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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 RESPONSIVE BRIEF OF THE UAE INTERVENTION GROUP REGARDING CO2 ISSUES

In accordance with the Commission's scheduling order in this matter, the UAE Intervention Group ("UAE") files this brief to explain UAE's position on the legal status of these dockets in light of the Utah Supreme Court decision in *Committee of Consumer Services v. Public Service Commission of Utah*, 75 P.3d 481 (Utah 2003), and to respond to the initial briefs filed herein by Questar Gas Company ("QGC") and the Committee of Consumer Services ("CCS").

BACKGROUND

UAE sponsored direct and rebuttal testimony of Kevin Higgins in Docket 99-057-20 in opposition to QGC's request to include CO_2 processing costs in rates. In his testimony, Mr. Higgins explained that inclusion of CO2 removal costs in QGC rates would violate the fundamental

ratemaking principal of cost causation - that costs should be assigned to those who cause them. Moreover, Mr. Higgins explained his conclusion that Questar Corporation had subordinated the interests of the captive ratepayers of QGC to those of Questar Corporation in a situation with clear conflicts of interest. Mr. Higgins proposed that no CO2 removal costs be included in QGC rates.

Mr. Higgins further explained that, to the extent any CO2 removal costs were allowed in QGC rates, such costs should be allocated on a per-customer basis. Mr. Higgins noted that the only plausible basis for including CO2 removal costs in QGC rates was the claim made by QGC that CO2 processing was necessary for the safety of many of its customers and that this approach was less expensive than alternative means of ensuring safety. This safety rationale does not apply to most transportation customers, who do regular maintenance of their facilities and can typically accommodate natural gas with widely varying levels of CO2 and BTU content. Moreover, the alternative safety measures that the CO2 processing allegedly avoided would have cost each customer approximately the same amount of money. Mr. Higgins thus showed that a per-customer allocation of CO2 processing costs was the most appropriate allocation method, if any CO2 costs were ultimately charged to QGC customers.

After significant prefiled testimony and exhibits had been filed, the DPU and QGC entered into the contested CO2 Stipulation to permit $5 million in CO2 removal costs into QGC rates annually for five years. The CO2 Stipulation was ultimately approved by the Commission and appealed by CCS. UAE (then known as the Large Customer Group, or LCG), QGC, DPU and the Industrial Gas Users ("IGU") also signed an Allocation and Rate Design Stipulation ("Allocation Stipulation"), pursuant to which UAE and IGU agreed that they would "not oppose" the CO2 Stipulation, that the CO2 Stipulation was a "reasonable resolution of recovery of CO2 processing

costs in Questar Gas's rates," and that they "agree and stipulate to the terms and conditions" of the CO2 Stipulation.

Parties to the Allocation Stipulation agreed that QGC would seek to include a maximum of $5 million in CO2 costs in rates and that any CO2 removal costs included in rates would be allocated under a specified methodology that utilizes a uniform percentage revenue increase to most customer classes, with a double allocation of costs to the IT and FT-2 classes. Although the stipulated allocation methodology assigns significantly more costs to transportation customers than the per-customer approach supported by Mr. Higgins, UAE agreed to accept the additional assignment of costs in order to resolve the matter.

The PSC approved the Allocation Stipulation and the allocation methodology specified therein ("Approved Allocation Method"). While the CCS appealed the Commission's approval of the CO2 Stipulation and the inclusion of CO2 costs in rates, it did not appeal the Approved Allocation Method. The Supreme Court reversed the Commission's approval of the CO2 Stipulation and the inclusion of CO2 removal costs in rates.

IMPACTS OF UTAH SUPREME COURT REVERSAL

In its recent ruling, the Utah Supreme Court determined that the Commission was wrong to permit CO2 removal costs into QGC's rates based on the CO2 Stipulation, absent a finding of prudence of the underlying contact and expenses. QGC and CCS take very different positions on the import of the Supreme Court ruling, and on the steps that the Commission should take in response. UAE has reviewed the Supreme Court ruling, the briefs filed by QGC and CCS, and relevant authorities, and will provide its primary conclusions and positions.

1. The Approved Allocation Method remains in full force and effect, places a $5 million per year limit on CO2 costs that may be included in QGC rates, and governs the allocation of all CO2 costs ultimately allowed in rates, if any.

The Approved Allocation Method was not challenged on appeal and was not rejected by the Supreme Court. Neither the Allocation Stipulation nor the Approved Allocation Method is dependent upon the ultimate disposition of the CO2 Stipulation or affected by the Supreme Court's reversal. Rather, the Allocation Stipulation and the Approved Allocation Method remain in force and effect, limit any CO2 cost recovery by QGC to a maximum of $5 million per year, and govern the allocation of any CO2 removal costs that may ultimately be allowed into rates.

2. UAE requests that the Commission confirm that the Allocation Stipulation and the Approved Allocation Method remain in force and effect, limiting CO2 cost recovery and governing the allocation of any CO2 costs ultimately permitted in rates.

As indicated above, it is the assumption and position of UAE that, to the extent this Commission ultimately permits QGC to recover any CO2 removal costs, either for the period from 1999 to the present or going forward, the Allocation Stipulation and Approved Allocation Method will dictate the maximum recovery and the method for allocating such costs among customer classes. The positions of UAE set forth in this brief are all based and dependent upon this assumption, and UAE reserves all of its rights and arguments in the event the Allocation Stipulation and Approved Allocation Methodology do not remain in effect. UAE respectfully requests confirmation from the Commission that the Allocation Stipulation and the Approved Allocation Method remain in full force and effect and will govern the allocation of all CO2 costs allowed into rates, if any, up to the maximum allowable level of $5 million per year.

3. UAE intends to honor its agreement not to challenge the inclusion of $5 million of annual CO2 processing costs in rates.

UAE agreed in the Allocation Stipulation that it would not oppose the inclusion of up to $5 million per year in CO2 processing costs in QGC's rates. Consistent with its position that the Allocation Stipulation and the Approved Allocation Method remain in force and effect despite the Supreme Court's ruling, UAE intends to honor that agreement. Accordingly, UAE will not oppose QGC's efforts to persuade the Commission that, notwithstanding the Utah Supreme Court's ruling, QGC has met its burden of proof to recover up to $5 million in annual CO2 processing costs for the period of time covered by the Allocation Stipulation.

PROCEDURAL ISSUES

As indicated above, UAE intends to honor its obligations under the Allocation Stipulation. However, UAE will set forth its primary conclusions and positions on several procedural issues of relevance to these proceedings in light of the Supreme Court's reversal. These procedural issues potentially have a much broader application than these cases and the Allocation Stipulation alone, and the resolution of the procedural issues could affect the interests of UAE members in other proceedings.

4. To the extent practicable, the Commission should proceed as though it had rejected the CO2 stipulation on the grounds specified by the Supreme Court.

Were this a typical proceeding in a court of law, UAE would likely agree with the CCS that the Supreme Court's reversal is final and binding, and the only remaining thing for the Commission to do is to implement the court's ruling by adjusting rates and ordering refunds. Given the nature of this administrative proceeding, however, and the peculiar roles of the

judiciary and the Commission in setting utility rates, the impact of the Supreme Court's reversal and the proper role of the Commission in response are more complicated, and less clear.

UAE concludes, in light of the duty of the Commission to regulate utility rates, the desirable role of stipulations in resolving disputes in the administrative process, the authorities cited by the parties and other relevant considerations, that the Commission should now attempt, to the greatest extent practicable, to return to and complete the proceedings as if the Commission had rejected the CO2 stipulation based upon the recent legal determination of the Utah Supreme Court. UAE believes that such an approach gives proper deference to the Utah Supreme Court's role in enforcing and clarifying Utah law, to the Utah Public Service Commission's role in setting utility rates, and to principles of fairness and equity.

In resuming the proceedings as though the CO2 Stipulation had been rejected, UAE submits that the Commission should first clarify its findings and conclusions with respect to QGC's efforts to meet its burden of proof as to prudence. Depending upon that clarification, the Commission should then consider permitting the parties to complete limited additional cross examination of certain witnesses, and to re-present closing briefs.

a. The Commission should first clarify whether it has already determined that QGC failed to satisfy its affirmative burden of proof.

QGC argues that the legal error identified by the Utah Supreme Court was in the Commission's failure to "rul[e] on the prudence of the … CO2 Processing Agreement" and "to decide whether [CO2 processing costs] were prudent." (QGC Initial Brief, at 2, 29). A fair reading of the Supreme Court's decision, however, does not support this argument. Rather, the Supreme Court construed the Commission's Order as having determined that QGC had not met and could not meet its burden of proof to establish prudence. The Court thus held that the

Commission's error was in not holding Questar Gas to its burden of proof and in not rejecting rate recovery of CO2 costs:

> We first note that … the record clearly indicated that ***the Commission did not make a determination that the CO2 plant contract … was prudent. Indeed, the Commission stated that there were insufficient facts in the record for it to make such a determination, nor could a sufficient record be developed***. …
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> ….
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> …. 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 v. Public Service Commission of Utah, 75 P.3d 481, 485-86, (Utah 2003) (emphasis added).

It is not clear, however, whether the Commission, in fact, intended conclusively to find that QGC had not met, or could not meet, its burden of proof as assumed by the Supreme Court. This lack of clarity stems from seemingly inconsistent language in the Commission's Order. One possible reading of the Commission's Order is that QGC did not and cannot establish the prudence of its affiliate contract on the record:

> ***The record is insufficient to permit us to determine*** whether [Questar Gas]'s 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***.
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> Report and Order, August 11, 2000, Docket No. 99-057-20, page 34 (emphasis added).

An alternative reading of the Commission's Order is that the Commission determined that it was

not required to, and would not, decide whether the affiliate contract and expenditures were prudent because it concluded (erroneously, according to the Supreme Court) that it could approve the CO2 Stipulation without a finding of prudence given the perceived desirability of the outcome:

> Clearly QGC has the burden to demonstrate the decision to enter the contract is a prudent one. Parties differ as to whether it did so successfully. ***But whether or not QGC met this burden,*** we can and do conclude that ***its decision to procure gas processing has yielded the required result***, that is, it has effectively protected the safety of its customers. This means the costs of gas processing can be legitimately recovered in rates. The amount that should be recovered remains to be determined.□

Report and Order, August 11, 2000, Docket No. 99-057-20, page 35 (emphasis added).

Given this ambiguity in the Commission's findings, and in light of the unique role of the Utah Public Service Commission in setting utility rates and the Utah Supreme Court in reviewing Commission rulings for legal error, UAE submits that, notwithstanding the Supreme Court's apparent interpretation of the Commission's order, the Commission should now clarify the intent and effect of its own ruling.

If, as the Supreme Court apparently concluded, this Commission has already determined that QGC did not or could not carry its burden of proof to establish the prudence of the CO2 contract and expenses, then CCS is correct and there is no reason for any further proceedings in this docket, other than to implement the Supreme Court's reversal. Nothing cited by QGC in its brief would support a "second bite at the apple" for QGC to attempt to establish prudence. QGC is entitled to one plenary hearing, not two.

b. If the Commission has not determined that QGC failed to satisfy its burden of proof, limited additional cross examination and briefing may be appropriate.

If the Utah Supreme Court misunderstood this Commission's order and the Commission did not make a determination that the record does not or cannot support a finding of prudence, UAE submits that the parties should now be given an opportunity, based on the record before the Commission and perhaps limited additional cross-examination, to argue whether QGC did or did not satisfy its "heavy" burden to establish by "substantial evidence" the prudence of some or all of up to $5 million in annual CO2 costs paid by QGC to its affiliate. See *Committee of Consumer Services,* 75 P.3d at 486. This new opportunity, however, should be strictly limited to those additional procedural steps that would have been appropriate under all of the circumstances had the Commission rejected the CO2 Stipulation and the alternative safety rationale as a sufficient basis for allowing CO2 costs into QGC rates.

At the point that the CO2 stipulation should have been rejected, QGC and the other parties had submitted substantial prefiled direct, rebuttal and surrebuttal testimony and exhibits. Moreover, the entire record of the previous pass-through docket had been incorporated by reference. [Transcript, pg. 11, l. 13 - pg. 13, l. 16] QGC had every incentive and obligation to support the prudence of its affiliate contract and CO2 expenditures on the record. CCS and other parties had every incentive and opportunity to support their claims of imprudence. All parties had presented their evidence and had been given a full opportunity to cross-examine other witnesses. With a few limited exceptions (discussed below), all parties also had an incentive to cross examine all adverse witnesses.

If the Commission had determined following the June 2000 hearings that the "safety" rationale was insufficient to support the CO2 stipulation or CO2 cost recovery, as the Supreme Court has now indicated, it is certainly possible that those parties who had withheld or altered the nature of their cross-examination of certain witnesses in reliance on the CO2 Stipulation, and who had reserved their rights with respect to such issues,[1] might properly have been permitted by the Commission to complete their cross examination of certain witnesses. Accordingly, as to those parties who can demonstrate to the Commission's satisfaction that they altered their cross examination in reliance on the CO2 Stipulation, and reserved their rights to further cross-examination in the event the CO2 Stipulation was rejected, the Commission could now permit such parties to complete their cross-examination, to the extent it might impact the Commission's determination.[2]

It is also likely that parties may have altered the nature of their closing briefs to the Commission in light of the CO2 Stipulation. Had the CO2 Stipulation and alternative safety rationale been rejected by the Commission on the grounds specified by the Supreme Court, QGC undoubtedly would have attempted to marshal its record evidence in support of prudence and to argue that it had satisfied its burden to prove by substantial evidence that the affiliate contract and some or all of its expenditures thereunder were prudent. Similarly, other parties would likely

[1] E.g., Transcript, pg. 98, l. 21 - pg. 99, l. 14; pg. 219, ll. 11-24].

[2] The Commission could determine that such cross examination would not be useful. For example, a party cannot reasonably rely upon cross-examination of adverse witnesses to satisfy an affirmative burden of proof. "A party should not be permitted to establish his claim or to prove his defense by a cross-examination of the witnesses of his opponent. Such is not the purpose for which a witness is cross-examined." *Shobert v. Brookville Bank & Trust Co.*, 200 A. 942, 945 (Pa. 1938)

have made arguments focused more directly on the prudence issue, rather than on the CO2 Stipulation.

UAE respectfully submits that, unless the Commission determines that it would not be helpful, parties should be given a limited opportunity to do further cross-examination and to make oral and/or written arguments to the Commission on the sole remaining issue of relevance - whether QGC has satisfied its burden of proof to establish by substantial evidence that it was prudent in entering into the CO2 contract with its affiliate, and that is expenditures thereunder, up to a maximum of $5 million annually, were prudent.[3]

c. The record should not be re-opened for additional testimony or exhibits.

No party should be permitted to re-open the record or submit additional testimony or exhibits. It would not have been appropriate in 2000 to permit parties to re-open the record upon rejection of the CO2 Stipulation, and it is not appropriate now. All parties had every incentive to, and did, put on their best cases supporting or opposing the prudence of the affiliate contract and expenditures. Parties simply could not reasonably have limited or altered the nature of their testimony or exhibits on the issue of prudence in reliance on the CO2 Stipulation. No party should be given a second opportunity, now with the benefit of the Commission's order and the Supreme Court ruling, to re-present its case. Moreover, new witnesses or exhibits would require further discovery, additional rounds of direct and rebuttal testimony, and new hearings. UAE submits that such a result would be unfair to the parties and would be inconsistent with the Supreme Court's ruling.

[3] Assuming the Allocation Stipulation and Approved Allocation Method remain in effect, UAE would likely waive further cross-examination or closing arguments relating to prudence.

CONCLUSION

UAE submits that, upon rejection of a proffered stipulation, the Commission should properly give the parties to a Commission proceeding a reasonable opportunity to complete those aspects of the proceeding directly impacted by the rejected stipulation. However, no party should be given a second chance to present its case or to meet its burden of proof.

Unless the Commission has already determined that QGC failed to meet its affirmative burden of proof to show by substantial evidence the prudence of its affiliate contract and CO2 processing expenses, UAE submits that it would be appropriate to give the parties a limited opportunity to complete the proceedings as they likely would have been completed had the CO2 Stipulation been rejected. However, it would be inappropriate for any party to be given another opportunity to bolster the record or re-present its case.

DATED this 23rd day of October, 2003.

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CERTIFICATE OF SERVICE

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