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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of QUESTAR GAS COMPANY to Adjust Rates for Natural Gas Service in Utah	DOCKET NOS.: 98-057-12 99-057-20 01-057-14 03-057-05 BRIEF REGARDING CO2 ISSUES FILED BY US MAGNESNIUM LLC

US Magnesium LLC ("US Mag"), successor in interest to Magnesium Corporation of America ("Magcorp") for purposes of these dockets, files this brief regarding the jurisdictional and procedural status of these dockets on the issue of CO2 processing costs in light of the recent decision of the Utah Supreme Court in *Committee of Consumer Services vs. Utah Public Utility Commission*, 75 P.3d 481 (Utah 2003).

US Magnesium Testimony in Docket 99-057-20

In testimony submitted by Roger Swenson on behalf of Magcorp in Docket 99-057-20, Mr. Swenson argued that transportation customers like Magcorp, who bring their own gas supplies to the city gates and who can easily utilize lower BTU gas, should not be expected to bear costs incurred in processing CO2 for the benefit of others. Notwithstanding these objections, the Commission

allowed Questar Gas to charge Magcorp significant amounts of money for costs that it did not cause and that provide it with no benefits.[1]

Based on an appeal by the Committee of Consumer Services, the Utah Supreme Court has recently ruled that the Commission was wrong to include CO2 processing costs in the rates of Questar Gas customers because Questar Gas failed to demonstrate that its contact with its affiliate was prudent. Questar Gas is now asking for a second chance to meet its failed burden of proof and claims the right to retain CO2 expenses illegally collected in the past. There is simply no way to construe the Supreme Court ruling as supporting Questar Gas' arguments, and Questar Gas may not so easily evade the Supreme Court's ruling. The Commission should immediately order Questar Gas to remove all CO2 costs from rates and to refund all CO2 costs illegally collected to date.

Regardless of how the Commission responds to the company's renewed quest for CO2 cost recovery, those costs should not be allocated to transportation customers. Questar Gas claims that CO2 processing of gas entering Questar Pipeline's system is necessary for the safety of its residential customers. Questar Gas also argues that processing CO2 was the quickest and least expensive option available that would accomplish the goal of ensuring safety for its customers. Perhaps this explanation, if accurate and accepted by the Commission, might warrant the payment of CO2 processing costs by residential and small commercial customers, but it does not warrant payment of CO2 removal costs by a large industrial transportation customer like US Mag. US Mag purchases its own gas supplies and has not in any way caused the CO2 problem claimed by Questar Gas. Moreover, US Mag has on-site experts who monitor and adjust its

[1] As currently allocated, US Magnesium will pay approximately $200,000 in CO2 processing costs between June 1999 and May 2005.

facilities on a regular basis in response to changing conditions and BTU content. The High-CO2/Low-BTU aspects of the coal seam gas that cause safety concerns for QGC customers whose furnaces are not set at the proper levels do not cause any problems for US Mag. Indeed, US Mag has no problem accepting lower-BTU gas, if it is the most economical source of energy, and simply adjusts its facilities as appropriate. Accordingly, even if the Commission allows Questar Gas to pass on the costs of CO2 processing to its customers, US Mag should not receive any allocation of such charges.

The Supreme Court rejected any CO2 costs in customer rates

In light of the Utah Supreme Court ruling, US Mag submits that the Commission must immediately order Questar Gas to remove CO2 costs from current rates and refund all CO2 costs it previously collected. The Commission found that Questar Gas had not met its burden of proof to demonstrate the prudence of the CO2 contract or expenses. The Supreme Court held that the Commission must thus reject any rate increase based on CO2 costs. The Court explained, in language that is difficult to misconstrue:

> If the record had permitted, the Commission could have carried out its initial obligation to review the prudence of the CO2 plant contract and its terms, holding Questar Gas to its burden of establishing that its decision to enter into the contract and the costs it agreed to were prudent and not unduly influenced by its affiliate relationship with Questar Pipeline. Since the Commission found that no such record was or could be made available, it should have refused to grant a rate increase that included CO2 plant costs. We therefore overturn the Commission's decision to accept the CO2 Stipulation and to grant the rate increase proposed therein.

Committee of Consumer Services, 75 P.2d at 486 (emphasis added). There is no ambiguity in this ruling. The Utah Supreme Court conclusively ruled that Questar Gas failed to meet its

burden of proof; that the record would not permit a finding that Questar Gas had met its burden of proof; and that the Commission must reject any rate increase based upon CO2 costs.

<u>Questar Gas is not entitled to a second attempt to meet its burden of proof</u>

Notwithstanding the unambiguous ruling of the Utah Supreme Court, Questar Gas has asked the Commission to reopen the 1999 docket; to allow it to present additional evidence and arguments; and to rule yet a second time on its claim of prudence. In so doing, Questar Gas seriously mischaracterizes both the Commission's order and the Supreme Court's ruling. Questar Gas claims that the Commission "did not … rule on the prudence of the … CO2 Processing Agreement." (Questar Brief, pg. 2). In other words, Questar Gas claims that the Commission's error was its failure to do its job in that it failed to decide whether the CO2 costs were prudent.

In fact, the Commission directly ruled on prudence and found that Questar Gas had not met, and could not meet, its burden of proof to demonstrate that its affiliate contract was prudent:

> The record is insufficient to permit us to determine whether its [Questar Gas] analysis of options prior to early 1998 was sufficiently objective and thorough, that is, to reach a conclusion whether options were ruled in or out as a result of the influence of affiliate interests. Nor can a sufficient record be developed.

August 11, 2000 Report and Order, Docket 99-057-20 (emphasis added). Similarly, the Supreme Court held that the failure was that of Questar Gas in that Questar Gas failed to produce substantial evidence sufficient to meet its burden of proof to establish prudence. The error was not that of the Commission's decision, rather Questar Gas failed to meet its burden of establishing prudence:

> "Since the Commission found that no such record [sufficient to establish prudence] was or could be made available, it should have refused to grant a rate increase that included CO2 plant costs."

Id.

Despite its finding, that Questar had not established prudence, the Commission permitted Questar Gas to include $5 million of CO2 processing costs in rates on the theory that "the end justifies the means." The commission accepted Questar Gas' argument that CO2 processing helped avoid potential safety risks, and on that basis permitted the utility to recover a portion of its CO2 processing costs. The Utah Supreme Court squarely rejected this alternative ground for cost recovery, explaining that it begs the question of who should bear the cost of the CO2 removal expenses. *Committee of Consumer Services*, 75 P.3d at 486.

In light of the Commission's finding that Questar Gas did not meet its burden of proof to establish prudence, and the Supreme Court's confirmation of that holding and its rejection of the Commission's alternative "safety" rationale, there is no legal basis for permitting Questar Gas to collect or retain any CO2 costs or to reopen the 1999 docket.

Questar Gas is seeking a second bite at the apple in a belated attempt to meet its failed burden of proof on prudence. All litigants would appreciate an opportunity to try again to meet a failed burden of proof, once they have been educated by the Commission or the Court on the failings of its first attempt. Unfortunately for the litigant who fails to satisfy its burden, but fortunately for society, parties are permitted just one opportunity to prove their case.

There is no basis for any further proceedings in the 1999 rate case. The record in that docket is complete and the case is finished. The parties filed direct, rebuttal and surrebuttal testimony and exhibits. The entire record from a prior docket was incorporated by reference. The Commission found, and the Supreme Court confirmed, that, notwithstanding this substantial

record, Questar Gas failed to meet its burden of proof to demonstrate through substantial evidence that the affiliate contract was prudent. *Id.*, 486. Given its failed burden of proof, Questar Gas is not entitled to a second chance to bolster the record, submit additional testimony, or make further arguments.

Questar Gas claims that the presentation of its case was somehow affected or "truncated" by the CO2 stipulation later rejected by the Supreme Court. The stipulation did not, and could not, have "truncated" Questar Gas' presentation of its evidence on prudence. QGC filed direct, rebuttal and surrebuttal testimony and exhibits. Questar Gas had every opportunity and incentive to satisfy its burden of proof on prudence, but was simply unable to do so. Questar Gas also had every incentive to cross-examine adverse witnesses on issues of prudence, given that some parties continued to oppose the CO2 stipulation and to challenge prudence.

Moreover, even if, as Questar Gas claims, it altered its cross-examination of certain witnesses who initially opposed CO2 recovery but later agreed to the stipulation, no further proceedings would be warranted. Questar Gas could not have met its failed burden of proof through further cross-examination of adverse witnesses. Cross-examination of adverse witnesses could not have cured the fundamental defect found by the Commission and the Court - Questar Gas' failure to demonstrate by substantial evidence that affiliate interests did not unduly influence QGC's actions and inactions. Questar Gas is the only party in possession of evidence that could possibly have satisfied its burden of proof on this issue, and it failed to present such evidence.

Questar Gas parades an extensive list of citations in its brief. However, most of its cases and arguments wholly miss the point. Questar Gas simply sets up and attempts to tear down various straw man arguments, by mischaracterizing the rulings of the Supreme Court and the

Commission. While many of Questar Gas' administrative law arguments might be correct in the abstract, they are simply not relevant to the issue now before the PSC.

For example, Questar Gas argues that the Utah Supreme Court cannot set rates. That is undoubtedly accurate. However, the Supreme Court clearly can, and did, determine that the Commission unlawfully allowed CO2 costs to be included in customer rates given Questar Gas' failure to satisfy its burden of proof to demonstrate prudence based on substantial evidence.

It may even be possible that Questar Gas is correct that, following a Utah Supreme Court rejection of a stipulation initially accepted by the Public Service Commission, the matter and the parties should basically be returned to their positions at the time the stipulation was or should have been rejected. However, that argument does not help Questar Gas in this case. Questar's failure was a failure to satisfy its burden of proof. Returning the proceedings and the parties back to that time, the glaring defect in Questar's evidence would still doom its attempt to charge customers its affiliate CO2 costs.

Moreover, had the Commission rejected the CO2 stipulation as a proper basis for rate recovery, as it should have done, the Commission would have had no choice but to reject any recovery by Questar Gas of CO2 processing costs, because Questar had not met its burden of proof on the issue of prudence.

Conclusion

It would not have been proper in 2000, and it is clearly not proper now, to allow Questar Gas to get a second shot at establishing prudence. It is simply not reasonable for Questar Gas to expect a second shot to meet its failed burden of proof, this time armed with the benefit of the Commission's and the Supreme Court's rulings as to its deficiencies. Parties are not entitled to multiple attempts to satisfy their burden of proof. Questar Gas had a full and fair opportunity to

present all of its evidence and to attempt to establish its claim of prudence. It failed. It does not get a second chance.

It is certainly not unfair to restrict Questar Gas to one hearing to establish its burden of proof. Indeed, it would be grossly unfair - to the parties, to the customers, to the Commission, and to justice - if Questar Gas were given multiple chances to satisfy its failed burden of proof following appeal.

Questar Gas also makes the remarkable argument that a refund is not appropriate because most CO2 costs have been and are being collected pursuant to subsequent stipulations and Commission orders that were not separately appealed. Questar Gas cannot so flippantly evade the Supreme Court's ruling. It should go without saying - although it is actually said in authority cited by Questar itself - that all stipulations or orders that were dependent in any manner upon the rejected CO2 stipulation and order are also reversed.[2] In suggesting to the contrary, Questar Gas claims that its can continue to charge Utah customers for charges conclusively determined by the Utah Supreme Court to be unjust, unreasonable and contrary to Utah law, if subsequent stipulations and orders failed to specify the obvious fact that CO2 removal costs in rates are all predicated and dependent upon the CO2 Stipulation and the subsequent Commission order approving the same. Such a ludicrous theory does not deserve further analysis.

[2] Questar Gas Brief at 14: "reversal of a judgment or decision of a lower court … vacates all proceedings and orders dependent upon the decision which was reversed." *Phebus v. Dunford*, 198 P.2d 973, 974 (Utah 1948)

There is no legal basis whatsoever for Questar Gas to collect any further CO_2 costs from its Utah customers or to retain any CO_2 costs illegally collected to date. The Commission should immediately order Questar Gas to revise its rates to exclude CO_2 costs and to refund all CO_2 costs previously collected.

DATED this ____day of ____________, 2003.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this ____ day of ________________, 2003, to the following:

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