

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of Integrated
Water Management LLC for a Declaratory
Order

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DOCKET NO. 11-999-08
ORDER DENYING PETITION FOR
DECLARATORY ORDER

ISSUED: October 19, 2011

SYNOPSIS

The Commission denies the petition for declaratory order due to lack of written consent of necessary parties, and failure to adequately specify the facts underlying the proposed transaction and the need for the requested ruling.

By The Commission:

On July 18, 2011, Integrated Water Management, LLC (“IWM”) petitioned the Commission to issue a declaratory order to the effect that IWM may purchase gas from Questar Gas Company (“Questar”) that is delivered through a gas line owned and operated by El Paso Midstream Investment Company (“El Paso”), without subjecting El Paso to Commission regulation as a “public utility,” as defined in Utah Code Ann. § 54-2-1. Referencing Utah Admin. Code R746-101-2.D, IWM asserts no public utility under Commission jurisdiction would be adversely affected by granting the petition.

POSITIONS OF THE PARTIES

In its petition, IWM explains it owns and operates a wastewater treatment facility in Duchesne County. This facility stores and processes water produced from oil and gas exploration and production operations. IWM currently uses liquefied propane gas to run

equipment that separates residual trace oil from the wastewater. IWM would like to convert its equipment to use natural gas.

El Paso owns and operates a natural gas gathering network and processing facility in the vicinity of IWM's operations. IWM proposes to tap one of the two El Paso lines that run through the IWM property (the dry gas line) and install a meter. Questar, under IWM's plan, would act as an intermediary in the transaction, buying from El Paso at wholesale the gas IWM receives via El Paso's line, and then selling it to IWM at the regulated tariff rate. IWM seeks a declaratory ruling that such a transaction would not subject El Paso to regulation by the Commission as a public utility.

IWM argues El Paso could supply IWM natural gas under the foregoing arrangements without becoming subject to Commission regulation as a public utility "gas corporation." *See* Utah Code §§ 54-2-1(9) (10) and (16). IWM reasons El Paso would not meet the definition of a "gas corporation" because its gas plant would not be used for "public service" nor would El Paso be "selling or furnishing" gas to a consumer. Instead, El Paso would only be selling and furnishing gas to Questar, a gas corporation public utility. IWM asserts the interests of the public would be protected under these arrangements because Questar would sell the gas acquired from El Paso to IWM at the tariff rate.

The Utah Division of Public Utilities ("Division") has reviewed the petition and recommends it be denied for two reasons. First, the Division argues the petition is defective because it fails to describe adequately the facts and circumstances under which the applicability of the statute defining public utility status (Utah Code Ann. § 54-2-1) is to be reviewed, as

required by Utah Admin. Code R746-101-3.3. The Division lists a variety of key facts relevant to the issues presented in IWM's petition that are not presented or discussed in the petition. For example, the petition fails to describe any terms and conditions of service agreed upon by the three parties to the arrangements IWM proposes. Indeed, Questar and El Paso represent in their responses to the petition that no such agreement exists and that they are each opposed to participation in the arrangements IWM describes, at least at this time. The Division maintains in the absence of defined terms and conditions, the Commission could not properly assess the impacts of the proposed service on El Paso's public utility status.

Second, the Division argues the petition fails to satisfy Utah Code Ann. § 63G-503(3)b) which requires the written consent of Questar and El Paso for the issues IWM presents to be resolved by declaratory ruling. That section states: "An agency may issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party, only if that person consents in writing to the determination of the matter by a declaratory proceeding." The Division points out IWM's contemplated transaction would require the participation of both Questar and El Paso. In the Division's view, under Utah law Questar and El Paso are each a "necessary party" to this proceeding because the presence of each is required for a full and fair determination of their respective rights. *See Green v. Louder*, 29 P. 3d 638 (Utah 2001) at 650. The Division also asserts critical facts not presented in the petition but known to Questar and El Paso are necessary and essential for the Commission to reach an informed decision on the petition. Accordingly, their participation is necessary and a declaratory proceeding may not go forward without their written consent.

Questar opposes the petition stating it is founded on hypothetical facts that neither exist now nor are likely to exist in the future. Questar has declined IWM's prior requests to participate in essentially the same service arrangements IWM presents in its petition, believing they may be detrimental to both Questar and its customers. Questar questions the reliability of El Paso's gas supply and the recovery of costs associated with odorization and pressure regulation facilities. Questar maintains these aspects of the natural gas service IWM proposes could generate costs that may ultimately be borne by other Questar customers. Questar also considers the issues raised in the petition to be moot because the ruling IWM seeks would not change El Paso's right to decline to provide the contemplated gas service.¹

El Paso, appearing specially without conceding Commission jurisdiction, also opposes the petition. El Paso notes that, for the present at least, it does not agree to the transaction IWM proposes. It states this proceeding could substantially prejudice its rights and that it does not consent to a determination of this matter by a declaratory ruling. El Paso also argues that declaratory actions are appropriate only for justiciable controversies and that this matter does not qualify. El Paso characterizes IWM's petition as "based on a speculative, hypothetical sequence of business and regulatory transactions for which there is no demonstrable expectation of fulfillment." *Response of El Paso Midstream Investment Company, LLC, to Petition for Declaratory Order*, filed September 29, 2011, ¶ 7. Thus, El Paso opposes IWM's petition as, at best, premature.

¹ Questar does not address the question of its own obligation to serve IWM under the circumstances IWM posits, asserting the petition does not seek any declaration relating to such obligation.

On October 11, 2011, IWM filed a reply to the responses of the opponents to the petition. IWM argues the opposing parties have treated its petition as though it seeks approval of an agreement that would bind Questar and El Paso, rather than a ruling that is advisory and based on a contemplated hypothetical scenario. In IWM's view, although its petition included the actual names of the gas pipeline owner and the gas utility, the petition could have used fictional names with the same effect. IWM also challenges the applicability of legal precedents Questar cites in characterizing the petition as moot.

DISCUSSION, FINDINGS, AND CONCLUSIONS

As required by Utah Code Ann. § 63G-4-503(2), the Commission has promulgated rules prescribing the contents of petitions for declaratory orders and the circumstances under which the Commission will issue such orders. *See* Utah Admin. Code R746-101-1 *et seq.* Having reviewed the petition and responses in light of the applicable statutes and rules, we deny the declaratory order IWM requests for three reasons. First, necessary parties whose rights would be substantially prejudiced by the requested order have not consented in writing to the determination of the matter by a declaratory proceeding, as required by Utah Code Ann. § 63G-4-503(3)(b). We accept the reasoning of the opponents to the petition that, under the facts before us, El Paso and Questar are necessary parties whose rights would be prejudiced by the order IWM seeks. Consequently, the Commission in this instance lacks statutory authority to issue a declaratory order.

IWM argues it could have avoided the objections of El Paso and Questar by using fictional names in its petition -- naming no parties to the contemplated transaction other than

itself. This argument, however, overlooks the petitioner's obligation to describe a "given set of facts" to which the statute in question is to be applied and an "adequate reason or need" for the requested ruling. *See* Utah Admin. Code R746-101-1.B.3. and R746-101-3.A.4. Because of the nature of the contemplated transaction, it cannot be completed and achieve the desired effects without the cooperation of each of the two parties who say they are unwilling to participate in it. The petition would be both impermissibly vague and pointless without naming El Paso and Questar. Accordingly, the petition necessarily names these parties and bears upon their rights, thereby triggering the requirement for their written consent. This consent is an important safeguard because declaratory orders have the same status and binding effect as any other order issued in an adjudicative proceeding. *See* Utah Code Ann. 63G-4-503(6)(d). Hence, the requirement for the written consent of El Paso and Questar applies but is not satisfied.

Second, the petition fails to set forth a given set of facts with sufficient specificity to make a declaratory ruling appropriate or useful. As noted above, our rules establish the requirements and process for addressing petitions for declaratory orders. These rules define such an order as an administrative interpretation of rights or other legal relationships which determines the applicability "...of a statute, rule or order to a given set of facts." *See* Utah Admin. Code R746-101-1.B.2. and 3. As the Division points out, IWM's petition lacks an adequate description of the facts and circumstances associated with the proposed transaction to facilitate the determination IWM requests. Important terms and conditions pertaining to the ownership of the gas, the facilities to be used and the impacts of the proposed transaction on Questar's operating costs are only addressed in cursory fashion, if at all. For example, without

factual support or analysis, IWM alleges the favorable ruling it seeks will not adversely affect any public utility, namely Questar. Yet, Questar argues the proposed transaction could require it to build odorization and pressure regulation facilities, the costs of which may not be recoverable from IWM under Questar's tariffs. These alleged facts, while potentially significant, are not even mentioned in the petition. Moreover, they contradict IWM's representation that its petition will not adversely affect Questar. Undoubtedly, the lack of detail in the petition is at least partly due to the absence of any agreement among the three parties involved in the proposed service concerning its terms and conditions. Without such basic information, the Commission does not have an adequately defined set of facts to which to apply its interpretation of Utah Code Ann. § 54-2-1, as required by Utah Admin. Code R746-101-3.A.3.

The third reason for denying the petition is closely related to the second. Without agreement among the potential parties on at least the essential terms and conditions of the proposed service, the matter is too speculative to be addressed by Commission order. As El Paso notes in its response, a declaratory action by the Commission is only appropriate when a justiciable controversy exists. Here, not only is there no agreement among the essential parties as to the terms and conditions of service, two of these parties decline to participate in the service arrangements IWM proposes. Consequently, it is at best premature for the Commission to attempt to declare the "rights, status, interests or other legal relationships" that would arise out of these arrangements. *See* Utah Admin. Code R746-101-1.B.2. In other words, the petition does not describe sufficient "need or reason" for the ruling IWM desires. *See* Utah Admin. Code R746-101-3.A.4.

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ORDER

For the reasons stated above, the petition for declaratory order is denied.

DATED at Salt Lake City, Utah, this 19th day of October, 2011.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
D#210819

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the Commission within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of October, 2011, a true and correct copy of the foregoing ORDER DENYING PETITION FOR DECLARATORY ORDER was served upon the following as indicated below:

By Hand-Delivery:

Division of Public Utilities
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