regulates Questar Gas Company as a statutory gas corporation. Regardless of the Commission's ruling on IWM's petition, Questar Gas Company's status will not change. In addition, as the Questar Gas Response correctly notes "the Petition *does not* seek any declaration relating to Questar Gas' obligation to provide service under the hypothetical circumstances it outlines and, therefore, Questar does not address that question here."²

¹ See *Matrix Funding Corp. v. Utah State Tax Comm'n* 912 P.2d 960, 961 (Utah 1996). *Matrix Funding Corp. v. Utah State Tax Comm'n* 868 P.2d 862 (Utah App. 1994). Note: the Utah Legislature recodified Utah Code §63-46b-21 to §63G-4-503 in 2008.

² Questar Gas Response p. 3.

Questar Gas argues that the Commission should deny IWM's petition because the petition "is premised on hypothetical facts that neither exist now nor are unlikely to occur" and is therefore moot.³ In support of this argument, it cites *Matrix Funding Corp. v. Utah State Tax Comm'n.*⁴ and an order of the Commission in *In the Matter of the Application of PacifiCorp for Approval of a Backup, Maintenance and Supplementary Power Supply Agreement With Kennecott.*⁵

1. In *Matrix Funding* the issue was moot because the legislature changed the tax statute not because the scenario was hypothetical.

In *Matrix Funding*, a company asked the Tax Commission for an advisory opinion under the declaratory order provisions of Administrative Procedure Act about whether a hypothetical sale-leaseback transaction would be subject to sales tax. The Tax Commission issued an opinion that such a transaction would be. The company appealed to the Court of Appeals, which upheld the Tax Commission's ruling. The Utah Supreme Court granted certiorari, but declined to adjudicate the issue as moot because in the intervening time:

[T]he Legislature amended provision of the tax code to specifically address the issue of whether sale-leaseback transactions were subject to the sales tax. This provision applies to the type of sale-leaseback transaction at issue in this case. Neither the Tax Commission, nor the Court of Appeals in reviewing the decision of the Tax Commission, addressed the issue in light of the 1995 amendment because it had not yet been enacted. A decision by this Court addressing the hypothetical transaction presented to the Commission on the basis of the pre-1995 law could not decide the taxability of a future sale-leaseback transaction between Matrix and its customers.⁶

³ Questar Gas Response p.3. A curious idea that Questar Gas raises, but does not explain, is the idea of hypothetical facts that do not now exist.

⁴ 912 P.2d 960 (Utah 1996).

⁵ Docket No. 01-035-30.

⁶ *Matrix Funding Corp.* 912 P.2d 960, 961.

Questar Gas implies that the Court in *Matrix Funding* declined to consider the issue because it was based on a hypothetical situation. On the contrary, in *Matrix Funding* the Court notes that “[t]he hypothetical posture of the case does not, by itself, prevent us from reviewing and administrative declaratory order.”⁷ Instead, the reason the issue was moot was that the *statutory law* upon which the Tax Commission had considered the hypothetical situation had changed, thereby rendering review of the applicability of the declaratory ruling to future scenarios meaningless.

Here the hypothetical nature of IWM’s petition is appropriate for the declaratory order provisions of the Administrative Procedures Act and the declaratory ruling provision of the Commission’s rules. Questar Gas has not claimed that underlying statutes or rules have changed in such a way as to render the Commission’s consideration of the petition moot, if such a thing is even possible.

2. *In the Matter of the Application of PacifiCorp was a request to approve an agreement— not a request for a declaratory ruling, a crucial distinction.*

In further support of its contention that the Commission should not consider IWM’s petition for a declaratory order because it deals with a future hypothetical events, Questar Gas cites a Commission order in an application by PacifiCorp to approve an agreement between it and Kennecott.⁸

Presumably, the application by PacifiCorp for approval of the agreement by the

⁷ *Id.*

⁸ Order Approving Service Agreement, 4. *In the Matter of the Application of PacifiCorp for Approval of a Backup, Maintenance and Supplementary Power Supply Agreement With Kennecott*. Docket No. 01-035-30.

Commission was required because of its status as an entity regulated by the Commission. Although neither the Order, nor Questar Gas elaborates, it is unlikely that PacifiCorp's application was made under the declaratory ruling provisions of Rule R746-101 and Utah Code §63G-4-503. In declining to decide some future issues involving surcharges the order says that appropriate place for determining those is in "proceedings directly such surcharges."

Questar Gas cites *In the matter of the application of PacifiCorp* but makes no argument how an application for an approval of an agreement of a regulated entity should guide the Commission in issuing advisory opinions—except to imply they should be treated the same. In fact, these are two very different functions of the Commission. Approval of an agreement necessarily deals with the specific details of the contract in front of it. On the other hand, a petition for a declaratory ruling presents a prospective scenario and asks the Commission to apply its rules to the hypothetical facts.

B. Reply to El Paso Midstream Investment Company's Response

El Paso Midstream Investment Company petitioned to intervene and submitted a response opposing IWM's petition for a declaratory order. As with Questar Gas, IWM does not oppose El Paso's participation in the action, but finds its participation, and more importantly its opposition, curious.

In both its Petition to Intervene and its Response El Paso goes to great lengths to stress the extent to which it wishes to avoid regulation by the Commission—a reality to which IWM is sensitive and is what motivated IWM make the petition to begin with. El Paso seems so concerned that even involvement in a declaratory proceeding (without protection under a "special appearance"), the outcome of which would not change its status with the Commission, would subject it to regulation—as though mere whisper of its name and the Commission in the

same sentence would bring its business under the Commission's purview.

The purpose of IWM's petition for a declaratory ruling is to ask the Commission whether a prospective transaction would subject an unregulated entity (El Paso Midstream) to regulation. The outcome of such a declaratory ruling will greatly help IWM to decide whether to pursue the proposed transaction and approach El Paso and Questar Gas with a proposal. As is evidenced by El Paso's Response even to a request for an advisory opinion, El Paso is so concerned about being regulated that approaching it with such a proposal without some guidance from the Commission is a nonstarter.

El Paso is concerned that it did not approve of IWM's prospective transaction and that a declaratory ruling on IWM's petition would somehow prejudice its rights.⁹ These concerns would be valid if IWM was seeking approval of an existing transaction or if the determination would effect presently existing facts or relationships. They do not.

If the Commission issues a declaratory ruling finding that the proposed transaction would subject El Paso to regulation then the decision does not prejudice El Paso, because El Paso would not be subject to regulation until it actually enters into such a transaction. In fact, a declaratory ruling would provide El Paso with guidance about how to respond to a proposal for such a transaction and allow it to appropriately evaluate and mitigate the risks of such a transaction. If, on the other hand, the Commission were to rule that the proposed transaction would not subject El Paso to regulation, then it is in the same position as now—unregulated, but with additional guidance.

El Paso's concerns may be explained if it is true that El Paso mistakenly believes that a declaratory ruling by the Commission would require it to participate in the hypothetical

⁹ El Paso Midstream Response p.2 ¶¶ 3-4.

transaction. This goes beyond what IWM is asking.

El Paso also complains IWM's request is premature because it lacks many of the contractual details to implement to proposed transaction. Such detail is necessary only if the contemplated transaction were before the Commission for *approval* of an agreement under its jurisdiction over regulated entities.¹⁰ Our course, if an actual transaction should occur (the likelihood of which would depend heavily on the result of the declaratory ruling), significant details would need to be negotiated—and an application for approval may even need to be made with the Commission if it involves Questar Gas. However, considering such things is premature.

Perhaps the last paragraph in El Paso's Response best illustrates how El Paso has misunderstood the purpose of IWM's petition. Its statement that "IWM's petition is in the nature of, 'We are just wondering, if we could interest Questar and El Paso in a transaction...'"¹¹ shows a complete lack of understanding. If IWM makes a proposal to El Paso and Questar Gas, it will be **to** El Paso and Questar. If after such a proposal is made and progresses to the point of agreement, and such agreement requires *approval* by the Commission then an application will be made to the Commission. The current petition is not such an application. The current petition is in preparation for a proposal to El Paso. It is hypothetical and advisory. The purpose is to establish the legal rights of the parties in advance of actually entering into a transaction that could have grave and significant ramifications.

El Paso argues, without support, that "administrative or judicial actions are appropriate only for justiciable controversies...." It is unclear what it means by this. However, IWM's petition is clearly of the type contemplated by the Administrative Procedure Act's declaratory

¹⁰ El Paso Midstream Response p.3 ¶¶ 8.

¹¹ Id. ¶9.

order provision. In *Matrix Funding Corp. v. Utah State Tax Comm'n*, Matrix Funding asked the Tax Commission for an advisory opinion under the declaratory order provisions of Administrative Procedure Act about whether a hypothetical sale-leaseback transaction would be subject to sales tax.¹² The Tax Commission issued an opinion that such a transaction would be. The company appealed to the Court of Appeals, which upheld the Tax Commission's ruling. The Utah Supreme Court granted certiorari, but declined to address the issue because the legislature had amended the statute during the time it was on appeal. Importantly, for purposes here, the Court on Appeals decision and the Supreme Court decisions suggest that the Tax Commission's consideration of a petition for a declaratory ruling involving a proposed hypothetical transaction for "purely prospective arrangement" was an appropriate under the declaratory order provision.¹³

Regardless, of the Commission's ruling on IWM's petition, El Paso is not prejudiced. IWM's petition seeks the same thing as El Paso—to avoid regulation.

C. Reply to Response of the Division of Public Utilities

The Division also opposes the petition to issue a declaratory ruling. It does so for two reasons. First, it complains that there is not a contract, memorandum of understanding or meeting of the minds between IWM, Questar Gas, and El Paso about how the proposed venture will be implemented and therefore it lacks the specificity required by Rule R746-101. Second, it argues the petition should be denied because the rights of Questar Gas and El Paso would be prejudiced if the Commission grants the request and they did not consent to the declaratory proceeding.

¹² 912 P.2d 960 (Utah 1996).

¹³ Id at 961. For the Court of Appeals Decision See *Matrix Funding Corp. v. Utah Tax Comm'n* 868 P.2d 832 (Utah App. 1994).

Like Questar Gas and El Paso, the Division believes the petition to be more than it is. It is not an application for approval of an agreement. Nor does it bind Questar Gas or El Paso to an existing or prospective agreement. Rather, it is simple a determination of rights under a hypothetical scenario.

1. IWM petition is for a declaratory order about whether an entity is regulated not an application for approval of an agreement involving a regulated entity.

The Division appears to be looking well beyond what IWM is asking the Commission. IWM is merely asking whether a hypothetical transaction would subject on one of the parties, which is currently unregulated, whether the transaction would subject it to regulation in light of Utah Code 54-2-1(10) and (16).

For some reason, the Division is concerned with dry gas, wet gas, processing plant, odorants, and the particulars of how El Paso sell gas to Questar Gas and how Questar would sell gas to IWM and other such details of how such a deal would be implemented. While these are interesting questions, they are questions for a different action. If this were an application for the Commission to approve an agreement with a regulated entity then such details may be required. This is not such an application.

2. Neither Questar Gas nor El Paso Midstream are prejudiced by a declaration in IWM's favor.

The Division claims that if the Commission grants IWM's petition that the rights of Questar Gas and El Paso Midstream would be prejudiced. What rights these are is unclear. First, the parties would have to enter voluntarily into a transaction similar to the proposed hypothetical plan for the ruling to be relevant. Furthermore, if they the ruling is granted and Questar Gas and El Paso do enter into a transaction with IWM similar to the hypothetical

transaction, their status would be the same as it is now—regulated in the case of Questar Gas and unregulated in the case of El Paso. Nothing changes and there is no prejudice.

III. CONCLUSION

The single simple question before the Commission is: Would an unregulated gas producer or processor be subject to regulation by the Commission if that unregulated gas producer or processor provided gas to a consumer via a regulated gas corporation as an intermediary? The statutes and practice suggest the answer is that clearly the gas producer is not subject to regulation. However, especially in light of the opposition, there is uncertainty, which would greatly benefit from clarification in the form of a declaratory ruling clarifying the rights of parties to such a transaction. It will benefit IWM specifically by knowing whether and how to proceed in formulating a proposal to El Paso Midstream and Questar Gas.

Respectfully submitted: October 11, 2011

Integrated Water Management, LLC

A handwritten signature in black ink, appearing to read "Matthew M. Nelson". The signature is written in a cursive, flowing style with some overlapping letters.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of October 2011, I caused to be e-mailed a true and correct copy of the PETITIONER'S REPLY TO THE RESPONSES OF QUESTAR GAS, EL PASO MIDSTREAM, AND THE DIVISION OF PUBLIC UTILITIES to:

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