

2000

In The Matter of The Committee of Consumer Services v. Utah Public Service Commission : Reply Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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| In the Matter of the Committee of Consumer Services, |) | |
| |) | |
| Petitioner, |) | Case No. 20000893-SC <i>gray</i> |
| |) | |
| vs. |) | PSCU Docket No. 99-057-20 |
| |) | |
| Utah Public Service Commission, |) | |
| |) | Priority 14 |
| Respondent |) | |
| |) | |

REPLY BRIEF OF INTERVENORS CROSSROADS URBAN CENTER AND SALT
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Petitioners/Intervenors Crossroads Urban Center (“Crossroads”) and Salt Lake Community Action Program (“SLCAP”) respectfully submit their Reply Brief in support of the appeal of a final order of the Utah Public Service Commission (the “PSC”). For convenience, Crossroads and SLCAP shall be collectively referred to herein as Intervenors.

INTRODUCTION

At this juncture, it is clear that Intervenors and Appellees view this case quite differently. The Appellees view this case as one in which the central, if not only, issue is whether or not the decision of the Public Service Commission is supported by substantial evidence on what they view as an extensive record. In the view of Appellees, the standard to be applied by this Court in this matter is whether the action of the Public Service Commission was based upon a determination of fact, made or implied by the Commission, that is supported by substantial evidence when viewed in light of the whole record before the Court. Intervenors, in stark distinction, respectfully submit that Appellees are fundamentally in error. We further respectfully submit that the issue before this Court is whether or not the Public Service Commission committed a legal error when it did not require Questar to meet its burden of proof of providing a record from which the Public Service Commission could conclude that the costs sought to be included in the rate base had been prudently incurred by Questar.

Thus, as between Intervenors and Appellees, this appeal turns upon whether Appellants or Appellees are correct as to the issue and standard of review before this

Court. That is because neither Questar Gas Company nor the PSC even bothered to address the burden of proof issue. Rather, they ignored the issues raised by Crossroads and SLCAP and argued an issue more to their liking. Appellees further ignored the fact that the PSC expressly admitted in its final order that not only had Questar Gas Company failed to create a record from which it could determine that the costs at issue were prudently incurred, such a record could not be created. Questar obviously has no response to this issue.

In these circumstances the only action on the part of the PSC that would have been consistent with existing law was to deny the inclusion of the gas processing costs in the rate base. Questar Gas Company should have been required to either absorb those costs itself or to seek them from some other parties or in some other proceedings.¹

ARGUMENT

A. The Issues Raised By Intervenors Are Properly Before This Court.

The overall approach to this appeal by Questar Gas Company is to create a series of strawmen and then knock those strawmen down. However, Questar additionally suggests that the issues raised by Appellants are not properly before this Court and are not encompassed by Utah Code Ann. § 63-46b-16(4)(d). This contention does not merit serious consideration.

¹ As noted by Appellants, the “costs” include not only the actual costs but a return for the allowed rate of return on those costs to be paid by the ratepayers.

The Petition for Review filed with this Court on October 20, 2000 specifically notes that the Committee of Consumer Services specifically requested in a Petition for Reconsideration filed with the PSC a reconsideration of the inclusion of CO processing costs in Questar Gas Company rates. That is what this appeal is about.

In the Docketing Statement filed by the Committee of Consumer Services, among the issues listed as presented on appeal was the following:

5(b). Whether the Commission has erroneously interpreted and applied existing law regarding the burden of proof a utility must meet in rate proceedings. This is a legal issue, and the standard of review is a correction of error standing under Utah Code Ann. § 63-46b-16(4)(d).

Utah Code Ann. § 63-46b-16(4) reads in its entirety as follows:

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
- (b) the agency has acted beyond the jurisdiction conferred by any statute;
- (c) the agency has not decided all of the issues requiring resolution;
- (d) the agency has erroneously interpreted or applied the law;
- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
- (h) the agency action is:
 - (i) an abuse of the discretion delegated to the agency by statute;
 - (ii) contrary to a rule of the agency;
 - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that

- demonstrate a fair and rational basis for the inconsistency;
or
(iv) otherwise arbitrary or capricious.

Intervenors respectfully submit that the first issue they raise is clearly comprehended by applicable statutes and that that was made quite clear in the Docketing Statement filed long ago.

The second issue raised by Intervenors is that the PSC cannot simply accept a stipulation by some, but not all, of the parties in lieu of the application of normal legal standards, which in this case would require Questar to have made a record demonstrating that the costs were prudently incurred. Thus, the second issue is merely a special circumstance of the first. That is, it is submitted that as a matter of law, even if the PSC could accept a stipulation by all of the parties to the proceedings in lieu of requiring a utility to shoulder its burdens, it cannot accept a stipulation by only some of the parties in those circumstances. This is clearly a legal issue and is comprehended by Utah Code Ann. § 63-46b-16(4)(d).

B. Appellees Are Asking This Court to Change Existing Law.

What Appellees are asking, *sub silentio*, this Court to do is make a radical change in the law. At present, the law is quite clear. In order for costs to be included in a rate base, a utility must present a record from which the PSC can conclude that they were prudently incurred. The PSC has starkly stated that not only did Questar fail to meet this burden, the required record could not be created. See Intervenors Opening Brief, at p. 4. What Appellees seek is a change in the law that would allow a utility to avoid its burden and instead create a system whereby *post hoc* justifications can be

used as a substitute for the present requirement that costs be demonstrated to have been prudently incurred based upon an adequate record.

As a matter of public policy, this would be an exceedingly bad shift in applicable law. First of all, the notion that a utility should, prior to incurring costs, investigate and analyze their reasonableness and prudence ought to be too compelling for argument. Second, *post hoc* argumentation as to the “benefits” conferred by costs that were not previously justified has little to recommend it. It will become a rhetorical exercise, and those with the most funds to expend will have a clear advantage. Moreover, it can lead to the sort of nonsensical “compromise,” based on speculation and conjecture, that was made in this case.

At the time that the Questar companies made the choice to purchase, transport and sell the coal seam gas, there were a series of choices open to it. Questar chose among at least the following possibilities: (1) purchase other gas; (2) require the seller of the gas to pay for the processing;² (3) the affiliated pipeline company could pay for the processing; (4) application could be made to the Federal Energy Regulatory Commission (“FERC”) to resolve issues of who should pay; (5) the shareholders of Questar could pay for the processing; (6) the ultimate consumers of the gas, including all consumers on the system, not only the Salt Lake City ratepayers, could pay for the processing; and (7) all transporters of gas could pay for the processing plant.

² Testimony on behalf of the large user group was that the owner and seller of the gas should have paid for processing because otherwise there is an economic dislocation and subsidization of that gas.

Questar chose to make this decision itself without creating a record. It improperly arrogated to itself the decision as to who should pay for these costs and decided that the ratepayers in Utah should pay for these costs. This was wholly inappropriate. Moreover, as has been pointed out above, when Questar made this decision, it did not create a record justifying this decision so that the decision could properly be reviewed by the PSC.

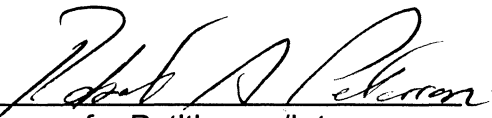
Questar needs to be told that when it acts in this fashion, it acts at its peril and that it will not be allowed to come up with *post hoc* justification seeking to saddle consumers with such costs. Rather, it must adopt the proper procedures and create a record that any costs sought to be included in the rate base were prudently incurred, giving due consideration to alternative choices made at that time. Questar has utterly failed to meet that burden in this case.

CONCLUSION

Based upon the authority and argument set forth above, Petitioners/Intervenors Crossroads Urban Center and Salt Lake Community Action Program respectfully submit that this Court should apply what has been the settled law of this State and rule that because Questar failed to create a record from which it could be determined whether the costs incurred were reasonably and prudently incurred, they cannot be a part of the rate structure. Additionally, this Court should order a refund over some reasonable amount of time to present ratepayers of all such costs thus far collected.

DATED this 5th day of March, 2003.

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CERTIFICATE OF SERVICE

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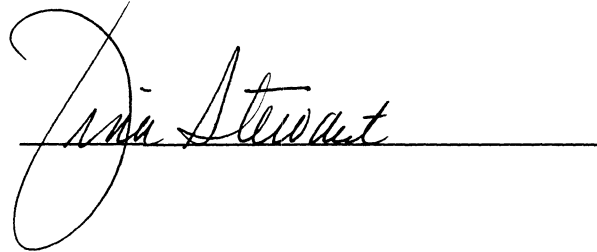
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A handwritten signature in cursive script, reading "Tina Stewart", is written over a solid horizontal line.

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