C. Scott Brown (4802)
Colleen Larkin Ball (5253)
Questar Gas Company
180 East First South
P.O. Box 45360
Salt Lake City, Utah 84145
(801) 324-5172
(801) 324-3131 (fax)
scott.brown@questar.com
colleen.bell@questar.com

Attorneys for Questar Gas Company

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of Excess PacifiCorp Income Tax Cost Monies Collected in Rates	)	DOCKET NO. 05-035-98
	)	**REPLY OF QUESTAR GAS TO BRIEF OF UIEC AND RESPONSE OF COMMITTEE**

Questar Gas Company ("Questar Gas" or the "Company") hereby replies to the "Petition of the Utah Industrial Energy Consumers to File a Brief in Opposition to PacifiCorp's Motion to Dismiss" ("Brief") filed by Fairchild Semiconductor, Holcim, Inc., Kennecott Utah Copper Corp., Kimberly-Clark Corp., Malt-O-Meal, Praxair, Inc., and Western Zirconium ("UIEC") on November 18, 2005, and the "Utah Committee of Consumer Services Response to Motion to Dismiss" ("Response") filed by the Utah Committee of Consumer Services ("Committee") on November 21, 2005, in this matter.

I. INTRODUCTION

This matter was initiated by a Request for Agency Action ("Request") filed by the Committee on October 6, 2005. The Request seeks a refund from or other relief against PacifiCorp resulting from the findings of an audit of PacifiCorp, its parent PacifiCorp Holdings,

Inc. (“PHI”) and its parent ScottishPower plc (“ScottishPower”) and the ScottishPower holding company system by the United States Securities and Exchange Commission (“SEC”) under the Public Utility Holding Act of 1935, as amended (“PUHCA”). PacifiCorp filed its Motion to Dismiss and Answer (“Motion”) on November 4, 2005, seeking dismissal of the Request on various grounds, including that the Request was barred (1) by the rule against retroactive ratemaking and (2) because the Committee had stipulated that the rates during the period in question were just, reasonable and in the public interest.

On November 18, 2005, UIEC filed its Brief in response to the Motion. Among other things, the Brief argued that the Motion should be denied because (1) PacifiCorp was required to disclose information about the SEC audit and its results in its rate case filing to avoid application of the utility misconduct exception to the rule against retroactive ratemaking and (2) the Committee and other parties are not bound by the stipulations they entered into in PacifiCorp’s rate cases because the stipulations allow the parties to assert different positions in future cases.

On November 21, 2005, the Committee filed its Response to the Motion. Among other things, the Response argued that the Motion should be denied because (1) PacifiCorp’s disclosures regarding the SEC PUHCA audit may not have been sufficient to allow the Committee to understand the meaning and import of the consolidated tax issue and (2) the Committee is not bound by its stipulations in rate cases because the stipulations did not explicitly address the consolidated tax question.

On November 21, 2005, Questar Gas filed its Petition to Intervene on the ground that it has a direct and substantial interest in this proceeding because “the outcome of this proceeding may potentially have a substantial impact on the regulatory and ratemaking process of Questar

Gas." On November 23, 2005, Questar Gas filed its Motion for Extension of Time to file a pleading until December 6, 2005.

In accordance with its intervention, Questar Gas responds to certain arguments in the Brief and Response because such arguments are directly contrary to established precedent and practice and, if accepted by the Commission, would detrimentally impact the ratemaking process. In addressing these points, Questar Gas does not concede that other arguments in the Brief or Response are correct nor does it waive its right to contest such arguments in the future in this or other proceedings.

II. ARGUMENT

A. The Brief and Response Have Misconstrued the Utility Misconduct Exception to the Rule Against Retroactive Ratemaking in a Manner that Would Render the Rule Meaningless.

The Utah Supreme Court has recognized that the rule against retroactive ratemaking is consistent with statutes requiring ratemaking to be prospective in nature and that it benefits both utilities and their customers. *See Stewart v. Public Service Comm'n*, 885 P.2d 759, 778 (Utah 1994); *Utah Dept. of Bus. Reg. v. Public Service Comm'n*, 720 P.2d 420, 423 (Utah 1986). The court has also recognized two specific exceptions to the rule—utility misconduct and unforeseen and extraordinary events. *See MCI Telecommunications Corp. v. Public Service Comm'n*, 840 P.2d 765, 771-72, 775 (Utah 1992). The exceptions recognize two specific circumstances in which it may be appropriate to adjust rates retroactively. With respect to the utility misconduct exception, the court held: "A utility that misleads or fails to disclose information pertinent to whether a rate-making proceeding should be initiated or to the proper resolution of such a proceeding cannot invoke the rule against retroactive rate making to avoid refunding rates improperly collected." *Id.* at 775. The court further stated: "The rule against retroactive rate

making was not intended to permit a utility to subvert the integrity of rate-making proceedings." *Id.* With respect to the unforeseen and extraordinary event exception, the court held that the event must be both unforeseen and extraordinary, that it "must have an extraordinary effect on the utility's earnings," *id.* at 771, and that the "increase or decrease will necessarily be outside the normal range of variance that occurs in projecting future expenses." *Id.* at 771-72.

An issue discussed in the Motion, Brief and Response in connection with the utility misconduct exception is notice of the SEC audit and its results to the Commission and the parties. With respect to that issue, UIEC faults PacifiCorp for not disclosing the audit in its filing in a rate case, *see e.g.* Brief at 13, and the Committee faults PacifiCorp because the Committee did not appreciate or fully understand the impact of the audit at the time the disclosures were made. Response at 14-16. If accepted by the Commission, these contentions would so broaden the utility misconduct exception as to render the rule against retroactive ratemaking meaningless.

A utility cannot be expected to anticipate every issue any party, including parties that may or may not even intervene in a rate case, may wish to raise in the course of the case. Rather, the utility is obligated to provide full and accurate disclosure of its financial statements for the test period, including adjustments to those statements resulting from applicable Commission decisions in prior cases, to provide data and analysis supporting any adjustments it is proposing and to clearly highlight any adjustments that would depart from Commission precedent. A utility is also required to respond accurately to requests for information that relate to adjustments proposed by other parties in discovery, subject, of course, to reasonable discovery objections. A requirement that it additionally provide in its filing information that might have affected a party's participation or position in a case would allow a challenge to past rates at any time simply based

upon a claim that information that may have affected a party's participation or position was not supplied in the filing.

The Committee's suggestion that disclosure alone is not enough, but that the party receiving the disclosure must fully comprehend and appreciate it is equally troublesome. A utility has no way of knowing the level of comprehension or competence of another party or the level of attention or diligence another party may devote to information disclosed. There is no suggestion in *MCI* that the utility has a duty to inquire into such matters. Rather, *MCI* plainly states that the utility's obligation is to disclose and not to mislead or subvert; it does not suggest that the utility should assume responsibility for the diligence and competence of other parties. Again, if the Committee's standard were accepted by the Commission, the rule against retroactive ratemaking would be meaningless. All a party would have to do to challenge rates set in a prior order is claim that it did not fully appreciate or understand the information disclosed to it. Surely, there is some responsibility on a party to at least ask questions if it does not understand the significance of information disclosed to it. Incompetence or lack of diligence cannot be a basis for setting aside a rate otherwise determined to be just and reasonable and is certainly not a basis for claiming utility misconduct in the ratemaking process.

B. The Brief and Response Improperly Undermine the Value of Stipulated Settlements of Rate Cases.

The law favors settlements in regulatory proceedings before the Commission, Utah Code Ann. § 54-7-1(1), *see also Utah Dept. of Admin. Services v. Public Service Comm'n*, 658 P.2d 601, 613-14 (Utah 1983), including rate cases. Utah Code Ann. § 54-7-1(4). This policy is a sound one that enhances the regulatory process through efficiency by allowing the Commission and parties to focus their resources on issues that cannot be otherwise resolved. *See* Utah Code

Ann. § 54-7-1(b)-(c). The policy should not be undermined through improper withdrawal from or repudiation of stipulations.

In this case, PacifiCorp has stated in its Motion that the Committee was a party to stipulations in each rate case during the period in question that were adopted by the Commission in resolution of all relevant revenue requirement issues. Motion at 39-40. The Brief and Response do not dispute this point. Rather, UIEC argues that the Committee and other parties have not waived their right to raise the issue of the tax refund in subsequent proceedings under the terms of the stipulation because the stipulation was a "black box." Brief at 11. The Committee argues that it is not bound by the stipulations because the issue of income tax savings at the consolidated level was never addressed in the rate cases. Response at 13-14.

The language in the stipulations in these cases cited by UIEC is similar to language in stipulations in Questar Gas's rate cases and other regulatory proceedings. It is common in such stipulations for parties to acknowledge that they are compromising their positions and entering into a settlement without waiving their rights to assert positions in future proceedings that might be deemed to be inconsistent with or contrary to positions accepted for purposes of the stipulation. Such language does not allow a party to repudiate the terms and conditions of a stipulation and to argue that rates stipulated to be just and reasonable are not just and reasonable. Rather, the language permits the party in a future rate case to argue for a position different than might have been used in resolving the prior stipulated case. If these provisions are interpreted as urged by UIEC and the Committee, stipulations are of no value.

While Questar Gas does not claim to know each and every issue discussed or litigated in the PacifiCorp rate cases at issue, it appears uncontested that the stipulations covered applicable revenue requirement issues. If the Committee stipulated that rates set in the applicable rate cases

were just and reasonable, it should not be allowed to challenge those same rates retroactively based on a claim that the terms of the stipulation allow it to assert contrary positions in future cases or bind it only to adjustments specifically mentioned in the stipulation. If the Commission allows such arguments, it will undermine the usefulness and value of settlements in proceedings before the Commission contrary to law and sound policy.

III. CONCLUSION

For the reasons set forth above, the Commission should reject the Brief's and Response's arguments that the utility's duty to disclose information relevant to the ratemaking process requires the utility to disclose information potentially of interest to any party at the time of filing its rate change request and to assure that the recipient of the disclosure fully comprehends and appreciates it. Otherwise the rule against retroactive ratemaking will be meaningless. The Commission should also reject the arguments of UIEC and the Committee that would undermine the value of settlements in regulatory proceedings.

RESPECTFULLY SUBMITTED: December 6, 2005.

_____

C. Scott Brown
Colleen Larkin Ball
Questar Regulated Services

Attorneys for Questar Gas Company

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY OF QUESTAR GAS TO BRIEF OF UIEC AND RESPONSE OF COMMITTEE** was served upon the following by electronic and first-class mail, on December 6, 2005:

Reed Warnick
Assistant Attorney General
Paul Proctor
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
rwarnick@utah.gov
pproctor@utah.gov

Michael Ginsberg
Assistant Attorney General
Patricia E. Schmid
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84111
mginsberg@utah.gov
pschmid@utah.gov

Edward A. Hunter
Jennifer H. Martin
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
eahunter@stoel.com
jhmartin@stoel.com

F. Robert Reeder
Vicki M. Baldwin
Parsons Behle & Latimer
201 South Main Street, Suite 1800
PO Box 45898
Salt Lake City, UT 84145-0898
BobReeder@parsonsbehle.com
VBaldwin@parsonsbehle.com