ROBERT J. MOORE (5764)
Assistant Attorney General
STEVEN W. SNARR (3022)
Special Assistant Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0158
rmoore@agutah.gov
stevensnarr@agutah.gov
Attorneys for Utah Office of Consumer Services

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Informational Filing of Dominion Energy Utah Concerning the Transponder Replacement Program to and Request for a Waiver of Applicable Commission Rules	Docket No. 19-057-25 The Office of Consumer Services' Legal Comments Regarding Dominion Energy Utah's Informational Filing and Request for Waiver of Commission Rules

Pursuant to Utah Code § 54-10a-301 and Utah Admin. Code r. 746-1, the Utah Office of Consumer Services ("Office") files this Response to Questar Gas Company d/b/a Dominion Energy Utah's ("Dominion" or "Company") Informational Filing and Request for Waiver of Commission Rules ("Request for Waiver").

BACKGROUND

Between 1999 and 2006, Dominion installed Elster transponders on the Company's meters. Request for Waiver, Exhibit 2 at 5. Sometime in early 2015, Dominion discovered that these transponders were malfunctioning at an exceptionally high rate. *Id.* at 1. An investigation revealed that the batteries in the Elster transponders were failing long before their estimated life,

therefore, while the meters were accurately reading gas usage these readings were not being transmitted to remote receivers. *Id.*

In March of 2105, the Company began a pilot program comparing the Elster transponders to transponders manufactured by Itron. *Id.,* Exhibit 2 at 11. By September of 2015, the pilot program was completed and the Company reached a decision to replace the Elster transponders with Itron transponders and the replacement program began in November of 2015. *Id.* As part of this replacement program, when the Company could not obtain a reading on a meter because of transponder failure, it would employ estimated billing until the transponder could be replaced or the meter could be read manually. *Id.* at 2. After the transponders were replaced and/or the meters read, the customers would receive a bill that included recoupment for under-estimated bills or credit for over-estimated bills. The projected cost of the transponder replacement program is approximately $62 million. *Id.*, Exhibit 2 at 11.

The first time the Company clearly informed the Commission of its decision to replace the Elster transponders and described the replacement program was in a January 8, 2018 technical conference, approximately three years after the problem was discovered and approximately two years after the replacement program was implemented. *Id.* at 2. At the conference the Company discussed the impact the transponder issue was having on its Customer Satisfaction Standard Metric. Specifically, as part of the settlement stipulation leading to the approval of the merger between Questar Gas Company and Dominion Resources Inc., the Company agreed that if its service levels became deficient, it would "file a remediation plan with the Commission explaining how it will improve and restore service to meet the Customer Satisfaction Standards." *Id.*, Exhibit 2 at 2 (Merger Settlement Provision # 47). Because of the

transponder issue, the Company was repeatedly deficient in two metrics: (1) reading each meter monthly and (2) average wait time for customer after menu selection. *Id.*

These deficiencies were reported and the transponder replacement program was identified as a remediation method in the merger Integration Progress Reports in Dockets Nos. 17-057-05, 18-057-09 and 19-057-17. In all these reports the Company represented that the transponder replacement program would be complete in 2019. *See e.g., Dominion Energy Utah's Quarterly Integration Progress Reports 2019,* Docket 19-057-17, Dominion Energy Utah's 1st Quarter 2019 Progress Report, Exhibit 47.[1]

In 2019, the Elster transponders began to fail at an accelerated rate leading to a marked increase of customer complaints and instances were customer bills were being estimated for a period of over six months. Request for Waiver at 2. This fact led to increasing regulatory concern.

In its September 17, 2019 Comments in Dominion's IRP docket, 19-057-01, the Office observed that "in some cases bills have been estimated for many months and have resulted in large true-up bills once that transponder was installed. . . . [W]ith these outcomes, [Dominion] may have violated Commission rules and/or its own tariff." September 17, 2019 IRP Comments, Docket 19-057-01. Specifically, the Office cited to Utah Admin. Code r. 746-200-4 B. 1., 746-320-8 A. 1., C, and Dominion's Tariff § 8.02. In addition, in his testimony in Dominion's general rate case, docket 19-057-02, Eric Orton of the Utah Division of Public Utilities ("Division") asserted that the "Company has not shown sufficient urgency in meeting [its] commitments" to resolve its deficiencies in its customer satisfaction standards metric and

[1] In Dominion's Request for Waiver, at pg. 2, the Company asserts that these reports listed the completing date of the transponder replacement program as 2020. This is a mistake. Exhibit 47 to these reports clearly states that the program is to be complete in 2019. *See, e.g., Dominion Energy Utah's Quarterly Integration Progress Reports 2019,* Docket 19-057-17, Dominion Energy Utah's 1st Quarter 2019 Progress Report, Exhibit 47.

complete the transponder replacement program. He went on to testify that the Division recommends that if the transponder replacement program is not finished by the second quarter of 2020, penalties should be imposed. Docket 19-057-02, DPU Exhibit 2.0, Direct Testimony Eric Orton, at 19-20.

On October 1, 2019, the Company filed its Request for Waiver, asserting: "Though the Company believes it has complied with [Utah Admin. Code r. 746-200-4 B. 1., 746-320-8 A. 1., C, and Tariff § 8.02] to the extent that the Commission believes it appropriate, the Company seeks waiver of those requirements for the remaining duration of the transponder replacement program." Request for Waiver at 3. The Company also proposed to make quarterly reports on the status of the meter reads and stated that the transponder replacement program would be complete, not in 2019, but in 2020. *Id.* at 2-5. On October 22, 2019, Dominion conducted an informal informational meeting with the Office and the Division. During this meeting, Dominion represented that it has devoted more resources to replacing transponders for customers whose bills have been estimated for over six months. The Company also stated that it had a goal of assuring no customer receives estimated billing for a period longer than six months during the remainder of the responder replacement program, except in cases were meters are inaccessible. [2] The Company again represented that the transponder replacement program would be completed in 2020.

REQUEST FOR WAIVER

The Office supports a waiver of rules 746-200-4 B. 1., 746-320-8 A. 1., C, and Dominion's Tariff § 8.02 through the remainder of the transponder program, although with conditions.

[2] Because this meeting was informal, the Office does not have cites for this information communicated at the meeting. However, the Office includes this information because the Office believes it to be undisputed.

While not cited by the Company, the starting point in determining whether the Commission should grant a waiver of Commission rules is Utah Admin. Code r. 746-1-100, which provides a party can move the Commission to deviate from a rule and the "party making the motion to deviate has the burden to demonstrate that the rule imposes a hardship that outweighs the benefit(s) of the rule."

In this case, an analysis of rule 746-1-109 requires a determination of whether a waiver of these rules is needed. This is because Dominion's Request for Waiver is ambiguous on this point. Dominion asserts that "the Company believes that it has complied with [Rules 746-200-4 B. 1.; 746-320-8 A. 1., C, and Dominion's Tariff § 8.02], . . ." and "the Company believes it has acted in compliance with the Commission Rules and its Tariff . . . ." Request for Waiver at 3 and 5. Nevertheless, in other parts of its pleading, Dominion seeming admits that it has violated and will continue to violate these rules, particularly with respect to rule 746-200-4 B. 1.

Rule 746-200-4 B. 1. is straightforward and provides: "A gas . . . public utility using estimated billing procedure shall try to make an actual meter reading at least once in a two-month period and give a bill for the appropriate charge determined from that reading." Unlike Rule 746-320-8 A. 1., C, and Dominion's Tariff § 8.02, Rule 746-200-4 B. 1. does not contain a provision excusing compliance in cases where the meter in inaccessible. Rather, rule 746-200-4 B. 2. sets out procedures and requirements a utility must complete in cases where the meter is inaccessible and provides if "access has not been achieved, the utility will notify the customer that he must make arrangement to have the meter read as a condition of continuing service."

Finally, rule 746-200-4 B. 3. provides that "after compliance with Subsection R746-200-4(B)(2), a public utility cannot make an actual meter reading it may give an estimated bill for the current billing cycle in accordance with Subsection R746-200-7(C)(1)(f), Reasons for

Termination." Accordingly, rather than excuse compliance with the rule in cases of inaccessible meters, rule 746-200-4 B. requires a utility to initiate proceedings for terminating service in cases were the meter is inaccessible.

In its Request for Waiver, Dominion seemingly admits that it has been violating this rule and will continue to violate this rule during the remainder to the transponder replacement program. Specifically, the Company states: "Though the Company has tried to make actual reads incompliance with this requirement, the malfunctioning transponders has resulted in an unusually high volume of meters that must be read manually, ***and the Company has been unable to obtain actual reads for all meters in a two-month period.*** " Request for Waiver at 4 (emphasis added). In addition, the Company's admission that some customers have received estimated bills for periods in excess of a six-month also establishes that Dominion has not been complying with rule 746-200-4 B. 1. requiring an attempt to make a meter reading every two months. *See* Request for Waiver at 2.

Moreover, the Company's plan going forward, to ensure that estimated bills do not exceed a six-months period unless the meter is inaccessible, will not achieve compliance with rule 746-200-4 B. 1. Rule 746-200-4 B. 1. requires meters to be read over a two-month period. Moreover, in the case of inaccessible meters, the Company is not excused from the requirement of the rule unless it institutes termination procedures pursuant rules 746-200-4 B. 2. and 746-200-4 B. 3. The Company's plan going forward does not comply with these two provisions and accordingly does not comply with rule 746-200-4 B. A waiver of this rule is therefore needed for the Company to proceed with its plan.

Whether a waiver is need for rule 746-320-8 A. 1., C is less clear, due to the rule's complexity. However, given the fact that in some cases customers have paid estimated bills for a

significant period and received large true-up bills, it is very likely that the Company has and will violate this rule during the transponder replacement program. Rule 746-320-8 A. 2. provides: "A 'catch-up bill' is a bill on an actual reading provided after one or more bills based on estimated or customer readings. A catch-up bill which exceeds by 50 percent or more bill that would have been provided under a utility's standard estimation program is presumed to be a backbill." Rule 746-320-8 C. provides: "A utility shall not provide a backbill more than three months after the utility actually becomes aware of the circumstances . . . that caused the underbilling . . . . This limitation does not apply to . . . denial of access to meter situations." Finally, rule 746-320-8 A. 2. B., requires the utility to notify the customer of the backbill and that "notification shall be followed by, or include, a written explanation of the reason for the backbill that shall be received by the customers before the due date and be sufficiently detailed to apprise the customer of the circumstances, error, or condition that caused the underbilling . . . ."

Dominion asserts that it does not know if it has complied with this rule because "it has not been able to determine if any of [its] customers fall under the 'catch up bill" definition . . . ." Request for Waiver at 4. However, given the fact that many customers had received estimated billing for six month or longer, it is likely that the true-up bill for underbilling over such an extended period could result in a true-up bill, that "exceeds by 50 percent or more bill that would have been provided under a utility's standard estimation program . . . ." Rule 746-320-8 C. In such cases, because Dominion recouped under payment for a backbill longer than the three months allowed, the Company would have violated rule 746-320-8. In addition, it appears that Dominion did not provide written notice to the customers of the reasons of the backbills, which also constitutes a violation of rule 746-320-8 A. 2. B.

The Company's goal of limiting estimated bills to a six-month period will likely not change this result because an estimated bill of six-month would also likely result in true-up bills that equal or exceed 50% of a standard estimated bill. Although under rule 746-320-8 C, the Company would be excused from compliance with this rule in cases where the meter is inaccessible. Nevertheless, because it is likely that the Dominion will violate this rule under its plans going forward, a waiver of this rule is also needed.

The Company's actions regarding its tariff § 8.02 stand on somewhat a different footing. Section 8.02 of Dominion's tariff provides that, except in cases where the meter is inaccessible, the Company's right to make a correction to an estimated bill in cases of transponder related billing errors is limited to a six-month period. Again, to the extent that the Company admits that they have issued true-up bills for estimating bills that exceeded this six-month period, the Company admits to violating its tariff. *See* Request for Waiver at 2.

However, it is less clear that Dominion will continue to violate its tariff under the Company's plans going forward. If Dominion can maintain its goal of obtaining a meter reading for every customer whose bill has been estimated for a six-month period, with the exception for inaccessible meters, the tariff would not be violated and a waiver of this tariff provision would not be needed. If, however, the Company fails to meet its goal, a waiver would be required. Moreover, rule 746-1-100, allowing for deviations from a rule, does not apply to deviations form a tariff provision, so the analysis of analysis under rule 746-1-100 does not necessarily apply to the waiver of a tariff provision.

In any event, as discussed above, a waiver of rules 746-200-4 B. 1. and 746-320-8 A. 1., C. is needed and the question of whether a waiver should be granted depends on an analysis under rule 746-1-100, which in turn depends on whether Dominion has carried its burden of

demonstrating "that the rule imposes a hardship that outweighs the benefit(s) of the rule." Rule 746-1-100. Because Dominion does not cite to rule 746-1-100, it does not expressly make this argument. However, Dominion does state the "Company could devote greater resources to obtaining these manual reads, but believes it is better to dedicate those resources to replacing transponders than to use those resources to manually read meters." Request for Waiver at 4.

The Office believes that the rationale in this statement is sufficient justification for the waiver of rules 746-200-4 B. 1. and 746-320-8 A. 1. C., pursuant to rule 746-1-100. Rules 746-200-4 B. 1. and 746-320-8 A. 1., C, ensure that consumers do not receive estimated bills, and their corresponding true-ups, over an extended period of time. However, the underlying cause of the extensive estimated billing is Dominion's failure to complete its transponder replacement program. Therefore, if a waiver of these rules can result in the conclusion of the transponder replacement sooner than if the rules were enforced, the waiver of the rules should result in greater benefits than the enforcement of the rule. Rule 746-1-100. This reasoning is also sufficient to justify a waiver of tariff § 8.02, to the extent a waiver is necessary.

However, it is also true that Dominion has been extremely cavalier in complying with the Commission rules, as demonstrated by the Company's failure to bring this issue to the Commission's attention for three years after it began utilizing an extensive and problematic estimated billing procedure. Given these facts, the waiver should be conditioned on the completion of the transponder program in a reasonable time. Accordingly, the Office proposes that if the transponder program is not completed by September 1, 2020, the waiver should be terminated and penalties should be imposed under Utah Code § 54-7-25, if the provisions of rules 746-200-4 B. 1. and 746-320-8 A. 1., C are thereafter violated. Finally, the Office supports Dominion's proposal to provide quarterly reports on the progress of the transponder replacement

program including the status of its meter reading and request that the Commission include this reporting requirement in its order.

PENALTIES FOR PAST VIOLATIONS

Granting the Company's request for a waiver of rule 746-200-4 B. 1. and 746-320-8 A. 1., C for the remainder of the transponder replacement program does not resolve the issue of Dominion's past violations of these rules, particularly in regard to penalties. Section 54-7-25 provides: "Any public utility that violate of fails to comply with . . . any rule . . . issued under this title . . . is subject to a penalty on not less than $500 or more than $2,000 for each offense." In interpreting this provision, the Utah Supreme Court has held that "section 54-7-25 of the Utah Code clearly states that a fine is mandatory if such violation occur." *Beehive Telephone Co. v. Pub. Serv. Comm'n of Utah*, 2004 UT 18, ¶ 33, 89 P.3d 131. The Commission does have discretion, however, in determining what constitutes an independent violation under section 54-7-25 and in calculating the penalty. *See generally*, Id. at *¶* 10.

As discussed above, it is clear that Dominion has violated rule 746-200-4 B. 1. and most likely has violated rule 746-320-8 A. 1., C, particularly in 2019 when the transponders began to fail at a high rate. Accordingly, it is mandatory that a penalty be imposed. However, on the basis of the instant record, it is not possible to determine the extent of the violations nor to calculate the amount of the penalty. In fact, the establishment of a violation under 54-7-25, must be proven by clear and convincing evidence and "'a high degree of caution should be observed in determining whether there has been a violation."' *Beehive Telephone Co.*, 2004 UT 18, ¶ 43 (quoting *Wycoff Co. v. Pub. Serv. Comm'n,* 369 P.2d 285, 285-86 (Utah 1962)).

Given this high standard, the paucity of the present record and the fact that Dominion has tacitly, if not expressly, admitted that violations have occurred, it would be necessary to

undertake additional discovery and file testimony into the violations in order to establish the appropriate penalty.

The Office also notes that even if a penalty under section 54-7-25 were not mandatory, under the facts of this docket some form of penalty would be warranted. Throughout the course of the transponder replacement program, Dominion has acted in complete disregard of the rules governing estimated billing even though estimated billing is an essential component of the program. In fact, it appears that Dominion did not even move for a waiver of these rules until alerted to the necessity by the Office's September 17, 2019 Comments. Dominion cannot expect that it can blithely disregard rules governing a $62 million multiyear program without consequences. Accordingly, the Office requests that the Commission consider additional procedures to determine an appropriate penalty.

Finally, any past violation of Dominion's tariff stands on a different footing from the violation of the estimated billing rules because section 54-7-25 does not mandate penalties for violation of a utility's tariff. However, Utah Code § 54-7-20 provides: "When a complaint has been made . . . concerning any . . . charge for any . . . service performed by any public utility, and the commission has found . . . that the public utility has charged an amount . . . in excess of the schedules, rates and tariffs . . . the commission may order that the public utility make due reparation . . . ." If any of the customers who filed complaints with the Division have received estimated billing for a period longer than six months, this would amount to a charge for services performed by a utility in excess of the amounts provided for in the Company's tariff. Therefore, these customers would have a claim for reparations under section 54-7-20. Accordingly, the future proceedings in this docket should seek to identify these customers and Dominion should make the appropriate refund of these excess charges made in violation of its tariff § 8.02.

CONCLUSION

Dominion has and will continue to violate rule 746-200-4 B.1. and is likely to have violated and to continue to violate rule 746- 320-8 A. 1., C. A waiver of these rules is therefore needed while Dominion completes it transponder replacement program. Moreover, the Company is liable for mandatory penalties for its past violations of these rules under section 54-7-25. Because the record is currently insufficient to identify all violations and determine the amount of the penalties, additional proceedings should be undertaken in this docket to identify the violations and calculate the penalties. In addition, Dominion is also liable to pay reparations for past violations of its tariff § 8.02 to complaining customers who received estimated billing for a period in excess of six months in accordance with section 54-7-20. Dominion cannot ignore the rules and tariff provisions governing its transponder replacement program without suffering consequences.

Respectfully submitted, October 31, 2019.

__*/s/ Robert J. Moore*__________
Robert J. Moore
Attorney for the Office of Consumers Services