Gary G. Sackett (USB No. 2841)
JONES, WALDO, HOLBROOK & MCDONOUGH
170 South Main, Suite 1700
P.O. Box 45444
Salt Lake City, Utah 84145
(801) 534-7336

Jonathan M. Duke (USB No. 6382)
QUESTAR CORPORATION
180 East First South Street
P.O. Box 45433
Salt Lake City, Utah 84145
(801) 324-5938

Attorneys for Questar Gas Company

Submitted: February 3, 2003

BEFORE THE UTAH PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF QUESTAR GAS COMPANY FOR A GENERAL INCREASE IN RATES AND CHARGES	:	**Docket No. 02-057-02** **RESPONSE OF QUESTAR GAS COMPANY TO COMMITTEE OF CONSUMER SERVICES' REQUEST FOR RECONSIDERATION**

Pursuant to Utah Administrative Code § R746-100-11.F and Utah Code Ann. § 63-46b-12(2)(a) (1997), Questar Gas Company (Questar or the Company) respectfully submits its response to the Petition for Review and Reconsideration of the Commission's December 30, 2002, Order (the December 30 Order) submitted by the Committee of Consumer Services (the Committee).[1]

[1]Contrary to various citations in pleadings before this Commission, requests by an aggrieved party for Commission review of its orders are governed by Utah Code Ann. § 63-46b-12, *not* § 63-46b-13. Section 13 applies to "an order [that] is issued for which review by the agency . . . under Section 63-46b-12 is unavailable." But Utah Code Ann. § 63-46b-12 *is* available and directly applicable when a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order

A. Introduction and Summary.

The Committee has sought Commission review of the part of the December 30 Order in which the Commission analyzes the issue of rate of return on common equity and concludes that Questar's rates should be based on an authorized return on equity (ROE) of 11.2%. However, the Committee raises no new factual or legal issues that the Commission hasn't heard, considered in extensive detail and incorporated in its order resolving this vigorously litigated issue.

In that regard, it may be helpful in discussing the Committee's petition first to note that there are two somewhat distinct approaches that a request for review/reconsideration/rehearing can take:

1. *Review for Reversible Error.* A request may be based on a claim that the tribunal has committed reversible error; i.e., that it has in some respect arrived at its conclusions in a way that violates the law—the Administrative Procedures Act (APA) or an applicable statute, for example. However, the Committee filing does not identify any statute, regulation or case law that the Commission's order violates or is inconsistent with. Rather, the Committee's quarrel is with the Commission's interpretation of and conclusion about the facts, but there is no reversible error.

Notwithstanding that the Committee has identified no error that would entitle it to appellate relief under Utah Code Ann. § 63-46b-16 (4), its filing may just be a formal-

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by the agency. Utah Code Ann. § 63-46b-12 provides that a respondent has *15* days from the mailing date of the request for review or the time period allowed by the agency (10 days under Utah Admin. Code § R746-100-11.F), "*whichever is longer*," in which to file its response. Questar Gas is filing within the period specified by Utah Admin. Code § R746-100-11.F to avoid a dispute over the timing.

ism that it believes is necessary to establish its right to seek judicial review of the agency's order.[2]

2. *Reconsideration.* On the other hand, a request may be based solely on the petitioner's belief that the agency has not thoroughly evaluated the factual and policy aspects of the case, even when there is no reversible legal error involved in the order. A party is entitled to try to convince the tribunal that it has placed the wrong emphasis on the various factual matters that have been before it or attempt to have the agency rethink issues or facts that may have been overlooked, underemphasized of otherwise received short shrift. But, the Commission has heard the full extent of the Committee's evidence and argument and has rejected it. The Committee's pleading brings nothing new to the issue; there really is nothing more to consider or reconsider.

The Committee's filing does not distinguish these two concepts, but in either case, Questar believes that the Committee's request should be denied.

B. There Is No Reversible Error on the ROE Issue in the December 30 Order.

The Commission's ultimate decision on this issue rests on its hearing, evaluation and analysis of the facts, expert witnesses' testimony and exhibits and the arguments of counsel. The primary legal threshold the Commission must meet in this case is that its factual conclusion that 11.2% represents Questar Gas Company's cost of equity capital satisfies the "substantial evidence" test. This test has been codified in the Utah APA and articulated countless times by the Utah Supreme Court and the Utah Court of Appeals. The central question, then, is whether there is substantial evidence to support the Commis-

[2]*See, e.g.,* Utah Code Ann. § 54-7-15 (2000).

sion's decision. To the extent that the Commission's final decision is based on the factual matters set before it with extensive detail and exposition by three expert ROE witnesses, there is no legal reason for the Commission to reconsider its decision.[3] When the Commission's final decision is fact-based,

> 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: . . . 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.

Utah Code Ann. § 63-46b-216(4)(g) (1997) (emphasis added).

As the Utah Supreme Court noted in *Beaver County v. WilTel, Inc.*, 2000 UT 29, at ¶ 16, 995 P.2d 602, "It is not our prerogative on review to re-weigh the evidence. Instead we defer to the Commission's findings because, when reasonably conflicting views arise, it is the Commission's province to draw inferences and resolve these conflicts." The substantial-evidence concept is more fully stated in such cases as *First Nat'l Bank of Boston v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990), which articulated the standard: " 'Substantial evidence' is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." The Court elaborated on the principle in the 1994 case, *US West Communications, Inc. v. Public Service Commission*: "The provision that there be substantial

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[3]By noting that there is substantial evidence to support the Commission's 11.2% finding, Questar is not taking the position that it agrees in principle with the outcome. That is, Questar's substantive position remains that the preponderance of the evidence in the case would have supported a Commission finding of an ROE substantially above the level it reached. Questar's position in this responsive pleading, on the other hand, is only that there is substantial evidence under Utah law to sustain the Commission's December 30 finding and conclusion on this issue.

evidence to support a finding does not require or specify a quantity of evidence but requires only 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' . . . . The issue before us, then, is whether, based on the record as a whole, there was evidence before the Commission that reasonably supported its conclusion." 882 P.2d 141 (Utah 1994) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), in turn quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The record before the Commission is replete with evidence that satisfies the requirement for "substantial evidence." The Committee may disagree with it, have a different slant on it, interpret it differently or otherwise quarrel with the outcome, but there is no rational way to argue that the December 30 Order fails the substantial-evidence test.

On a related point, the Committee appears to suggest that the Commission doesn't have the authority to fashion a finding on the evidence before it if it does not match one of the witnesses' point recommendations. This is, of course, not the state of the law. Again, a party—including Questar—may disagree with the Commission's final weighing of the evidence, but on this record, the Commission's result meets the minimum test for being supported by substantial evidence. That test does not require that the Commission select a "winner" from among the discrete recommendations, so long as the conclusion comports with the requirements of the APA and interpretative case law.

C. The Commission Has Addressed the ROE Issue Fully; There Is Nothing to "Reconsider."

The Committee's pleading is styled as a "Petition for Review and Reconsideration." As discussed in Part B above, there is no legal deficiency in the December 30 Order. Accordingly, there is no reason for the Commission to undertake further proceedings to remedy a legal shortcoming in the order. That leaves only the justification for further proceedings to be based on material matters that have not been fully dealt with by the Commission, important considerations that the Commission may have overlooked, arguments that may have been misunderstood or incompletely developed, or equitable considerations that have not been previously developed.

None of these possible reasons for conducting further proceedings exist in this case. The Commission heard and analyzed a complete record. The December 30 Order sets out the Commission's analysis and reasoning in great detail. The Committee's reconsideration request has raised no material fact, argument, assertion or claim that hasn't been addressed and disposed of, either directly or indirectly, by the Commission.

There simply is no legal or equitable reason for the Commission to reconsider the ROE issue in this proceeding.

D. Brief Response to Specific Committee Arguments.

1. *Result Is "Contrary to the Evidence."* The Committee hyperbolically charges the Commission with acting in a "capricious manner" that is "contrary to the evidence." It may be that the Commission's conclusion, after an extensive, 20-page analysis, does not comport with the Committee's view of the world of utility finance, but it is hardly

action that could fairly be characterized as "capricious."[4] As for the result being contrary to the evidence, it may have been contrary to the evidence presented by the Committee's witness (but, as well, contrary to the Company's evidence), but the aggregation of evidence before the Commission quite clearly encompassed its conclusion. The only adjudicatory framework under which the Commission's conclusion was contrary to the evidence would be one in which the adjudicator was bound to select one of the positions set forth by the parties. That, of course, is not the law in Utah and is not the case here.

2. *Commission "Essentially Ignored the* [*Witnesses'*] *DCF."* At page 2 of its pleading, the Committee claims that the "Commission essentially ignored the DCF . . . results of the three expert witnesses." This barely warrants a response. A party may disagree with how the Commission weighed the DCF evidence presented, but the preponderance of the Commission's ROE discussion is dedicated to an analysis of the often contradictory evidence before them concerning the DCF model. The December 30 Order refers to the DCF no less than 40 times in discussing the role of the DCF in its determination that 11.5% represents a base ROE from which to make adjustments for Questar's particular facts. It is an incontinent distortion to claim that the witnesses' DCF presentations were "essentially ignored."

3. *The Commission Exercised Its Judgment.* In a curious argument that has no identifiable legal foundation, the Committee (at page 3, ¶ 4) complains of the Commission's exercise of its judgment. It is not clear what the Committee expected the Commis-

[4]The Committee does not provide any case law to indicate the standards for capricious action that it charges the Commission with.

sion to do with the wide range of evidence on the issue, much of it diametrically opposed or in substantial disagreement. It is not only *permissible* for the Commission to exercise its judgment within the bounds of reasonableness, it has an obligation to do so.[5] Its charge is to determine "just and reasonable rates" under Utah Code Ann. §§ 54-3-1 and 54-4-4, not to be constrained to pick a number recommended by the witness it liked best. To do so requires the Commission to exercise its judgment, and it cannot be a surprise that it concluded that a number that did not coincide with any particular recommendation was appropriate.[6]

Did any of the parties agree with that judgment? Probably not.[7] Did that make it unreasonable or unlawful? Certainly not.[8]

4. *The Parcell Testimony Is"Unrebutted."* The Committee claims at pages 5-6 that certain of Mr. Parcell's testimony was"unrebutted." Unless one counts as "unrebutted" a witness statement for which no other witness said "I don't agree with that statement," this claim is frivolous. The Committee lists several things that Mr. Parcell cited

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[5]The Committee's pejorative claim that the Commission "manufacture[d] an 11.5% cost of equity estimate for the proxy group" leaves one to ponder what—short of selecting one of the witness's point recommendations—the Commission should have done to avoid "manufacturing" a result.

[6]*See generally Mountain States Legal Found. v. Public Serv. Comm'n,* 636 P.2d 1047, 1054 n3 (Utah 1981).

[7]As noted above, Questar quite clearly believes that the Commission's judgment produced a number that was too low, but it has no basis to claim that the Commission had no right to exercise reasoned judgment in arriving at its conclusions.

[8]Similarly, the Committee's claim of "bias" (at page 3, *e.g.*) is merely an alternate way to air a generic complaint about the result. The Committee does not explain what exactly is "biased." Ordinarily, this charge would be applied against some standard; here, it is simply an empty charge. Indeed, the Committee's conclusion is not close to any witness's overall position, making it difficult to see where the bias lay.

in his testimony about the role of earnings per share in the financial world. Did he say or claim these things? Yes. Are they "unrebutted?" No. Professor Williamson provided substantial contrary evidence showing that it is earnings growth that "drives" the DCF, not dividend growth (*e.g.*, Exs. QGC 3.0 and QGC 3.0R). The Commission recognized that dividend-growth data are currently of lesser reliability in the DCF calculations, analyzed the situation accordingly, and chose to rely more heavily on earnings growth.

5. *The Commission Result Is a "Sharp Departure."* At pages 2 and 6 of its pleading, the Committee asserts that the Commission's DCF produced a "sharp shift" and a "sharp (and unsupported) departure" from prior decisions. First, it is hardly a "sharp departure" to arrive at an authorized ROE that is only 20 basis points different from the previously authorized level. Nor is it a "sharp shift" to continue to rely on the same DCF model it has used for many years, but to make a modest change in the relative weighting of earnings and dividend data to reflect the fact that dividend-driven DCF estimates that produce ROEs in the 7% range are not credible.

Second, looking at the details of the Committee's claim of "sharp shift," it is quite clear that there is nothing "sharp" about it. As the December 30 Order notes, the Commission gave 25% weight to dividend growth data (and 75% weight to earnings) when it applied the DCF model to the determination of Questar's ROE in Docket No. 99-057-20. (December 30 Order, at 32.) Even by the Committee's reckoning, the Commission's DCF analysis in this case moved, at most, half-way between 75% and 100%.[9] A move from

[9]The Committee infers an 87½% weighting for earnings data in the DCF analysis in this case—presumably because the Commission's 11.5% benchmark was obtained as the midpoint of the value using 75% earnings data and the value using only earnings data (i.e., 100%). This is, of course, before the Commission's adjustment for various risk factors.

75% weighting to 87½% is hardly a "sharp shift."

Finally, even if this modulation of the DCF inputs were considered to be high on the "sharp scale," it does not follow that the Commission has either erred or crossed the "gradualism" line. The Utah APA directly permits agency action that is contrary to past action if "the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency."[10] Utah Code Ann. § 63-46b-16(4)(h)(iii). Did the Commission do this? Absolutely. The discussion on pages 29-35 of the order gives a complete accounting of how the Commission decided to make this rather modest change to the earnings-data weighting.

6. *Adjusting 11.5% to Reflect Questar's Circumstances.* In an argument analogous to an "apples-to-oranges" exercise, the Committee (at page 9) would have the Commission abandon its benchmark finding of an 11.5% ROE for the proxy group in *this* case (the apples) and apply various risk-adjustment factors to the value for the proxy group in the *last* case (the oranges). This, of course, would lead to a lower authorized ROE, but it is a process that is devoid of logic.

As Questar noted in its post-hearing briefs, the collective evidence in this case stands on its own and is not linked to a past value that was established under different conditions and evidence. The application of risk factors to the 11.5%, rather than to the out-of-date figure from the prior rate case, is not only defensible, it is the only rational

[10]Questar does not necessarily concede that this section of the APA would apply to an agency determination of a component part of an "action." The "action" referred to in the statute is more likely a reference to a specific action that the agency takes, rather than a judgment about contributing factor to the overall action taken (such as what data to use in the DCF).

value to apply them to.[11]

D. Summary.

The upshot is that (a) the Committee has identified no part of the Commission's determination of ROE as an element of Questar's rates that was illegally determined, and (b) there is no part of the Commission's December 30 Order that warrants reconsideration or rehearing or any further proceedings.

WHEREFORE, QUESTAR GAS COMPANY respectfully requests that the Commission dismiss the Committee of Consumer Services' Request for Review and Reconsideration.

Respectfully submitted this third day of February 2003.

QUESTAR GAS COMPANY

Gary G. Sackett
JONES, WALDO, HOLBROOK & MCDONOUGH

Jonathan M. Duke
QUESTAR CORPORATION

Attorneys for Questar Gas Company

[11]Not to go on too much about it, but this expression of support for the Commission's general approach to the problem should not be construed as Questar's full agreement with the Commission's various factual conclusions.

CERTIFICATE OF SERVICE

I certify that I have caused to be delivered by U.S. mail or by hand-delivery a copy of the foregoing RESPONSE OF QUESTAR GAS COMPANY TO THE COMMITTEE OF CONSUMER SERVICES' REQUEST FOR REVIEW AND RECONSIDERATION in Docket No. 02-057-02 to:

Michael Ginsberg, Asst. Attorney General
Division of Public Utilities
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111

Reed T. Warnick, Asst. Attorney General
Committee of Consumer Services
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111

Steven F. Alder, Asst. Attorney General
Utah Energy Office
160 East 300 South, 5th Floor
PO Box 140857
Salt Lake City, UT 84114-0857

Jeff Burks
Utah Energy Office
1594 West North Temple, Ste. 3610
Salt Lake City, UT 84114-6480

Dr. Charles E. Johnson
1338 Foothill Blvd., PMB 134
Salt Lake City, UT 84108

Bruce Plenk
16 East 13th Street
Lawrence, Kansas 66044

Capt. Robert C. Cottrell, Jr.
AFLSA/ULT, Utility Litigation Team
139 Barnes Dr., Ste. 1
Tyndall AFB, FL 32403-5319

William J. Evans
Parsons Behle & Latimer
201 South Main Street, Suite 1800
PO Box 45898
Salt Lake City, UT 84145-0898

Gary A. Dodge
Hatch James & Dodge
10 West Broadway, Suite 400
Salt Lake City, UT 84101

Cheryl Murray
Committee of Consumer Services
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111

Dennis Miller
Division of Public Utilities
400 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111

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