PAUL H. PROCTOR (#2657)
REED T. WARNICK (#3391)
Assistant Attorneys General
Utah Committee of Consumer Services
MARK L. SHURTLEFF (#4666)
Attorney General
160 East 300 South
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone (801) 366-0353

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF APPLICATION TO REMOVE GSS AND EAC RATES FROM QUESTAR GAS COMPANY'S TARIFF	)	Docket No. 06-057-T04 UTAH COMMITTEE OF CONSUMER SERVICES'PRE-HEARING MEMORANDUM OF LAW IN SUPPORT OF STIPULATION

The Utah Committee of Consumer Services respectfully submits the following Memorandum of Law in support of the Committee's request that the Utah Public Service Commission approve the GSS/EAC Stipulation filed on February 15, 2007. The purpose of this Memorandum is to explain the framework of Utah law that determines whether the GSS rates and the EAC can be upheld or must be eliminated.

INTRODUCTION

Between 1987 and 2000, the Commission approved generally applicable tariffs through which Questar Gas Company would recover the non-refundable contribution in aid of construction (CIAC) to extend natural gas service to the existing residents and businesses in specific geographic localities in Central and Southern Utah.[1] These tariffs were necessary because there was no private developer or governmental entity in any of these localities to which Questar could apply its standard tariff provisions to extend its main and service lines by collecting up-front CIAC.

After considering the applications from several competing utilities, in Docket No. 86-057-03, the Commission granted Questar a certificate of public convenience and necessity, and approved a 10-year GSS rate schedule for a limited number of communities within nine counties: Sanpete, Sevier, Juab, Millard, Piute, Garfield, Beaver, Iron, and Washington. In Docket No. 91-057-13, the Commission approved a 20-year GSS rate schedule for extensions to the remaining communities, including those in Southwestern Utah. In Docket No. 92-057-T01, the Commission approved the use of GSS rates to permit extension of service into un-served areas not as geographically separated from Questar's existing service territory, as was the case for Central and Southern Utah.

[1] Many of the applications and filings pertaining to the GSS rates and the extension area charge are in the name of Questar Gas Company's predecessor, Mountain Fuel Supply Company. For simplicity, this memorandum will refer only to Questar.

In Docket No. 96-057-07, the Commission approved a new tariff that established an extension area charge (EAC) for service to areas with existing residents and businesses, but previously un-served by any natural gas utility. Unlike the methodology for GSS rates, which multiplied by two, the volumetric distribution non-gas portion of a customer's bill, the EAC used a fixed monthly charge for a term to recoup the total non-refundable CIAC that would otherwise have been paid up-front.[2]

To determine GSS rates and the EAC surcharge, the Commission relied upon assumptions regarding the number of, and timing for, existing residents and businesses initially converting to natural gas space and water heating, and projected revenue from projected customer growth in the area. However, because these were existing communities that used other fuels for space and water heating, these projections were imprecise. Thus, GSS and EAC rates were not established based on the precise costs of extensions to serve customers.[3]

Once completed, the distribution facilities for the GSS and EAC localities were added to Questar's rate base, and the GSS and EAC revenues were accounted for as general revenue, not as a reduction to rate base.[4]

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[2] Service was extended to the Panguitch, Cedar Fort and Brian Head areas under the authority of Utah Code §54-3-8.1, effective March 21, 1998 and repealed December 31, 1999. The statute authorized an EAC which did not fully recover CIAC, but which put a ceiling on the rate impact to existing customers. See Argument, Part II.

[3] Direct Testimony of Daniel E. Gimble, page 8, lines 14-16; Supplemental Testimony of Marlin H. Barrow, page 3, line 17 – page 4, line 1; Rebuttal Testimony of Gary L. Robinson, lines 470-474.

[4] Prior to Questar's most recent general rate case, Docket No. 02-057-02, a customer requiring a main or service line extension was granted a footage allowance based on the natural gas appliances to be installed at the residence. Construction costs for footage greater than the allowance were paid for by the customer and classified as a

The issue presented in this Docket is whether treating customers in expansion areas differently than other customers in the same classes, with the passage of time has become disconnected from the statutory and administrative standards for just and reasonable rates, as the differences have diminished and the rationale for the different rates has weakened.

ARGUMENT

I. UNREASONABLY DIFFERENT RATES AND CHARGES AS BETWEEN LOCALITIES AND/OR BETWEEN CLASSES OF SERVICE MAY NOT BE MAINTAINED.

It is self-evident that all charges for utility service must be just and reasonable, as must all rules and regulations affecting or pertaining to a public utility's charges or service. *Utah Code §54-3-1*. To determine whether a rate is just or unjust, and reasonable or unreasonable, the Commission has discretion to broadly inquire into a rate or charge in relation to "the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the state of Utah; methods of reducing wide periodic variations in demand of such products, commodities or services, and means of encouraging conservation of resources and energy." *Id.* The Commission may consider all of the circumstances and facts bearing

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contribution in aid of construction ("CIAC"). GSS and EAC area extension costs and the rate or charge in excess of GS-1 rates, were similarly classified. As an approved practice since the final order in Docket No. 87-057-13, Questar accounted for these contributions as revenues rather than as reductions to rate base. The Commission granted Questar's proposal to change this treatment and account for and to record CIAC as a reduction to rate base rather than as revenue. The Commission ruled that this accounting practice is consistent with the practice of other utilities in the country and is also consistent with GAAP. However, all GSS and EAC area costs and revenues continued to be accounted for under the previous practice.

upon the rate or charge, not just cost and revenue. *See Los Angeles & S.L.R.R. v. Public Utils. Comm'n,* 15 P.2d 358 (Utah 1932).

Not only must rates be just and reasonable, rates may not be preferential or prejudicial to *any person*, nor may *any unreasonable difference* as to rates and charges between localities or as between classes of service, be established *or maintained*. *Utah Code §54-3-8 [emphasis added]*. This statute, as well as the requirement that a rate be just and reasonable, calls for continuous compliance, for public utility rates and charges are dynamic. A rate or classification, once set, remains subject to ongoing scrutiny. Eliminating a difference in rates between different localities and between different customers within the same general service class of customers complies with these directives.

The Utah Supreme Court methodically examined Utah Code §54-3-8 and its relation to Utah Code §54-3-1, in *Mountain States Legal Foundation v. Utah Public Service Commission,* 636 P.2d 1047 (Utah 1981). *Mountain States* addressed a preferential senior citizen rate, but the Court's holding equally applies where a rate is claimed to be prejudicial, or unreasonably different as between localities or classes of service.

The Court begins by noting, "It is axiomatic in rate making that utilities are barred from treating persons similarly situated in a dissimilar fashion." 636 P.2d 1052, *citations omitted*. Reasonable classifications resulting in different rates must be rationally based.

Classifying customers for ratemaking purposes, according to common characteristics is necessary to "maximize the efficient utilization of plant and equipment and thereby provide the lowest possible rates on an equitable basis." *Id*. But, not every difference can justify a separate class. "Classification of customers must necessarily be accomplished by reference to general characteristics having some rational nexus with the criteria used for determining just and reasonable rates." 636 P.2d at 1052-1053. It is this rational nexus that no longer exists between the GSS rates and the EAC, and just and reasonable rates as determined under Utah Code §54-3-1.

Whether a rational nexus exists will be determined by examining a number of factors that describe the common characteristics of one class, or locality, based upon standards for a just and reasonable rate, and then compared to the characteristics of the other class or locality. 636 P.2d 1055. The test then is whether there is discrimination based upon the relationship of one rate to another. *Id*., *citation omitted*.

Discrimination between classes of customers rationally linked to the "regulatory scheme" is appropriate.

> The criteria set out in §54-3-1 clearly are not foreign to a proper determination of classifications. These standards are best effectuated, and perhaps in some cases can only be effectuated, if the Commission is accorded the power to classify in such a manner as to implement the purposes underlying those standards. Indeed, it is significant that the Legislature specified that as "*to each category of customer*" the definition of a just and reasonable rate "may include, but shall not be limited to, the cost of providing service" and "the well-being of the State of Utah." [Emphasis added.] 636 P.2d 1055

Initially, the greater cost to serve existing residents and businesses within a previously un-served area, indeed the additional cost to extend service at all, does justify charging a CIAC. However, cost of service is but one among several standards for determining whether a rate is just and reasonable, and therefore, non-discriminatory under Utah Code §54-3-8(1)(b). 636 P.2d 1054.

The issue before the Commission is whether the GSS rates and the EAC, after 15 years and 10 years, continue to effectuate the standards of just and reasonable rates, or do these rates now discriminate "with no rational basis, and [discriminate] based on factors foreign to the regulatory scheme, which are aimed at by the preference statute." 636 P.2d 1055.

Testimony and exhibits thus far admitted into evidence, and pre-filed testimony addressing the Stipulation, demonstrate that these rates and charges no longer have a rational nexus to cost of service, value of service, or economic impact of charges upon a very small group of customers; 7000 GSS and 1600 EAC customers.[5] These rates no longer implement the purposes underlying the just and reasonable standard. Accordingly, the holding in *Mountain States* commands that all general service customers throughout the state belong in one class and that their rates should all be the same.

[5] *Mountain States* acknowledges that Utah Code §54-3-8(1)(a) flatly prohibits preferences (or prejudicial rates) as between persons who are provided the same general type of service. This may describe the GSS customer who pays twice the distribution non-gas charge for the same service as provided GS-1 customers. Grouping customers of the same class to the groups advantage or disadvantage, may be a per se violation of the statute. For the purpose of only this Memorandum of Law, the Committee is relying upon §54-3-8(1)(b) prohibiting unreasonably different rates as between classes or localities.

Mountain States recognizes that beyond the theoretical foundations for rate making generally, and all of the relevant factors and standards to be considered in arriving at equitable rates and classifications, "there are broad public policy issues, whether implicitly or explicitly recognized, which are necessarily affected by whatever classifications of customers are recognized." 636 P.2d 1053. The Court later states:

> The 1977 amendments to §54-3-1, by permitting consideration of the economic impact of a rate on each category of customer, gave legislative approval, in the form of binding law, to considerations which may relate, directly or indirectly, to "social problems." In all events, it can hardly be gainsaid that utility pricing policies do directly affect a multitude of social as well as economic problems—whether so intended or not. In short, we cannot conclude that the Legislature has flatly precluded a senior citizen rate. Nor is it clear that the Commission would be compelled to find that the "senior citizen rate" does not include all costs, had it ruled on the matter." 636 P.2d 1057.

The Court held that the Commission's findings in support of the senior citizens rate were inadequate as a matter of law. In so holding, however, the Court respected the Legislative authorization to consider economic impacts of many sorts upon a category of customers, and to consider the well-being of the State of Utah, when determining if there is any unreasonable difference as to rates, charges, service or facilities, or in any other respect, either as between localities or as between classes of service.

II. THE UNANTICIPATED EFFECTS OF UTAH CODE §54-3-8.1 DEMONSTRATES THE UNREASONABLE RATE DIFFERENCES BETWEEN THE GSS AND EAC LOCALITIES, AND BETWEEN GSS AND EAC LOCALITIES AND ALL OTHER GS-1 CUSTOMERS.

In Docket No. 97-057-04, the Commission denied Questar's application to establish a third tariff under which Questar would establish service to rural communities

within Questar's certificated territory. Only a portion of the CIAC would be recovered from residents and businesses that choose to take service. Questar's application, which was supported by the Committee, also requested a specific charge for Panguitch, Utah.

The rural community charge (RCC), like the GSS and EAC tariffs, relied upon assumptions for the number of existing residents and business that would initially convert to natural gas space and water heating, and projected customer additions and projected revenue from general growth in the area. The three tariffs used either a higher non-gas distribution rate or a fixed monthly payment, to generate additional revenue to cover the cost of expansion.

The RCC tariff, on the other hand, contained a pivotal difference from the GSS and EAC tariffs. It was designed to recover only a portion of the CIAC, because under any other tariff, the rate for natural gas would exceed alternative or existing fuel sources, limiting the number of customers that Questar could expect to take service. "As the RCC would recover only a portion of the costs of the extension, [Questar] proposes that the difference between the RCC amounts and the otherwise required customer contributions be recovered from other [Questar] customers in a subsequent general rate case." *Order Denying Application For Rural Connection Charge Tariff*, page 8.

In denying the application, the Commission stated: "[Questar's] RCC proposal is specifically designed to counter the operations of the marketplace and interject a service that normal market mechanisms do not support." *Order Denying Application For Rural*

Connection Charge Tariff, page 12. The Commission also concluded that the RCC proposal violated Utah Code §54-3-8's prohibition of unreasonable preferences or advantages between localities. *Order Denying Application For Rural Connection Charge Tariff*, page 13-14.

In response, the Utah Legislature amended Utah Code §§54-3-8 and 54-4-8, and §63-55-254, and enacted Utah Code §54-3-8.1(*repealed* December 31, 1999), directing that the Commission approve an application of extend natural gas service to previously un-served municipalities within its service territory, if the application met specified conditions. Under Utah Code §54-3-8.1, the Commission calculated and approved an EAC for three localities, Panguitch, Cedar Fort, and Brian Head. *See Docket Nos. 98-057-02 (Panguitch), 99-057-05 (Cedar Fort), and 99-057-09 (Brian Head)*.

Utah Code §54-3-8.1 does not, however, approve or excuse *unreasonably* different and therefore prohibited, rates or charges, nor does the statute annul the Utah Supreme Court's holding in *Mountain States Legal Foundation v. Utah Public Service Commission*. The standards that the Commission applied in Docket No. 97-057-04 in denying Questar's application, applied to current extension area GSS rates and EAC charges, equally support the conclusion that these rates and charges are now unreasonably different as between localities or classes of service and are, therefore, prohibited.

An unintended consequence and prohibited disparate impact of the EAC as between two EAC localities and as between an EAC locality and geographic localities not subject to any surcharge, is apparent in the case of Ogden Valley and Brian Head. The Ogden Valley grew at an unexpectedly rapid pace and, very important, the development of one of Utah's premier, large ski resorts, combined with a 2005 interest rate reduction, resulted in Ogden Valley's paying off the customer contribution before the full term. In the case of Brian Head, also a ski resort, the imperfect estimate of the number of customer means that the customer contribution obligation, with interest, will likely never be paid. In other words, Brian Head customers have no reasonable expectation of ever paying GS-1 rates.[6]

In the case of customers paying GSS rates, no matter how many customers pay the doubled DNG portion of their bill, all will pay for 20 years, whether the actual costs to extend service are under or over collected. And, in each general rate case for the last 15 years, the upwardly adjusted new DNG rate has been doubled.

For example, in Beaver City, a GSS community, for 15 years each customer has paid a doubled, volumetric based distribution natural gas charge merely because the customer lived in an existing community that desired natural gas service. In comparison,

[6] The disparate rate impact discussed in the case of Ogden Valley compared to Brian Head also appears in the case of Cedar Fort. In the May 6, 1999 Report and Order in Docket No. 99-057-05, the Commission found that extending service to Cedar Fort was estimated at $773,000, requiring an up-front customer contribution of $673,000. The Commission applied Utah Code §54-3-8.1 to approve the $30.00 monthly EAC, which over 15 years recovered $397,000 leaving un-recovered, $276,000. By chance, the contribution in aid of construction from a near-by large gas fired electric generation plant needing transmission capacity on the pipeline that serves Cedar Fort, so reduced the Cedar Fort EAC balance that it is expected to be fully recovered in June 2007.

a large, previously undeveloped, new residential development within Questar's certificated territory required substantial new facilities for natural gas service. The developer paid a CAIC based upon only extension costs for the first phase of the total intended size of the development. All GS-1 customers, including GSS and EAC ratepayers, share the costs of extending service to the first phase to the extent of the allowed extension cost per home. And, all GS-1 customers share all the costs of the additional, larger system that will serve the much larger total development.

Even a strained application of Utah's public utilities statutes, or a contrived interpretation of Utah Supreme Court opinions, cannot reconcile the rate impact upon Panguitch, Cove Fort, and Brian Head, as consistent or rationally based. Whether compared as between one another or compared with the GS-1 class, the EAC or GSS extension area rates schedules have become unjust and unreasonable.

III. THE PROHIBITION OF RETROACTIVE RATEMAKING DOES NOT APPLY TO THE APPLICATION OR TO THE STIPULATION.

The rule against retroactive ratemaking prohibits the setting of rates designed to recover past under earnings or to refund past excess earnings.[7] The Utah Court of Appeals addressed a utility customer's claim that any change to a rate once set is retroactive ratemaking. *U.S. Magnesium v. Public Service Commission*, 110 P.3d 165, (Utah App. 2005).

[7] *See Utah Dept. of Business Regulation v. Public Serv. Comm'n*, 720 P.2d 420, 420-421 (Utah 1986).

Between January 1, 2002 and May 24, 2002, PacifiCorp provided electricity to U.S. Magnesium's facilities, without a contract or Commission order setting the price. PacifiCorp charged $18 per Mw hour, the price approved in the contract that expired December 31, 2001. In May 2002, the Commission set the price at $21 per Mw hour for future rates. Subsequently, the Commission set the rate for the period during which there was no explicit contract and no Commission order, also at $21 per Mw hour. U.S. Magnesium appealed claiming that setting a rate higher than the rate actually charged by the utility during the period in dispute, constituted retroactive rate making.

The Utah Court of Appeals held that neither the prohibition of retroactive ratemaking nor exceptions to it, were implicated because "the utility was not trying to recoup lost earnings." The Court said: "Contrary to U.S. Mag's contention, the retroactive rate making principle is not a black letter guarantee that all utility rates must be announced in advance. Rather, the principle prohibits a utility from adjusting its projected rates to benefit its shareholders." 110 P.3d at 168.

The Stipulation does not result in a current rate change, except a substantial reduction for the customers now paying GSS and EAC rates.[8] The amortization of uncollected GSS and EAC revenues will be further reviewed in an upcoming proceeding. Questar's revenues are not adjusted to recoup lost earnings, or to protect shareholder

[8] By statute, rate reductions do not require a hearing, much less a general rate case. Utah Code Ann. §§ 54-7-12(4)(a) & (5)(a).

earnings. As in *U.S. Magnesium v. Public Service Commission*, neither the Application nor the Stipulation implicate the retroactive rate making principle.

IV. ALL EXTENSION AREA RATES AND CHARGES ORIGINATE IN AND MAY BE MODIFIED IN AN ABBREVIATED PROCEEDING.

By its orders in every docket where extension area rates and charges have been determined, the Commission has, in effect, determined the law of the case, and stated a governing precedent. Absent extraordinary circumstances, the Commission's rule of law that extension area rates and charges may be established or modified, addressed and redesigned, outside of a general rate case, should stand and govern the same issue in subsequent stages of the same case and in other cases.[9]

Every application to extend natural gas service into existing but un-served areas, and to set the CIAC and the method of its payment, was submitted to and approved by the Commission outside of a general rate case. The Commission's May 26, 2006 Order Approving Rate Reduction Stipulation in Docket No. 05-057-T01, establishing the task force "to address GSS expansion area rate premiums and EACs in the company's tariffs and develop new tariff language to address future system expansion requests", did not limit the task force, or any recommendations, to only remedies available in general rate cases.[10]

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[9]In addition, such proceedings are authorized by *Utah Dept. of Business Regulation v. Public Serv. Comm'n*, 614 P.2d 1242, 1249-50 (Utah 1980). The Commission has a long history of regularly approving tariff changes involving rate changes outside of general rate cases.

[10] In Docket No. 96-057-07, the Commission authorized the EAC and provided that the EAC for a particular area could be adjusted, outside of a general rate case, based upon a comparison of the present value of revenue collected

V. THE STIPULATION IS A PROPER CONCLUSION FROM THE UTAH COMMITTEE OF CONSUMER SERVICES' PERFORMING ITS STATUTORY MANDATE.

In Docket No. 05-057-T01, when Questar and the Division first proposed to eliminate the GSS and EAC tariffs, the Committee questioned whether that docket was the appropriate procedure. In addition, the Committee questioned if that docket allowed for an adequate and fair opportunity to investigate and analyze Questar's and the Division's audits, studies and projections. The parties to the docket and ultimately, the Commission were persuaded by the Committee's position. The May 26, 2006 Order, and the GSS/EAC task force, permitted all parties a fair opportunity to ask and have answered questions pertaining to these rate schedules.

The Committee continued to express reservations about the proposal even after the task force filed its report. When, pursuant to the report, Questar filed a new application for relief, the Committee engaged in discovery, participated in technical conferences and continued to analyze these rates in order to assess the impact of Questar's proposed regulatory action on residential consumers and small commercial enterprises. The plain meaning of Utah Code §54-10-4(1) and (3), is that rate and regulatory impact assessment applies to *all* residential and small commercial enterprises "*in the state of Utah*." [Emphasis added.]

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with the required CIAC. *Report and Order*, July 8, 1996, Finding of Fact 8., page 4. Docket No. 96-057-07 was informally adjudicated under Commission Rule 746-110-2. The Conservation Enabling Tariff, which is the pilot sales and revenue decoupling mechanism for distribution non-gas revenues for the GS-1 class, including GSS and EAC ratepayers, was itself authorized by the Commission outside of a general rate case.

The Committee's impact assessment leading to positions expressed by Committee resolution and in testimony, was measured and evolved as more and more information was developed through investigation and the discovery process. Ultimately, the Committee came to the decision to support the Stipulation as a resolution to the rate differences that could no longer be justified. The Committee concluded that indeed, based upon the interests of ratepayers both within and without expansion areas, the majority of Utah ratepayers are best served by eliminating disparate rate schedules that are no longer rationally related to just and reasonable rates, as Utah law requirest they must be.

CONCLUSION

The Utah Supreme Court stated in *Mountain States*: "Moreover, no matter what classifications may be established, the disciplines of accounting and economics are not so precise, or so unified on cost allocation theories or the proper theoretical foundations for rate making generally, as to agree on all the relevant factors and standards to be considered in arriving at rates and classifications acknowledged to be equitable. Beyond that, there are broad public policy issues, whether implicitly or explicitly recognized, which are necessarily affected by whatever classifications of customers are recognized." 636 P.2d 1053. Ratemaking is not exact, but may not be left to the chance assumptions and estimates that over time are proven to be imprecise or simply wrong. Nor should any customer, group of customers, a geographic locale, or a sub-set of a class of service, pay

a rate that no longer has a rational nexus to the criteria used for determining just and reasonable rates. These parameters of Utah law found in appellate court opinions and in statute, are the foundation upon which the Commission may approve the Stipulation.

DATED this 26th day of March 2007.

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Paul H. Proctor
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PRE-HEARING MEMORANDUM OF LAW was served upon the following by electronic service on this 26th day of March, 2007.

DIVISION OF PUBLIC UTILITIES:
Mike Ginsberg
Trish Schmid
Assistant Attorney General
160 East 300 South
Fifth Floor
Salt Lake City, UT 84111
mginsberg@utah.gov
pschmid@utah.gov

Colleen Larkin Bell (5253)
C. Scott Brown (4802)
Questar Gas Company
180 East First South
P.O. Box 45360
Salt Lake City, Utah 84145
(801) 324-5556
(801) 324-5172
(801) 324-5935 (fax)
colleen.bell@questar.com
scott.brown@questar.com

Gregory B. Monson (2294)
Richard R. Hall (9856)
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
(801) 328-3131
(801) 578-6999 (fax)
gbmonson@stoel.com
rrhall@stoel.com

BEAVER COUNTY ECONOMIC DEVELOPMENT CORP.:
Robert G. Adams
Director

Beaver County Economic Development Corp.
105 East Center
P.O. Box 2211
Beaver, UT 84713-2211
Telephone: (435) 438-6482 (office)
Cell: (435) 421-9022
rga@cimasolutions.com or robadams@beaver.state.ut.us

CARBON COUNTY:
Mr. Delynn Fielding
Director
Carbon Economic Development
120 East Main Street
Price, UT 84513
Office Telephone: (435) 636-3295
Cell: (435) 650-1938
dfielding@co.carbon.ut.us

EMERY COUNTY ECONOMIC DEVELOPMENT:
Michael McCandless
Emery County Economic Development Director
P.O. Box 297
Castle Dale, Utah 84513
Telephone: (435) 381-5576
Cell: (435) 749-1368
Facsimile: (435) 381-5529
econdev@co.emery.ut.us

BALL:
Roger J. Ball
1375 Vintry Lane
Salt Lake City, UT 84121
(801) 277-1375
Ball.roger@gmail.com

BEAVER CITY:
Leonard Foster
Mayor, Beaver City
60 West Center Street
P.O. Box 271
Beaver, UT 84713
Telephone: (435) 438-2321
Lenfoster8@msn.com

BEAVER COUNTY:
Von J. Christiansen
Beaver County Attorney
P.O. Box 471
Beaver, Utah 84713
Telephone: (435) 438-6441
Facsimile: (435) 438-5348
vjchristiansen@beaver.state.ut.us

BEAVER COUNTY SCHOOL DISTRICT:
Dr. Ray Terry
Superintendent, Beaver County School District
291 North Main
Beaver, UT 84713
Telephone: (435) 438-2291
Ray.terry@m.beaver.k12.ut.us

BEAVER VALLEY HOSPITAL:
Craig Val Davidson
Administrator
Beaver Valley Hospital
1109 North 100 West
P.O. Box 1670
Beaver, UT 84713
Telephone: (435) 438-2531
cv.davidson@utahtelehealth.net

TOWN OF CEDAR FORT:
Joseph T. Dunbeck
Duane W. Moss
DUNBECK & GORDON
Attorneys for Cedar Fort
175 North Main Street, Suite 102
P.O. Box 947
Heber City, UT 84032
Telephone: (435) 654-7122
Facsimile: (435) 654-7163
jtd@dunbeckgordonlaw.com
dwm@dunbeckgordonlaw.com

DELTA CITY CORPORATION:
Gayle Bunker
Mayor
Delta City Corporation
76 N 200 West
Delta, UT 84624-9440
(435) 864-2759 (V)
(435) 864-4313 (F)
(435) 864-7399 (C)
gschafer@deltautah.com

ECONOMIC DEVELOPMENT CORP. OF UTAH
Jeff Edwards
Economic Development Corp. of Utah
201 South State Street, Suite 2010
Salt Lake City, UT 84111
(801) 328-8824, ext. 11
jedwards@edcutah.org

CITY OF ENTERPRISE:
City of Enterprise
Attn: S. Lee Bracken
P.O. Box 340
Enterprise, UT 84725
Telephone: (435) 878-2221
Facsimile: (435) 878-2311
lee@brackensusa.com

FILLMORE CITY:
David L. Christensen
Mayor
Fillmore City
75 West Center
Fillmore, UT 84631
Office: (435) 743-5233
Cell: (435) 406-9470
tracy@fillmorecity.org

GARFIELD COUNTY:
Garfield County
Commissioner D. Maloy Dodds
P.O. Box 77
Panguitch, UT 84759

gcclerk@mountainwest.net

GARFIELD COUNTY & PANGUITCH CITY:
Barry L. Huntington
55 South Main Street
P.O. Box 388
Panguitch, UT 84759
Telephone: (435) 676-2290
Facsimile: (435) 676-8239
garfieldcountyattorney@color-country.net

TOWN OF JOSEPH:
Ray J. Owens
Mayor
Town of Joseph
100 North State
Joseph, UT 84739
bamestoj@hotmail.com

MILFORD CITY:
Leo G. Kanell
Attorney for Milford City
P.O. Box 471
Beaver, Utah 84713
Telephone: (435) 438-6441
Facsimile: (435) 438-5348
lgkanell@beaver.state.ut.us

SALT LAKE COMMUNITY ACTION PROGRAM:
Betsy Wolf
Salt Lake Community Action Program
764 South 200 West
Salt Lake City, UT 84101
Telephone: (801) 891-5040
Facsimile: (801) 355-1798
bwolf@slcap.org

UTAH SMALL CITIES, INC.:
Bill Johnson
Vice Chairman
Utah Small Cities, Inc.
Uintah County
147 East Main
Vernal, UT 84078

Telephone: (435) 781-6731
Facsimile: (435) 781-6732
bjohnson@co.uintah.ut.us