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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition for Metropolitan Water District of Salt Lake & Sandy Requesting an Investigation into Public Utility Condemnation Practices and Initiation of a Formal Rulemaking Proceeding	Docket No. 14-2573-01 Response of the Division of Public Utilities to Request for Investigation and Rulemaking Proceeding
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Pursuant to Utah Administrative Code R746-100-4, the Utah Division of Public Utilities (Division) files its response to the Petition and Request for Agency Action (Petition) filed by Metropolitan Water District of Salt Lake & Sandy (MWDSLS). MWDSLS seeks an investigation and related rulemaking associated with condemnation practices of public utilities and certain actions by Questar Gas Company (Questar Gas).

The Petition should be denied. The Public Service Commission of Utah's (Commission) jurisdiction does not encompass the areas of dispute and, even if it did, Commission action granting the requested relief would be unwise, unwarranted, and not in the public interest.

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## **BACKGROUND**

Prior to bringing this action before the Commission, MWDSLS filed suit against Questar Gas in Third District Court, State of Utah, seeking resolution of certain disputed property rights.<sup>1</sup>

Specifically, MWDSLS requested:

A declaration of the Court that it owns the gas line at issue in the locations covered by the non-expired 1956 License Agreement.

A declaration that its position as the holder of the prior and dominant property estate in the SLA corridor is superior to that of Questar Gas Company's ("Questar") interest as a permittee of Salt Lake County, the servient land owner, and therefore, Questar cannot intrude on Metropolitan Water's real property rights.

A declaration that any future Questar occupancy must be supported by such conditions necessary to protect the SLA and the public which, under Utah statute, Metropolitan Water is free to apply.

A declaration that, if Questar is found to still be the owner of the gas line, without the required conditional approval for its occupancy in the SLA corridor, then Metropolitan Water's causes of action for trespass, interference with waterway, and public nuisance prevail as a matter of law.<sup>2</sup>

Questar Gas disputed these claims and filed a motion for summary judgment. The Court ruled in favor of Questar Gas, addressing, inter alia, matters of ripeness, priority among dominant and servient estates, and whether Questar Gas' pipeline constituted an "unreasonable interference" with MWDSLS' claimed property right.<sup>3</sup> The matter is now on appeal.<sup>4</sup>

## **RELIEF REQUESTED**

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<sup>1</sup> See, generally, the Petition setting out a detailed recital of the facts, claims, and the Memorandum Decision, Third District Court in and for Salt Lake County, Case No. 120905379 (Memorandum Decision). The Memorandum Decision is appended hereto as Attachment 1.

<sup>2</sup> See Memorandum Decision at p. 2.

<sup>3</sup> Memorandum Decision, pp. 3-5.

<sup>4</sup> Petition at p. 16.

MWDSLS asks the Commission for certain relief. The Petition contains three delineated requests, styled as “counts,” and seeks specific relief. As to Count I, MWDSLS requests:

the Commission investigate and determine whether Questar’s practice of refusing to acknowledge and comply with MWDSLS’s Regulations, which apply to all users of MWDSLS’s aqueduct corridors, is unjust, unreasonable, unsafe, inimical to public health, or not in the public interest and to “issue an Order requiring Questar to comply with MWDSLS’s Regulations unless there is a final decision of an appellate court holding those Regulations to be invalid.”<sup>5</sup>

Regarding Counts II and III, MWDSLS requests:

that the Commission engage in a formal administrative rulemaking proceeding for the purpose of requiring by rule:

- a. That all regulated public utilities adhere to the rules and regulations of metropolitan water district (Count II);
- b. That any regulated public utility seeking to condemn property of a metropolitan water district be required to:
  - i. exhaust available administrative remedies provided by that metropolitan water district before initiating condemnation proceedings; and
  - ii. provide for a hearing before the Public Service Commission if requested by the condemnee metropolitan water district as to the necessity of condemnation before condemnation may proceed (Count III).<sup>6</sup>

Then, also with regard to Counts II and II, MWDSLS asks that:

the Commission adopt these requested rules based upon a finding that the administrative rules MWDSLS is [sic] requesting are just and reasonable to require of regulated public utilities and will deconflict aqueduct corridor access issues between Questar and MWDSLS, protect critical public infrastructure, and ensure that the respective interests of these important utility enterprises are balanced through processes that operate in the broad public interest.<sup>7</sup>

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<sup>5</sup> Petition at pp. 24-25.

<sup>6</sup> Petition at p. 25.

<sup>7</sup> Petition at p. 25.

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## ARGUMENT

### 1. The Commission Does Not Have Jurisdiction

At its core, the dispute between MWDSLS and Questar Gas Company involves a conflict between two holders of non-exclusive property rights, an easement and a franchise respectively, pertaining to a common piece of real property.<sup>8</sup> The Petition cites several statutes as basis for its claim that the Commission has jurisdiction,<sup>9</sup> but property right disputes, in general, are not within the jurisdiction of the Commission.<sup>10</sup> District Courts, not the Commission, are courts of general jurisdiction and adjudicate property right disputes.<sup>11</sup>

Although the first statute cited by the Petition as support for its claim of Commission jurisdiction, is worded broadly, stating, “The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction,”<sup>12</sup> it consistently has been construed narrowly.<sup>13</sup> Indeed, the

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<sup>8</sup> See, generally, Memorandum Decision. The fact that MWDSLS has appealed the Memorandum Decision does not, absent relief granted by the Appellate Court, invalidate its conclusions.

<sup>9</sup> See Petition at pp. 5-7.

<sup>10</sup> Occasionally, real property matters associated with rate making issues are properly brought before the Commission. See, e.g., Committee of Consumer Services v. Public Utilities Commission, 595 P.2d 871 (Utah 1979), subsequent history omitted.

<sup>11</sup> See Utah Code Ann. § 78A-5-102(1) which states. “The district court has original jurisdiction in all matters civil and criminal, not excepted in the Utah Constitution and not prohibited by law.”

<sup>12</sup> Utah Code Ann. § 54-4-1.

<sup>13</sup> See, e.g., Bear Hollow LLC v. Public Service Commission, 247 P3d 956, 961-62 (Utah 2012) and US West Communication Inc. v. Public Service Commission, 998 P.2d 247 (Utah 2000).

Commission's jurisdiction has been found not to extend to real property matters generally.<sup>14</sup>

Thus, the first statute cited in the Petition does not support a claim of jurisdiction.

Next, the Petition claims that four other provisions of the Utah Code give the Commission jurisdiction. The Petition cites Utah Code Ann. §§ 54-4-2, 54-4-7, 54-4-14, and 54-4-18. On their face, these statutes give the Commission authority to investigate a public utility's actions; to determine whether a public utility's practices are "unjust, unreasonable, [and] unsafe; to require a public utility to operate its facilities "in such a manner as to promote and safeguard the health and safety of . . . the public;" and to "fix just and reasonable . . . practices" for public utilities. However, just as with the first cited statute, the Commission's grant of general powers, these statutes have been construed narrowly. Indeed, if not, the Commission would have

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<sup>14</sup> See Kearns-Tribune Corporation v. Public Service Commission, 682 P.2d 858, 859 (Utah 1984). See also Taylor v. Public Service Commission, 2005 WL 615164 (Ut. App. 2005) (Taylor) in which the Appellate Court stated:

Finally, we agree with the PSC that a decision regarding the existence of an easement over Taylor's property is not within the jurisdiction of the PSC. See Utah Code Ann. § 54-4-1 (2000) (stating that PSC is "vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state"). Cf. Kearns-Tribune Corp. v. Public Serv. Comm'n, 682 P.2d 858, 859 (Utah 1984) (setting aside PSC action and rule where no explicit statutory authority for rule).

This unpublished opinion is cited in accordance with Rule 30(f) of the Utah Rules of Appellate Procedure which states, "Published decisions of the Supreme Court and the Court of Appeals, and unpublished decisions of the Court of Appeals issued on or after October 1, 1998, may be cited as precedent in all courts of the State." A copy of Taylor is appended hereto as Attachment 2.

And, see also, In the Matter of the Formal Complaint of Saina Carey against Rocky Mountain Power, Docket No. 11-035-10, 2011 WL 1089624 (March 15, 2011) wherein the Commission stated:

The Commission, in previous orders has recognized its limited scope of jurisdiction. The matters raised by Ms. Carey, i.e. issues regarding violations of zoning laws, trespass, easements, illegal encumbrances, property devaluation, and other torts, are beyond the scope of the Commission's jurisdiction and are properly raised in a district court. See e.g. McCune v. Mountain Bell Tel., 758 P.2d 914 (Utah 1988) (holding that the "district court, not the Commission, . . . has jurisdiction to consider claims for . . . torts committed by a public utility); see also Atkin Wright & Miles v. Mountain States Tel. & Tel. Co., 709 P.2d 330, 334 (Utah 1985) (holding that a utility's actions which give rise to tortious or contractual liability and which do not call in question the validity of orders of the PSC or trench upon its delegated powers are subject to the jurisdiction of the district court). The only issues before the Commission which would impact Commission Rules and the Company's tariff, are the issues of tree-trimming." (Emphasis added).

authority over each and every decision and action made by a public utility – even those made in the ordinary course of business – and this would result in the Commission micromanaging public utilities by stepping into the shoes of the utility's management.<sup>15</sup> Micromanaging a public utility is not one of the Commission's statutorily delegated functions.<sup>16</sup> Thus, there is no direct statutory support for MWDSL's claim that the Commission has jurisdiction.

While the Commission might arguably have jurisdiction to order a public utility to abide by another entity's requests, rules, or policies if the company's refusal jeopardized the company's provision of safe, adequate, and reliable service, the Commission does not have jurisdiction to order such compliance in the ordinary course of the public utility's business. This is particularly so when the public utility has statutorily granted tools at its disposal to manage its necessary property rights.

## 2. Even If the Commission Has Jurisdiction, Commission Involvement Here Is Not Warranted

The Petition claims that Utah Code Ann. §§ 54-4-1, 54-4-2, 54-4-7, 54-4-14, and 54-4-18 give the Commission jurisdiction over the concerns raised in the Petition and the relief sought therein. While the Division disagrees that the Commission has jurisdiction, an analysis of the statutes in light of the facts at hand shows that even if the Commission did have jurisdiction, its involvement and grant of relief is not required, and Commission action would be unwise, unwarranted, and not in the public interest.

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<sup>15</sup> See Prows v. Mountain States Telephone and Telegraph Company, 2000 WL 1643595 (Utah PSC 2000) where the Commission stated, "As to Respondent's choosing to rely on one credit-reporting company as opposed to others, that is a business decision, within the utility management's discretion. It is well-settled utility law that the Commission cannot 'micro manage' the utility and substitute its business judgment for that of the company."

<sup>16</sup> See also, Logan City v. Public Utilities Commission, 296 P. 1006 (Utah 1931).

The Commission has the discretion to determine that no investigation, and thus no relief, is merited.<sup>17</sup> As the Court said in Williams v. Public Service Commission (Williams):

As to Industrial's assertion that the PSC should be compelled to conduct an investigation regarding the Mobile corporations' activities, s 54-4-2, U.C.A. states in part:

Whenever the commission believes that in order to secure a compliance with the provision of this title or with the orders of the commission, or that it will be otherwise in the interest of the public, an investigation should be made of any act or omission to act, ... it shall investigate the same upon its own motion, ...

This statute gives no right of investigation to a complainant; rather, it gives broad discretion to the PSC in the employment of the investigatory process. That discretion was not abused here.

As in Williams, the Commission has discretion here to determine whether an investigation is warranted, and analysis shows that no investigation is merited.

However, if the Commission determines that the Petition properly frames the dispute between MWDSL and Questar Gas as involving matters of public safety and public health and the reasonableness of Questar Gas' actions, and thus determines that the Commission has jurisdiction, it would be unwise for the Commission to involve itself in this dispute. Questar Gas' actions and operations not only are regulated by the statutes of the Commission, but also by federal pipeline safety statutes. Numerous federal, and some state, statutes prescribe and dictate how Questar Gas must maintain and operate its pipeline. Ensuring public health and safety interests are a key objective of these statutes.

The State of Utah, pursuant to a delegation from PHMSA, inspects and monitors Questar Gas' facilities and operations. Pursuant to these delegated powers and the Commission's own statutory powers, the Commission has undertaken investigations into pipeline safety matters

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<sup>17</sup> 645 P.2d 600, 602 (Utah 1982), discussing Utah Code Ann. § 54-4-2.

resulting in settlements involving both fines and corrective actions.<sup>18</sup> While the Commission has jurisdiction over Questar Gas, it has no jurisdiction over MWDSLS and thus cannot investigate, monitor, and correct MWDSLS' actions.

Also, at their core, MWDSLS' requests are asking the Commission to determine that MWDSLS, a non-public utility and "a political subdivision of the state,"<sup>19</sup> is more important than a Commission regulated public utility. By asking the Commission to declare that the rights and duties of MWDSLS are superior to those of Questar Gas, in essence, MWDSLS is asking the Commission to declare that the water service MDWSLS provides is more important than the gas service that Questar Gas provides. The requested relief is dramatic in scope, essentially requiring the subjugation of Questar's interests based upon MDWSLS's sole determination of need.

MWDSLS' requests for relief are akin to asking the Commission to allow MWDSLS to condemn Questar Gas' interest in the co-occupied property, acquired by a franchise from Salt Lake County, Utah. The Utah District, Appellate, and Supreme Courts have adjudicated conflicting uses involving eminent domain related issues<sup>20</sup> between municipalities and a public utility. In CP National Corporation v. Public Service Commission,<sup>21</sup> the Court held that the municipalities did not have statutory authorization to exercise eminent domain power over a public utility.<sup>22</sup> A more common issue presented to the District Courts is whether two easement

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<sup>18</sup> See Final Order Approving Amended Settlement Stipulation, Docket No. 11-057-05 (October 25, 2011) and Order Approving Settlement Stipulation, Docket No. 07-057-04 (November 20, 2008).

<sup>19</sup> Petition at p. 2.

<sup>20</sup> Utah Code Ann. § 78B-6-501 et. seq. addresses eminent domain.

<sup>21</sup> 638 P.2d 519 (Utah 1981).

<sup>22</sup> Note, however, that in CP National the Court explicitly stated, "Since there is no legislative grant which gives municipalities the authority to condemn an existing power system by right of eminent domain, the secondary issues concerning whether the municipalities' use is 'a more necessary public use' and whether a court can properly assert jurisdiction over condemnation of a utility when utility ownership is already within the jurisdiction of the Public Service Commission, need not be reached." Id. at p. 524. But see North Salt Lake v. St Joseph Water & Irrigation Company, 223 P.2d 577 (Utah 1950) wherein a court discussed that a municipality could, under certain circumstances, condemn property of a public utility.



holders in the same piece of property have conflicting uses, which has been generally been resolved by the first in time easement holder being told that it that has the dominant estate over the later in time, subservient estate.<sup>23</sup> Instructively, however, there is no need for the Commission to determine whether MWDSLS' interest is dominant because the Memorandum Decision found no conflicting use, and so the issue is unripe.

Furthermore, the Commission would be derelict if it gave up its authority over a public utility's business to the board of an unregulated entity. In essence, the MWDSLS asks the Commission for a blanket rule that a public utility must yield to a water district's rules. The rules of the water district are not set forth in statute and neither the Commission nor the public utility has any ability to demand changes to those rules. Were the Commission to require the water district's rules to be followed, the public utility could merely exercise its eminent domain authority to take what it needed from the water district or other property owner. The Commission has no power to prevent the public utility's exercise of its eminent domain power beyond determining the recoverability of associated costs. Such a delegation as is requested here by MWDSLS is not in the public interest.

### 3. No Rulemaking Is Necessary

The Petition requests the Commission to undertake a rulemaking proceeding, and, ultimately, to promulgate a rule as set forth in the Petition. As stated above, the dispute between MWDSLS and Questar Gas involves, at its core, a mix of property rights to use specific real property; property right disputes are not generally within the jurisdiction of the Commission. Thus, a rulemaking proceeding is foreclosed. Nevertheless, even if it were permitted, the blanket

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<sup>23</sup> See, generally, Metropolitan Water District of Salt Lake & Sandy v. Sorf, 304 P.3d (Utah 2013). See also, Big Cottonwood Tanner Ditch Co. v. Moyle, 174 P.2d 148 (Utah 1956).

subjugation of the utility's statutory rights to a water district is unwise, unwarranted, and not in the public interest.

### **CONCLUSION**

Therefore, the Division respectfully asks the Commission to deny the Petition. Both MWDSL and Questar Gas provide essential services to the public. As a governmental subdivision, MDWSSL has many rights and powers. However, neither its statutory rights and powers nor practical considerations vest the Commission with jurisdiction. Furthermore, these same considerations do not mandate or even support a Commission decision mandating public utility subservience to the water district.

Respectfully submitted this 21st day of July 2013.

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**CERTIFICATE OF SERVICE**

On this 21<sup>st</sup> day of July 2014, I hereby certify that I caused a true and correct copy of the forgoing *Response of the Division of Public Utilities to Request for Investigation and Rulemaking Proceeding* to be served via email to the following:

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