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2003 AUG 19 P 12:16

**IN THE MATTER OF THE APPLICATION OF  
SOUTHWEST GAS CORPORATION FOR APPROVAL  
OF ACQUISITION PLAN AND, IF APPROPRIATE,  
WAIVER OF SELECTED PROVISION OF THE  
AFFILIATED INTEREST RULES.**

ARIZONA CORPORATION COMMISSION  
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Arizona Corporation Commission

**DOCKETED**

**Docket No. G-01551A-02-0425**  
**Docket No. G-01970A-02-0425**

AUG 19 2003

**Decision No. 66101**

DOCKETED BY

**Dissenting Opinion of Commissioner Irvin**

While I believe that the acquisition of Black Mountain Gas ("BMG") by Southwest Gas ("SWG") is in the public interest, I could not support the Opinion and Order that was approved by the Majority. Decision No. 66101 reached the correct conclusion in approving the acquisition but in doing so imposed a condition that I believe is contrary to established law and Commission practice in order to reach the result of lowering rates for the residents of the Cave Creek Division of BMG.

**Condition No. 5**

**Applicable Public Interest Standard**

Condition No. 5 requires that BMG be dissolved as a corporate entity by July 1, 2004, and that upon its dissolution the transfer of its CC&N and assets to SWG shall be immediately effective. At that time, the customers in the Cave Creek division will have their rates and charges reduced to those currently authorized by SWG in its current service territory. This condition is based on Staff's conclusion that without the reduction of the rates for the Cave Creek customers, "... the acquisition, as proposed, was not *obviously* in the public interest without conditions that would

provide a substantial and immediate benefit to consumers.”[Order and Opinion, Pg. 3, emphasis added].

Unfortunately, while I whole-heartedly support reducing utility rates whenever possible, I believe that in this particular instance the Commission has taken a result-oriented approach which is inconsistent with “no harm” public interest standard established in Pueblo del Sol Water Company v. Arizona Corporation Commission, 160 Ariz. 285, 772 P.2d 1138 (App.1988) (“Pueblo”). Although the acquisition is appropriately governed by the Affiliated Interest Rules, set forth in §40-285 “*Disposition of plant by public service corporations; acquisition of capital stock of public service corporations by other public service corporations*”, that section does not contain a specific public interest standard to apply. Instead, the holding in Pueblo del Sol established the scope of the Commission’s consideration. In that case, the Court of Appeals held:

A Certificate of Convenience and Necessity (CCN) granting authority to a corporation is initially issued by the Commission only upon a showing that its issuance would serve the public interest. [citing cases]. It logically follows that prior to approving a transfer of assets and CCN, the Commission should examine all evidence available to it to determine whether or not the transfer is *detrimental* to the public interest. 772 P.2d at 1139. (emphasis added).

The Opinion and Order reaches the conclusion that imposing this condition is in the public interest by choosing a broader definition of the standard to be applied, set forth in A.R.S. § 40-282 *Application for certificate*;, which applies to the issuance of new Certificates of Convenience and Necessity. It provides that the Commission “may attach to the exercise of rights granted by the certificate terms and conditions it deems that the public convenience and necessity *require*.” (emphasis added). By relying on this standard, it opens the door to allow the Commission to use “carte blanche” to exact conditions when approving applications. I believe that the holding in Pueblo was intended to be a limitation on when a condition is “required”. This Decision sets a dangerous precedent in which the Commission now may use what are normally benign transactions as inappropriate vehicles to further other agendas, admirable or not.

Would the result have been the same if the current rates of the Cave Creek Division's customer were lower than SWG's current rates? I suspect not. But, unlike in the current instance, a condition to require SWG to retain the existing BMG rates may have been appropriate because the transaction may have otherwise not been in the public interest. Here, that simply is not the case. There is no evidence that any party can point to in the record that indicates that this transaction is "detrimental to the public interest". This fact alone should be sufficient to demonstrate that Condition No. 5 exceeds the Commission's authority to impose a condition of this nature on the approval of the acquisition.

#### Setting Rates Outside a Rate Case

As pointed out by SWG, BMG, the Arizona Utility Investors Association ("AUIA") and the Residential Utility Consumer Office ("RUCO"), by imposing Condition No. 5 the Commission has in effect set rates outside the context of a rate case. SWG correctly argues that in doing so, the Commission is acting in a confiscatory manner and violating established rate making principles. In arguing this position, SWG cites Scates v. Arizona Corporation Commission, 118 Ariz. 531, 578 P.2<sup>nd</sup> 612 (1978) ("Scates") and Residential Utility Consumer Office v. Arizona Corporation Commission, 199 Ariz. 588, 20 P.2d 1169 (2001) ("Rio Verde"). Because the Opinion and Order adequately explains SWG's arguments on this point, I will not go into detail to describe them.

During the Open Meeting in which this matter was heard, Staff advanced the argument that because of the relative small number of customers that the Cave Creek Division contained, the acquisition should be likened to adding a new subdivision within an existing service territory of a company's CC&N. As such, because the impact on the company's rate base is negligible, it need not undergo a rate case to determine whether the existing rates are appropriate. It was simply in the public's interest to apply SWG's existing rates because they were lower.

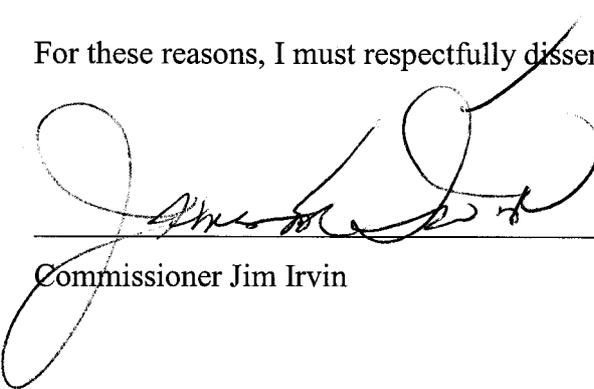
Unlike in the case of adding a new subdivision into a company's existing territory, rates already existed in the Cave Creek Division. A full rate case was completed in 2001 in which the

Commission determined the just and reasonable rates for that division, allowing BMG an opportunity to receive a fair rate of return on the system devoted to providing service to the customers in the Cave Creek Division. While it is obvious that the change in ownership has impacts on the cost of providing service to this division, outside of a rate case, we have not way of knowing without those impacts are.

Further, using this analogy as a justification to determine whether or not rates should be adjusted outside a rate case could prove to be troublesome. At what point does the impact on the company's rate base become relevant? If a company can prove no change (or simply a negligible change) in its customer base, can the Commission now change its rates outside of a rate case? Either the rate case requirement has meaning or it does not. The Commission cannot arbitrarily change rates in the "public interest" without calling the rate case doctrines into question.

In addition, the Opinion and Order points out that SWG has not provided any evidence in this case that it is reasonable for it to continue to charge the existing rates. While I am not sure why SWG must provide any evidence to demonstrate that it is reasonable to continue to charge the existing rates, I must still respectfully disagree with the Opinion and Order's conclusion. In meeting the appropriate public interest standard and demonstrating that the transaction is not detrimental to the public interest, it has demonstrated that not only is it reasonable to continue to charge BMG's existing rates, it is also required by law.

For these reasons, I must respectfully dissent.



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Commissioner Jim Irvin