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Utility Shareholder Association of Utah et al v. Public Service Commission of Utah et al : Brief

Utah Supreme Court

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IN THE SUPREME COURT OF

THE STATE OF UTAH

UTILITY SHAREHOLDER ASSOCIA-
TION OF UTAH, et al.,

Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION
OF UTAH, et al.,

Defendants,

UTAH DEPARTMENT OF BUSINESS
REGULATION, et al.,

Intervenors.

Case No. 18286

UTAH STATE COALITION OF
SENIOR CITIZENS,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION
OF UTAH, et al.,

Defendants,

UTAH DEPARTMENT OF BUSINESS
REGULATION, et al.,

Intervenors.

Case No. 18303

UTAH DEPARTMENT OF
ADMINISTRATIVE SERVICES,

Plaintiff,

vs.

PUBLIC SERVICE COMMISSION
OF UTAH, et al.,

Defendants,

FILED

MAY 17 1982

Clerk, Supreme Court, Utah

Case No. 18304

UTAH DEPARTMENT OF BUSINESS :
REGULATION, et al., :
 :
Intervenors. :

BRIEF OF UTILITY SHAREHOLDER ASSOCIATION OF UTAH,
ALEX OBLAD AND HAROLD BURTON

ON PETITION FOR WRIT OF CERTIORARI TO
THE PUBLIC SERVICE COMMISSION OF UTAH

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This Brief is submitted by the Utah Utility Shareholder Association of Utah (the "Association"), and Alex Oblad and Harold Burton, shareholders of Mountain Fuel Supply Company (the "Shareholders"), collectively referred to herein as the "Plaintiffs", in support of their Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case, commonly known as the Wexpro litigation, is on certiorari appeal herein to this Court from an order of the Public Service Commission of Utah (the "Commission") for the second time. In the first appeal, the Court reversed an earlier order of the Commission and remanded the case for further hearing before that agency in January, 1980.¹

After several pre-trial hearings, the matter was set for further proceedings in August of 1981. Extensive negotiations were undertaken during the Summer of 1981 between respective legal counsel and officials of Mountain Fuel Supply Company ("MFS" or the "Company") and Wexpro Company ("Wexpro"), on the one hand, and the Utah Division of Public Utilities (the "Division") and the Utah Committee of Consumer Services (the

¹ In Committee of Consumer Services v. Public Service Comm'n, 595 P.2d 871 (Utah 1979), cert. denied, 444 U.S. 1014 (the "Wexpro Decision"), this court reversed and remanded the Commission's order dated April 11, 1978, in Case No. 76-057-14.

"Committee"), on the other hand (collectively referred to as the "Parties"), in an effort to reach an accommodated settlement of the complex and manifold case. Other parties, including the Utah Coalition of Senior Citizens (the "Coalition") were invited to attend the negotiating sessions.

On August 31, 1981, the Parties filed a joint motion before the Commission wherein they requested that the Commission adopt and approve a Stipulation and Agreement (the "Agreement")² resolving issues on remand from the Wexpro Decision and certain other issues which were developed and reserved in Commission orders involving general rate increases in Case Nos. 77-057-03, 79-057-03, 80-057-01, 81-057-01 and exploration program matters in Case No. 81-057-04. (Stip. at § 2.)³

² The staff of the Public Service Commission of Wyoming is a party to the Agreement. On October 28, 1981, the Public Service Commission of Wyoming, after hearing, entered an order approving the Agreement as being in the public interest. No party has appealed that approval.

³ The following abbreviations are used for the purpose of citation in this Brief: (1) "Agr." refers to the Agreement and "Stip." refers to the Stipulation; reference is made to Sections therein; (2) "Tr." refers to the transcript of the evidentiary hearings before the Commission commencing October 14, 1981; (3) "Ord." refers to the Report and Order on Stipulation and Agreement issued by the Commission on December 31, 1981; (4) "Br." refers to the Brief submitted on November 20, 1981 by the Association to the Commission; (6) "Appl." refers to the Application for Rehearing submitted by the Plaintiffs to the Commission on January 18, 1982.

The Commission scheduled the motion for hearing in October of 1981, and took better than eight days of testimony and argument in connection with the terms and provisions of the proposed Agreement. After extensive briefing and further argument by all parties wishing to appear before the Commission, an order was entered on December 31, 1981 (the "Order"), approving the Agreement under proscribed conditions. Petitions for Rehearing filed by the Association, Coalition, and a new party, the Utah Department of Administrative Services, were denied by the Commission on February 9, 1982.

This Petition for Certiorari is taken from the Order.

1. Background Information Relating to the
Company's Exploration Program

Prior to the Company's formation in 1935, certain of the Company's predecessor organizations operated unregulated exploration and development programs under which they acquired unexplored leasehold acreage, maintained oil and gas exploration activities and developed significant oil and gas reserves without participation of any utility company funds. (Tr. at 1373, 1384.) After its formation in 1935, the Company continued the program established by its predecessors. (Tr. at 1372.) The method used in accounting for this program on the Company's books, including the classification of assets developed under it as utility or non-utility properties, was

based upon the "Uniform System of Accounts" promulgated by the Federal Power Commission and adopted by the Commission and was approved, and to a significant extent mandated, by orders of the Commission over a period of 40 years. (Tr. at 1374-78, 1384-86.) Under the accounting system, unsuccessful exploration costs, including dry hole costs, were expensed in the year incurred. The costs related to successful wells were capitalized into utility accounts if the well in question were classified as a gas well and into non-utility accounts if classified as an oil well. This method of classification was specifically approved by orders of the Commission. Id.

Since 1947, the Commission determined that a part of the unsuccessful exploration expenses of the program should be treated as normal utility operating expenses and included some specified amount of the expenses in its ratemaking equation. (Tr. at 1377-80.) The extent to which the specified portion of exploration expenses was recognized as one of the ordinary costs of doing business and was recovered through rates has varied from time to time. The portion of those business expenses not included or not recovered in rates has been paid directly from the non-utility account and, since its organization in 1976, by Wexpro. Since 1975, these unsuccessful exploration expenses have been split on a 50/50 basis between the utility and the non-utility or Wexpro.

The capital costs or investment in successful wells were never expensed. (Tr. at 1378-79.) Rather, the portion of capital costs associated with investment of shareholder funds in unexplored leases and successful gas wells was included, with other assets, in utility rate base upon which the utility business of the Company had an opportunity to earn a return. (Tr. at 1376, 1379, 1381.) Shareholders of MFS invested their funds in the Company and based their investment decisions, in part, in reliance on the accounting practices approved by the Commission in numerous orders during the 40 year period relating to the conduct of the exploration program.

The inclusion of unsuccessful drilling costs as an expense in setting rates and the existence of non-utility oil properties resulted in contention for many years. (Tr. at 1377.) As early as 1953, consumer groups sought to have the oil properties rolled into utility accounts and to have oil revenues used to reduce gas rates. (Tr. at 1378.) Prior to 1974, the Commission denied this request each time it was made, and final orders were entered determining that the non-utility oil properties should not and could not be considered as utility plant in setting natural gas rates. (Tr. at 1378-80.)

On January 14, 1974, in Case No. 6668, the Commission entered an order which rolled oil revenues, expenses and investments into the utility accounts. News of this order played havoc with trading of MFS stock and trading of the stock

was suspended by the New York Stock Exchange. Before the Commission issued such order, the Company's stock was trading at \$84 per share. After the announcement of the January 14, 1974 order, and during the trading suspension, from 300,000 to 500,000 shares were offered for sale with only a single offer to buy at \$35 per share. (Case No. 6668.) After rehearing, the Commission vacated its order on January 21, 1974, and returned to the long established exploration and development program that was previously approved with the separation of utility and non-utility accounts. Trading in the Company's common stock resumed when the Commission vacated its January 14, 1974 order, but at a lower price. Nevertheless, the pressure from consumer groups to have oil revenues used to reduce gas rates continued to be a source of friction. Because both the regulated utility business and the unregulated oil business of MFS are capital intensive, requiring large amounts of investor funds on a regular basis, and because of the bitter experience suffered as a result of the order of the Commission and the continuing consumer group pressures, serious concern about the ability to raise capital at reasonable rates faced the Company.

MFS recognized many years ago that mixing utility and non-utility activities in exploration might create problems. In 1950 it filed petitions with the Utah and Wyoming Commissions to separate the exploration program from the utility distribution operations. Wyoming approved the petition

but Utah did not. (Tr. at 1376.) The Utah Commission found that the problems of a joint program were being appropriately handled in 1950 and reaffirmed this ruling in 1953, 1957, 1960 (requiring some adjustments), 1968 and 1972 (requiring further adjustments).

However, the 1974 Commission order created new concerns for MFS and its shareholders despite the fact that it was vacated. In 1976, a group of shareholders sought to take control of the Company in a "proxy fight" based upon the potential for problems which existed because MFS had not completely separated unregulated oil properties and activities from utility programs. (Tr. 1388-89.) In an effort to safeguard shareholder investments, to attract additional investment capital, to protect non-utility oil properties from utility regulation, to allow expanded exploration activities in an unregulated environment and to enhance system gas supplies, Wexpro was created as a wholly-owned MFS subsidiary in late 1976. The oil properties then in the non-utility account were transferred to Wexpro under the Agreement of Purchase and Sale, and the Joint Exploration Agreement ("JEA") was established to govern drilling activities on properties of joint interest between the utility and Wexpro.

2. History of the Wexpro Litigation

The Wexpro case was commenced in December of 1976, when the Division, and later the Committee, challenged the

Agreement of Purchase and Sale and the JEA. The Commission entered an order on July 20, 1977, holding that it had no jurisdiction over the transfer. Thereafter, the Commission ordered a rehearing to consider certain modifications to the Agreement of Purchase and Sale and JEA which would allow MFS to receive all natural gas produced on transferred and joint interest properties at cost-of-service. The rehearing was held over a period of several weeks. On April 11, 1978, the Commission entered its Report and Order on Rehearing approving the Agreement of Purchase and Sale and JEA if certain amendments were made. The amendments were agreed to by MFS and Wexpro.

The Division and Committee sought review of the order before the Utah Supreme Court. On May 10, 1979, the court rendered the Wexpro Decision reversing the order and remanding the case to the Commission for further hearings.

During the pendency of the proceedings, MFS received rate relief in Case Nos. 77-057-03 (Count II), 79-057-03, 80-057-01 and 81-057-01. The rate relief in each of those cases was conditional upon further proceedings. Additionally, in March of 1980, MFS, Wexpro, Mountain Fuel Resources, Inc. (Resources) and Celsius Energy Company ("Celsius") filed applications with the Federal Energy Regulatory Commission ("FERC"), Docket Nos. CP80-274, CP80-275 and CI80-233, seeking, inter alia, approval to transfer all unexplored leasehold

properties used in interstate commerce to Celsius.⁴ Celsius is a wholly-owned subsidiary of Entrada Industries, Inc., which is in turn, a wholly-owned subsidiary of MFS. No decision has been rendered on these applications to date.⁵

In December of 1980, MFS and Wexpro filed an action against the Commission, Division and Committee in the United States District Court for the District of Utah, Mountain Fuel Supply Co. v. Public Service Commission of Utah, Civil No. C80-0710J (D. Utah, July 23, 1981), challenging the application of the Wexpro Decision on constitutional grounds. That action was dismissed without prejudice, the court holding that it was premature prior to the Commission's hearings in the Wexpro case. Finally, Wexpro issues were raised before the Wyoming Public Service Commission in its Docket No. 9192 Sub 68.

3. Summary of Agreement

In an effort to resolve the difficult issues raised by the Wexpro Decision and related litigation, to prevent loss of leasehold properties, to restore investor confidence and raise

⁴ In addition to the regulatory jurisdiction of the Utah and Wyoming Commissions involving retail sales of natural gas, MFS is also subject to the regulation of FERC, under the Natural Gas Act, for its gas transmission facilities, sales for resale in interstate commerce, transportation contracts and other aspects of its business.

⁵ These applications were recently amended to reflect the terms of the Agreement.

capital for an exploration program to enhance gas resources, to end the lengthy and costly litigation and to establish an exploration program which could compete under industry practices with other exploration companies, the Parties negotiated and entered into the Agreement. The Agreement provides for the division of properties, benefits and obligations, for the establishment and conduct of an exploration and development program and for the payment of monies. A summary of the Agreement is set forth below.

A. Producing Gas Reservoirs. The wells, surface facilities and costs of developing producing gas reservoirs capitalized in the utility account as of July 31, 1981 will remain in the utility account. The gas produced from these reservoirs will continue to be owned by and delivered to the utility at cost-of-service. Cost-of-service will be computed in the manner approved by the Commission in the past. The gas liquids and oil from presently producing wells will also belong to the utility and the revenues from the sale of these hydrocarbons will be utilized to reduce rates. Wexpro will be the operator of the properties and will receive reimbursement for its expenses as its only compensation. (Agr. at § III).

B. Development Drilling of Productive Gas Fields. The Agreement contemplates that additional gas can be developed from the presently producing gas reservoirs through development drilling. Much of this development drilling will be around the

edge of the reservoir. While it is development drilling of known producing fields (as contrasted to wildcat drilling), there is still a substantial risk of dry holes. Wexpro will provide the capital for such development drilling and will assume the risks of unsuccessful drilling. If a development well is unsuccessful, none of the costs will be borne by the utility or included in setting rates to the customer. The customers will not be called upon to provide any drilling funds. If a development well is successful, the costs will be capitalized in Wexpro, and Wexpro will be allowed a 16% base return (the 16% base rate of return is indexed and will fluctuate from year to year in accordance with fluctuations in the rate of return on common equity allowed to twenty selected utilities and natural gas companies) plus an 8% premium to compensate for assuming all of the risks and costs of unsuccessful drilling (Agr. at § § III-4 and III-5.1). All gas produced as a result of future development drilling on producing gas reservoirs will be owned by the utility.

The Agreement further obligates Wexpro to spend not less than \$40 million in the next five years on development gas well drilling, only the successful part of which will go into the rate base. (Agr. at § III-8(c).)

C. Producing Oil Reservoirs. The wells, surface facilities and costs of developing producing oil reservoirs are currently capitalized in Wexpro and will remain there. Gas

which is produced in association with the oil will be sold to the utility at cost-of-service computed in the same manner the Commission presently follows.⁶ Oil revenues will be utilized first to pay operating expenses and a 16% base rate of return (indexed as above) on Wexpro's investment in these properties. After paying the expenses and this agreed rate of return on investment, oil revenues will be divided 54% to the utility and 46% to Wexpro, with the utility's share of the oil revenues being used to reduce rates. (Agr. at § § I-41, I-44, II.) In the event Wexpro is required to install secondary recovery facilities because of regulation, contract or to avoid financial risks, Wexpro shall provide the necessary capital investment for such facilities. (Agr. at § II-6.)

D. Development Drilling of Productive Oil Fields.

Wexpro will provide all the capital and assume all risks in connection with the development drilling of presently producing oil reservoirs. If the developmental well is unsuccessful, the costs will be absorbed by Wexpro. If it is successful, it will be capitalized into Wexpro's accounts and Wexpro will earn a 16% base return (indexed as above) plus a 5% premium to compensate for assuming all risks and costs of unsuccessful

⁶ Currently, less than 1% of the utilities' gas requirements are supplied by gas produced in association with oil. Approximately 30% of the requirements come from producing gas reservoirs and the remainder from purchases from independent field producers and pipeline companies.

drilling. (Agr. at § II-8.) Gas developed through such development drilling will be sold to the utility at cost-of-service; oil profits, after return on investment, will be divided 54% to the utility and 46% to Wexpro. (Agr. at § II-4.)

E. Exploratory Properties. Legal title to all oil and gas leasehold acreage will be transferred to Celsius in order that it can function as the exploration program entity. Nearly all of these leaseholds, approximately 1.4 million acres, are unexplored, wildcat properties. The utility will receive a 7% overriding royalty interest on all production resulting from drilling on the unexplored acreage. The transfer will result in removal of approximately \$14 million from the utility rate base accounts and a corresponding reduction in the utility's revenue requirements. The cost of holding these properties (primarily the annual lease payments), which for the unexplored (Account 105) properties previously has been divided as a utility expense and a Wexpro (non-utility) expense, will be paid entirely by Celsius. Celsius will assume all dry hole and other exploration costs if exploration is not successful. Celsius will pay to the utility, to be used for the reduction of gas rates, an overriding royalty of 7% of the revenues realized from the sale of all hydrocarbons produced if the well is successful. The utility will also have a first right to purchase all the gas

produced by Celsius from these properties at market price, which is the equivalent of third-party field price for the gas established through arms-length negotiations. (Agr. at § IV.)

F. After-Acquired Properties. Since it was organized in late 1976, Wexpro has acquired leasehold acreage for its own account and at its own cost. Wexpro will pay a 2 1/2% overriding royalty interest to MFS in connection with such acreage (about 128,000 acres) acquired between January 1, 1977 and May 10, 1979 (the date of the Wexpro Decision), and on acreage in the Bug Field in southeastern Utah. The utility has a first right to purchase any gas produced from these properties at third-party market prices. Properties acquired by Wexpro totally outside the area where the utility had previously leased properties and various properties earned by Wexpro under farmout agreements, even though acquired before May 10, 1979, have been excluded from the utility's royalty interest. Properties acquired after May 10, 1979 (except certain Bug properties), are also excluded from this royalty. (Agr. at § V).

G. Farmouts. In the event any of the wildcat acreage is farmed out, rather than being drilled by Celsius, Celsius will endeavor to preserve the 7% royalty. If it is unable to farm out the properties with the farmee agreeing to pay the 7% on the interest acquired by it, Celsius will be required to pay

a 10% override on its proportionately reduced retained interest. (Agr. at § IV-4(b)).

H. Payments. In order to settle all claims for proceeds of oil production for past periods and to resolve the reserved issues in Case Nos. 77-057-03, 79-057-03, 80-057-01 and 81-057-01, the utility will make a one-time refund by means of reduced rates, to customers, of \$21 million. In addition, Wexpro will pay the utility, to be used for reduction of rates to customers, \$250,000 per year for 12 consecutive years.

Commission Proceedings

On August 3, 1981, the Parties presented the Commission with a summary of the proposed Agreement. The Commission set the matter for hearing on October 14, 1981, at which time the Association and the Coalition entered their appearances. The Parties, the Coalition and the Association presented evidence and argument before the Commission during the course of hearings held on October 14, 15, 16, 19 and 20, 1981, and November 23, 24 and 25, 1981. Additionally, a spokesman for Stand United for Rate Fairness, a utility consumer group, made a statement to the Commission expressing its reservations about the Agreement. Notice was published in a newspaper of statewide distribution for two consecutive days publicizing the hearings and the opportunity for public comment. The news media provided extensive coverage of the

hearings and gave notice of the opportunity for public comment. (Ord. at 4 and 5.)

The Commission issued its Report and Order on Stipulation and Agreement on December 31, 1981, adopting and approving the Agreement. On January 18, 1982, the Association and the Shareholders made application for rehearing on the basis that the Order does not comport with the intent and purpose that the Agreement be approved with finality, and that the Commission erred by entering an ambiguous and unlawful decision which failed to incorporate essential findings and conclusions concerning its final and binding effect. The Coalition and Utah Department of Administrative Services also filed applications for rehearing dated January 20, 1982. All applications were denied by the Commission in a written order dated February 9, 1982.

A. The Agreement was Entered After Vigorous Arm's Length Negotiations to Resolve the Issues Presented by the Wexpro Decision.

The Agreement was entered into by the Parties in an effort to resolve numerous conflicts and divisive issues arising from the Wexpro Decision and expanded litigation. The Agreement was the result of vigorous and difficult arm's length

negotiations between the Committee and Division on one side and MFS and Wexpro on the other. (Tr. at 1015-1016.)⁷

The purpose and intent of the Agreement is to provide for the division and allocation of properties for fair market value and additionally to provide incentives for their exploration and development in compliance with the Wexpro Decision. The Agreement itself and the evidence and argument presented by the Parties reveal that while settlement of issues presented by the Wexpro Decision seemed almost impossible given their complexity and the diverse views of the Parties, it was in the best interest of the customers and shareholders to reach an accord so as to avoid the expense of time consuming litigation which would further result in the loss of valuable property rights. (Stip. at § § 1.19, 1.20, 1.24, 1.25, and 14; Tr. at 939-944.)

The uncertainties arising from the Wexpro Decision and related litigation created a cloud over the Company's exploration and development program. A primary motivation for pursuing the difficult task of reaching an accord was to avoid the loss of many valuable leases which were about to expire and to prevent the additional loss of experienced and valued employees in a competitive market where job security and

⁷ Herman G. Roseman testified for the Division and stated in response to a question of whether negotiations were at arm's length: "At arm's, sometimes, arm plus a baseball bat." Tr. at 1015.

certainty are highly sought commodities. (Tr. at 942, 1935-1937.) The uncertain future of the Company's exploration and development program also resulted in the loss of business opportunities and an inability and unwillingness to finance major expenditures necessary to continue effective exploration and development. (Tr. at 940, 943-945.)

B. The Primary Purpose of the Agreement is to Resolve Issues with Finality.

It is apparent from the Agreement that the achievement of finality is its paramount purpose and a condition to its vitality. The Agreement provides that the conveyance terms are absolute and not subject to rescission. (Agr. at § VIII-5.) It is an express condition to the enforceability of the Agreement that it be approved by the Commission and any modification thereto be agreed to by the Parties and approved by the Commission "with finality". (Stip. at §§ 16.1-16.3 and § 3.1.) If the Agreement is not approved by the Commission in its entirety and the Parties cannot agree to a modification required by the Commission, the Agreement, by its terms, is void. (Stip. at § 16.3.) If at any time the Agreement is found to be voidable or unenforceable by any court or agency, any remaining terms of the Agreement are likewise void and unenforceable. (Agr. at § VIII-2.)

The finality aspects of the Agreement were specifically addressed by the Parties during the course of the hearings. (Tr. at 1611.) Indeed the Commission revealed that if it were to approve the Agreement and at a later date reconsider it, the whole purpose of the Agreement would be defeated. (Tr. at 1611.)

C. The Association Expressed its View to the Commission that the Agreement is Based on an Erroneous Interpretation of the Wexpro Decision Which is Unfair to Shareholders, But Supported its Approval if the Commission Would Render a Final and Res Judicata Order.

The Association presented to the Commission its view that the Agreement was entered into in large part on an erroneous interpretation of the Wexpro Decision, i.e., the only issue before the Supreme Court was one of jurisdiction and many statements made by the Court were obiter dicta which this Court did not and would not consider binding. (Br. at 1-10; Tr. at 1910-1917.) The Parties acknowledged specifically that the utility customers have a tenuous claim, if any at all, to the 2 1/2% royalty on properties independently acquired by Wexpro ("After Acquired Properties"), and that inclusion of such benefit in the Agreement constituted a substantial concession on the part of Wexpro and MFS to settle the matter and resulted in a valuable benefit to customers.⁸

⁸ Herman G. Roseman testifying for the Division said with respect to a question concerning the fairness of royalty payments on the After Acquired Properties: "Those are

The Association adduced testimony that the Agreement does not constitute a fair distribution of assets from the shareholders' standpoint, but that the Agreement serves a beneficial purpose to the extent that it is final and binding.⁹

8 (Cont.) properties with respect of which it is my understanding of the facts that the ratepayers have never borne any of the costs or risks except possibly indirectly. That is, those properties were never in the 105 account, they never were a part of the capital account of the regulated company, the ratepayers never paid capital carrying charges, delay rentals, nor would they pay for the cost of the lease were it to be cancelled. . . . In the interest of getting some sort of a settlement that was a concession made by the company in an attempt which I regard as not insubstantial and this was very beneficial, or potentially beneficial to ratepayers." (Emphasis added.) Tr. at 1028 and 1029. MFS's view of the customers' claim in the After Acquired Properties was stated by Edward Clyde as follows: "There's a category 6 that by no stretch of the imagination could the utility claim an interest in, but the properties that were in contention have all been put in and then decided [sic] under our formula." (Emphasis added.) Tr. at 1932.

⁹ John F. O'Leary testified for the Association with respect to his opinion concerning the Agreement. He was an extremely well-qualified witness as is evidenced by his employment background indicating he has held, among others, the following positions: Deputy Assistant Secretary of the Interior, Chief, Bureau of Natural Gas of the Federal Power Commission, Director of the U.S. Bureau of Mines, Director of Licensing, U.S. Atomic Energy Commission, Director of Energy Resources Board of New Mexico, Administrator of the Federal Energy Administration, Deputy Secretary of U.S. Department of Energy. Additionally Mr. O'Leary has served as a private consultant and has appeared on numerous occasions as a witness before congressional committees and before the Public Service Commissions of several states with respect to energy resource development. (Tr. at 1215-1217.)

Mr. O'Leary's testimony with respect to the finality aspects of the Agreement was as follows: "I think from the standpoint of the stockholders, given the events of the past

The Association urged the Commission to adopt the Agreement with the important qualification that the Commission enter an order that is binding and res judicata, i.e., the order be rendered in a fashion that it cannot be modified or repealed by the present Commission or future Commissions. (Tr. at 1611 and 1612; Br. at 13-20.) The Association specifically advised the Commission of those findings and conclusions that are necessary to the rendering of a res judicata order. (Tr. at 1973; Br. at 20-22.)

D. The Commission's Order Contains Statements Creating Uncertainty as to its Intended Res Judicata Effect and Fails to Incorporate Essential Findings and Conclusions.

In adopting the Agreement the Commission found as a conclusion of law, that the transfer of the certain properties and benefits to be received in return, are intended to be final. Paragraph 6 of the "Conclusions of Law" so provide:

The Commission's findings and conclusions with regard to the transfer of properties and the allocation of benefits contemplated by the Settlement, including the findings and conclusions that the

⁹ (Cont.) 2 1/2 years, there will be a tendency unless some device can be found to make this final and binding to continue to look over their shoulder. They found that they were operating on a premise that turned out to be error at the time of the Supreme Court's decision. I think they would not like to find themselves four or five years from now in a situation where this agreement could be unravelled to their detriment." Tr. at 1226 and 1227.

transfer of properties and the allocation of benefits are reasonable and for market value and are in the public interest, are intended by the Commission to be final and not subject to future change (except through an appropriate and timely petition for rehearing or judicial review). The Commission so concludes because to ensure the proper development of said properties, the parties must be able to rely on the finality of the findings and conclusions in regard to the transfer of properties and apportionment of benefits. The Commission also is entitled to rely on the finality of its order. (Ord. at 21.)

However, the Commission made this conclusion illusory by including other unnecessary and improper extraneous statements in the Order which create confusion and uncertainty as to the res judicata effect of the Order and by failing to include certain other findings and conclusions which are fundamental and essential to the entry of a final res judicata decision.

The Commission included numerous statements of philosophy, findings of fact and conclusions of law which are inconsistent with res judicata principles (the "Inconsistent Provisions"). The following Inconsistent Provisions are found in the Commission's statements of philosophy (the Commission recognized that such statements are not findings of fact and conclusions of law):

1. The Commission believes the utility business of MFS to be the cornerstone of its operations and that other activities must

enhance and not jeopardize that cornerstone. It is for these reasons that the Commission is vitally interested in company restructuring which is in effect diversification of functional separation, and we believe Utah statutes authorize Commission review of such proposals, and the setting aside or modification of same if, after a hearing, the scheme itself, or its logical or intended consequences, are found to be detrimental to the utility cornerstone or injurious to the public interest. (Emphasis added. Ord. at 8.)

2. Third, the Commission believes the no-profits-to-affiliates rule discussed in the Utah Supreme Court's decision and the potential for conflict of interest or sweetheart relationship within the structure of MFS and its subsidiaries require continued and ongoing scrutiny by the Commission of MFS and all of its subsidiaries whether or not they are subject to a regulated rate of return. The Commission further notes that the Supreme Court has appeared to elevate management responsibility to utility customers to a form of 'trust' relationship which also requires such ongoing scrutiny. (Emphasis added. Ord. at 8.)

3. Fifth, the Commission believes that exploration for the development of energy resources are an appropriate activity for MFS, both as part of its regulated activities and those which are not subject to a regulated rate of return. The Commission recognizes the past success of MFS' exploration and development program and believes that MFS should continue in the future such programs both for the benefit of its utility operations and those which are not subject to a regulated rate of return. The Commission notes that while exploration and development of gas has historically been a utility activity conducted by MFS pursuant to Commission orders as a joint regulated/non-regulated venture, the decision by MFS to abandon exploration as a utility

undertaking has been implemented unilaterally without Commission sanction. The Commission at this time and for the purpose of this settlement finds it unnecessary to determine if MFS' utility activities, which are subject to a regulated rate of return, should include an exploration and development program. (Ord. at 9.)

General provisions, creating unnecessary ambiguity, which may be claimed as inconsistent, are also found in the Commission's statements outlining "evidence, testimony, statements and argument of counsel upon which the Findings, Conclusions and Order are made", as follows:

4. Notwithstanding any language which might be construed to the contrary in either the agreement or stipulation all parties have agreed on the record that the acceptance of the settlement by the Commission in no way limits or affects the Commission's jurisdiction or regulatory authority and further is not to be construed as limiting the Commission and its future regulation of MFS. (Emphasis added. Ord. at 11.)

General provisions, creating unnecessary ambiguity, which may be claimed as inconsistent, found in the "Findings of Fact", are as follows:

5. As will be outlined in the following findings, the Commission accepts the Stipulation and Agreement as means of dealing with the 'Wexpro' case and related matters. The Commission does not and could not waive any of its jurisdiction or regulatory power and authority, in so accepting. (Emphasis added. Ord. at 18.)

6. As stated in finding (1) above, Mountain Fuel Supply Company is a regulated public utility and it cannot escape this by organizing itself into different corporate entities, parent and subsidiary in nature. By approving this Settlement and by past actions this Commission acknowledges and supports the proposition that MFS may have activities which are not limited to a 'regulated' rate of return. We do not, however, give up our necessary access to information from the parent or its subsidiaries, or our lawful regulatory control over MFS or any of its parties in accepting this Settlement. (Emphasis added. Ord. at 18.)
7. The Commission is not entirely persuaded that under attractive circumstances investors will not support a regulated exploration and development program, that such a program will cause problems with partners in the field or with the ability of MFS to keep employees. However, the Commission finds that it is unnecessary to make a final determination on this matter for the purpose of this proceeding. (Emphasis added. Ord. at 18.)

Provisions creating unnecessary ambiguity which may be claimed as inconsistent found in the "Conclusions of Law", are as follows:

8. The Settlement is an agreement between the parties and approval thereof by the Commission does not modify or in any way limit the jurisdiction of the Commission to require information from the parties and to investigate transactions under the Settlement in which the parties are involved. (Emphasis added. Ord. at 22.)
9. By adopting and approving the Stipulation, the Commission does not relinquish or limit any jurisdiction or statutory authority it possesses. (Emphasis added. Ord. at 22.)

In addition to incorporating confusing Inconsistent Provisions in the Order, the Commission failed to include in the Order necessary findings of fact and conclusions of law, examples of which are set forth in Plaintiffs' application for rehearing and the Association's brief, i.e., the Commission acts in its judicial capacity, policy considerations support res judicata finality, the Order shall not be open to collateral attack in subsequent proceedings, certain properties are transferred outside the Commission's regulatory authority and the Order shall be final and binding on all persons including this and future Commissions. (Appl. at 3 and 4; Br. at 20-22.)

RELIEF SOUGHT

Plaintiffs respectfully request that this Honorable Court set aside the Order and remand the case to the Commission with directions that it enter a new order which comports with the purpose and intent of Parties that the Agreement be approved with res judicata finality.

QUESTIONS PRESENTED

1. Whether the Order is sufficiently explicit as to its intended finality and otherwise comports with res judicata principles.
2. Whether the Commission erred in issuing an order which does not comport with res judicata principles where the paramount purpose of the Agreement is to obtain a final and

binding resolution of certain issues and where it is a condition to the vitality of the Agreement that the Commission approve it with finality.

3. Where the Commission approves the transfer of assets to a non-utility subsidiary of the Company, does the Commission relinquish jurisdiction over the transferred assets?

4. Whether the Commission acted arbitrarily and capriciously, thereby depriving Plaintiffs of property without due process, by entering an order which does not comport with principles of res judicata finality.

ARGUMENT

- I. TO BE ACCORDED BINDING AND RES JUDICATA EFFECT, AN ORDER OF THE COMMISSION MUST BE CLEAR IN ITS INTENT AND INCORPORATE CERTAIN FINDINGS AND CONCLUSIONS.

The doctrine of res judicata is a judicial principle which provides that a final judgment on the merits is an absolute bar to a subsequent suit between the same parties on the same cause of action. The doctrine binds parties and their privies both as to the issues actually litigated in the first suit and as to the issues which might have been raised and decided in that action. 5 Mezones, Administrative Law § 40.01 (1981). It is a well accepted view that, under appropriate circumstances, the doctrine of res judicata applies to administrative agency decisions. 2 Davis, Administrative Law Treatise § 18.02 (1970 Supp.).

A. Res Judicata Principles are Properly Accorded to Administrative Decisions Made in a Judicial Capacity.

That res judicata principles apply to administrative decisions was recognized by the United States Supreme Court in United States v. Utah Construction and Mining Co., 384 U.S. 394, 16 L.Ed.2d 642 (1966). In that case the Court acknowledged the hesitation of courts in some instances to apply res judicata principles to administrative agency decisions, but made it clear that when an agency acts in a judicial capacity, its decision should be accorded res judicata effect. The Court stated:

Occasionally, courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose. 384 U.S. at 421-422.

The principles of administrative res judicata have been recognized by many jurisdictions. Matos v. Secretary of Health Education and Welfare, 581 F.2d 282 (1st Cir. 1978); Cooper v. NTSB, 546 F.2d 870 (10th Cir. 1976); Hudson River Fishermen's Assoc. v. Federal Power Comm'n, 498 F.2d 827 (2nd Cir. 1974); A. Duda & Sons Coop. Assoc. v. United States, 495 F.2d 193 (5th Cir. 1974), aff'd on rehearing, 504 F.2d 970 (5th

Cir. 1974); Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Local Union No. 584, 281 F. Supp. 971 (E.D.N.Y. 1968); Philadelphia Elec. Co. v. Borough of Lansdale, 424 A.2d 514 (Pa. 1981); Campbell v. Superior Court in and for County of Maricopa, 18 Ariz. App. 287, 501 P.2d 463 (1972).

Several years ago this Court acknowledged that when the Commission renders a decision in its judicial capacity, res judicata may properly apply. The Court in Mulcahy v. Public Service Commission, 101 Utah 245, 117 P.2d 298 (1941) stated:

'The rule which forbids the reopening of a matter once judicially determined by competent authority applies as well to the judicial and quasi-judicial acts of public, executive, or administrative officers and boards acting within their jurisdiction as to the judgments of courts having general judicial powers.' (Citations omitted.) 117 P.2d at 302.

The Utah Court attempted the difficult task of distinguishing the judicial functions of an administrative agency and in so doing stated:

The judicial function is to define the legal rights and obligations conferred or imposed by law upon the community to the individual, the individual to the community, or one individual to another individual; and to apply the remedy and when one such party has infringed the right of, or failed in his or its obligation to the other. . . . The judicial function is not self-activating. It comes into operation only on request of the community or of an individual, when such party thinks another has interfered with his

rights, or failed in obligations to him. The judicial function only plays a role when there is an apparent controversy over the extent or infringement of legal rights, and appeal to the judiciary is made by one party to define and fix the legal rights of the parties with respect to the matter in controversy. (Emphasis added.) Id.

The Order was unquestionably rendered within the "judicial" capacity of the Commission, if such a concept is deemed necessary to the finality of the Agreement. The Order defines the legal rights and obligations of MFS and its subsidiaries to the community with respect to certain properties. The controversy arose upon the appeal of the Division to the Utah Supreme Court from an order of the Commission holding that it had no jurisdiction over the transfer of the long established non-utility oil properties from MFS and Wexpro. The Commission, by adopting the Agreement, resolved controversies concerning legal rights and obligations with respect to properties and their exploration and development, and thereby acted in its judicial capacity.

The premise that the Commission acted in its judicial capacity in entering an order adopting the Agreement is further supported by a decision of the United States Supreme Court wherein it expressed the view that it is an exercise of judicial power to render a judgment on consent. Pope v. United States, 323 U.S. 1, 89 L.Ed. 3 (1944). The court stated:

It is a judicial function and an exercise of the judicial power to render judgment on consent. A judgment upon consent is 'a judicial act.' (Citations omitted.) It is likewise a judicial act to give judgment on a legal obligation which the court finds to be established by stipulated facts (Emphasis added. Citations omitted.) 323 U.S. at 12.

While the Utah legislature¹⁰ and this Court¹¹ have recognized the judicial functions of the Commission, it has been acknowledged that it is a difficult task to delineate the judicial from the legislative functions of an administrative agency. In his concurring opinion in Mulcahy, supra, Justice Wolfe stated:

He indeed is to be congratulated who can pick out the legislative, the executive and judicial ingredients of many completed administrative processes. 117 P.2d at 307.

¹⁰ See Utah Code Ann. § 13-1-1.3 (1953), which provides in part: "The public service commission shall exercise all quasi-judicial and rule-making powers in regard to public utilities as provided in Title 54. The execution of any rules, regulations or orders of the public service commission of Utah issued pursuant to its quasi-judicial or rule-making power shall be made effective and administered under the executive director of the department of business regulations." (Emphasis added.)

¹¹ This Court expressly recognized the judicial or quasi-judicial nature of Commission functions in Wycoff Co. v. Public Service Comm'n., 13 Utah 2d 123, 369 P.2d 283 (1962), cert. denied, 371 U.S. 819, 9 L.Ed.2d 59 (1962); and Common Cause of Utah v. Public Service Comm'n., 598 P.2d 1312 (Utah 1979).

Plaintiffs submit that all terms of the Agreement dealing with the conveyance and exploration and development of the properties, as well as provisions concerning monetary expenditures must be adopted with finality. The Commission failed to make the essential finding that in approving these aspects of the Agreement it acted in its judicial capacity. Moreover, a finding that the Commission acted in its judicial capacity in rendering the Order is just one of several findings necessary to the rendering of a res judicata decision.

B. Where Public Policy Considerations Support
Repose, Res Judicata Attaches to an
Administrative Decision.

Commentators have criticized courts for expending their energies in attempting to classify or define various acts of administrative agencies for the purpose of determining the propriety of applying res judicata principles. Kenneth Culp Davis in his consummate treatise on administrative law states that the best approach to finding administrative res judicata is not to use labels, but rather inquire with respect to the underlying policy considerations which support finality. Professor Davis states:

The best approach is to avoid the labels that have been attached to various functions for other purposes and to determine what is judicial or non-judicial for purposes of res judicata by emphasizing factors which relate to res judicata The question is not what is judicial in the abstract or for some other purpose. The question is whether

considerations relating to res judicata require that the particular action be regarded as judicial or non-judicial. 2 Davis, Administrative Law Treatise, § 18.08 (1958).

Davis specifically criticizes the Mulcahy decision in attempting to determine whether or not res judicata should apply to a Commission order based upon an analysis of judicial versus non-judicial functions. Davis states:

The deficiency in this type of analysis is that it reaches a conclusion as to what is res judicata without considering the reasons for permitting or preventing the relitigation of the same or similar issues. Whether the issue relates to 'privilege' or to 'legal right,' a second adjudication of static facts is undesirable in absence of some special reason for permitting it. The court's attention should be focused upon the reasons for and against a second adjudication of the same or similar issues, not upon a futile effort to tag functions as abstractly judicial or non-judicial. Id.

That policy considerations support the entry of a res judicata order adopting the Agreement is self-evident. To enter a non-final order or an order open to modification is to destroy the "raison d'etre" of the Agreement. By its own terms, finality is a condition to the enforceability of the Agreement. The shareholders of MFS and Wexpro have a substantial investment at stake. MFS and Wexpro must have the continued confidence and support of shareholders to maintain economic viability. The Agreement must be adopted in a res judicata fashion so that the shareholders and investors can, at

last, stop "looking over their shoulders" and feel secure that the Agreement will not be unravelled to their detriment. Finality is particularly important to shareholders in view of the history of the Wexpro case where the Commission and shareholders thought Commission decisions regarding allocation of properties were final and operated for 40 years in reliance thereon only to have their investment and operating decisions overturned by the Wexpro Decision. Shareholders must be secure that the Order at last achieves a final resolution, as is required in any adjudication and settlement of property rights and interests.

The Commission was advised of the importance of including in its findings a statement that public policy considerations support res judicata finality of its order. (Br. at 22.) Such a finding is particularly desirable for the purpose of avoiding a controversy that could arise in the future as to whether or not the Order is indeed entered into pursuant to the judicial function of the Commission, and is further necessitated because the Order is based on a stipulation.

C. An Agency Decision Rendered Pursuant to a Settlement Agreement Must be Clear as to its Intended Res Judicata Effect.

While it is a well-accepted view that a judgment entered by consent of the parties may be res judicata to the

same extent as if entered after contest, the general rules of res judicata do not apply indiscriminately to such judgments. Annot., 345 U.S. 505, 97 L.Ed. 1188 (1953). Certain limitations to the general rules have been stated as follows:

The extent to which a judgment or decree entered by consent is conclusive in a subsequent action should be governed by the intention of the parties, as expressed in the agreement which is the basis of the judgment and gathered from all the circumstances, rather than by a mechanical application of the general rules governing the scope of estoppel by judgment. . . . In particular, it seems that, in the absence of an unambiguous agreement of the parties to the contrary, a judgment by consent does not operate as a collateral estoppel as to questions of fact or law involved in the litigation so as to preclude the parties from litigating the same questions in another action based upon a cause of action different from the one upon which the consent judgment was entered.

* * * *

From reading the cases on the subject under annotation it becomes manifest that, in consenting to a judgment or decree, ordinarily the parties and their counsel fail to give adequate attention to the question whether and to what extent the judgment is intended to be conclusive in a subsequent action on the same or another cause. It is advisable to incorporate in the judgment concise and clear stipulations on that question. Id. at 119. 345 US at 506. (Emphasis added).

The difficulty courts have in according a consent decree the same conclusive effect as a contested decree seems to be that the consent judgment represents the agreement of the parties and not necessarily the independent examination of the subject matter by the tribunal.

In the proceedings below, the Commission closely scrutinized the Agreement and conducted extensive hearings in an effort to be assured that the Agreement is lawful and in the public interest. The Association apprised the Commission that in light of the limited application of res judicata to agency decisions and particularly given the fact that the order rendered by the Commission would be pursuant to a consent or settlement, the order rendered must be unambiguous and contain certain findings and conclusions clarifying the Commission's intentions with regard to finality. (Br. at 20.) The Commission was urged to avoid the pitfalls inherent in a judgment based on stipulation by incorporating in its findings and conclusions statements that its order is final, binding and not subject to modification or repeal by this Commission or future Commissions; that the Order shall not be the subject of collateral attack in subsequent proceedings of any nature; that the Commission acts in its judicial capacity in rendering the Order; and that public policy considerations support repose. (Br. at 13-22.) The Commission unreasonably and improperly failed to incorporate such necessary findings and conclusions in the Order.

D. The Order Is Ambiguous as to Its Intended Res Judicata Effect.

The extent to which a decision entered pursuant to stipulation is res judicata is governed by the express intentions of the parties. Annot., 345 U.S. 505, 97 L.Ed. 1188 (1953). The Agreement is explicit with respect to its intended finality. However, the Order is replete with extraneous statements indicating that the Commission reserves continuing regulatory authority to review, modify or repeal the Agreement.

Certain provisions contained in the Order reveal that the Commission reserves the right to review, set aside or modify the functional separation of MFS and its subsidiaries and maintain ongoing scrutiny of MFS and its subsidiaries. (Ord. at 8.) The Commission states that it does not forego any regulatory power or authority in adopting the Agreement, (Ord. at 11 and 18), and that it retains lawful regulatory control over MFS or any of the parties to the Agreement (Ord. at 18.) The Inconsistent Provisions indicating that the Commission retains continuing regulatory authority over the subject matter of the Agreement, create serious questions as to whether the Commission intends the Order to be final and binding upon this Commission and future Commissions and thereby preclude the application of res judicata.

Even assuming, arguendo, that the Inconsistent Provisions of the Order do not preclude the application of res

judicata, the Order is ambiguous with respect to which terms of the Agreement are approved with res judicata finality. The Commission states in its Order that its findings "with regard to the transfer of properties and allocation of benefits. . ." are intended to be final. The Commission leaves open the question of whether or not the terms of the Agreement providing for the exploration and development of the certain properties and monetary expenditures are also intended to be final.

A public utility commission decision will be interpreted under the same rules by which other writings are construed. Creason v. American Bridge, 384 F.2d 475 (10th Cir. 1967); Arizona Corp. Comm'n v. Palm Springs Utility Co., Inc., 24 Ariz. App. 124, 536 P.2d 245 (1975). Under the legal maxim, expressio unius exclusio alterius (mention of one thing in a writing implies the exclusion of another), the Order must be construed as not approving exploration and development and monetary expenditures provisions of the Agreement with finality inasmuch as such provisions were not referred to in the orders. Union Pac. R. Co. v. Bean, 167 Or. 535, 119 P.2d 575 (1941); State ex rel. Port of Seattle v. Dept. of Public Service, 1 Wash 2d 102, 95 P.2d 1007 (1939). It is essential that res judicata apply to such provisions so that MFS and its subsidiaries can proceed diligently in reliance thereon.

II. CERTAIN FINDINGS AND CONCLUSIONS ARE CONTRARY TO
THE EVIDENCE AND UNSUPPORTED IN LAW.

Not only do the Inconsistent Provisions improperly create ambiguity concerning the intended finality of the Order, certain findings of fact and conclusions of law contained therein, are wholly contrary to the evidence and are unsupported in law.

- A. The Participants to the Proceedings did not Agree that the Acceptance of the Settlement by the Commission Would not Limit or Affect the Commission's Jurisdiction or Regulatory Authority.

The Commission states in Provision No. 4:

Notwithstanding any language which might be construed to the contrary in either the agreement or stipulation all parties have agreed on the record that the acceptance of the settlement by the Commission in no way limits or affects the Commission's jurisdiction or regulatory authority and further is not to be construed as limiting the Commission and its future regulation of MFS. (Emphasis added. Ord. at 11.)

This statement is an overly broad conclusion upon which the Commission's findings are made, is not supported by the evidence and creates uncertainty as to the res judicata effect of the Order. The Agreement incorporates the intent of the Parties that it be final and not subject to modification or rescission and that if it is not approved with finality it shall be void. (Agr. at §§ VIII-2 and VIII-5; Stip. at §§

16.1-16.3, 3.1 and 8.2.) The finality aspects of the Agreement were specifically addressed during the course of the proceedings. (Tr. at 1611-1612 and 1973.) The Association briefed the Commission at length on the importance of rendering a res judicata decision. (Tr. at 1919-1921; Br. at 14-22.) In order to enter such a decision the Commission necessarily limits its authority to regulate by amending or repealing its decision. In fact, the Association specifically requested the Commission to incorporate a finding in the Order acknowledging that in adopting the Agreement the Commission necessarily transfers certain properties outside of the Commission's jurisdiction. (Br. at 21.)

The participants to the proceedings assured the Commission that if in rendering its order it exceeded its statutory authority the order would be void. However, at no time did the participants agree that the Commission would not limit its jurisdiction or regulatory authority. To have done so would have been to take a position antithetical to the purpose and intent of the Agreement.

- B. The Commission Can Decide with Finality the Issues in the Case by Taking Jurisdiction and Exercising It, and Having Done So, in that Sense, It Has Lost Jurisdiction Over the Property and Benefits and, in that Sense, It Must Relinquish its Regulatory Power, in Approving the Agreement.

The Order contains a finding contrary to the evidence in Inconsistent Provision No. 5, and an unsupported conclusion of law in Inconsistent Provision No. 9, which provide:

5. As will be outlined in the following findings, the Commission accepts the Stipulation and Agreement as means of dealing with the 'Wexpro' case and related matters. The Commission does not and could waive any of its jurisdiction or regulatory power and authority in so accepting. (Emphasis added. Ord. at 18).

9. By adopting and approving the Stipulation, the Commission does not limit or relinquish any jurisdiction or statutory authority it possesses. (Emphasis added. Ord. at 22.)

Contrary the findings and conclusions set forth above, the Commission by entering a final order, at that point in time, of necessity must give up its regulatory power or authority to amend the Order. It is a condition to the vitality of the Agreement that its terms be final. Therefore, if the Commission does not forego its jurisdiction and regulatory power to amend the Order, it takes action in direct opposition to the purpose and intent of the Agreement.

Furthermore, the Commission is able to relinquish its jurisdiction by rendering a res judicata decision. Where an administrative agency renders a decision in its judicial capacity or where policy considerations support finality, the decision is res judicata and is therefore binding and not

subject to modification, i.e., the Commission has no further regulatory power to modify the decision. United States v. Utah Construction Co., 384 U.S. 394, 16 L.Ed.2d 642 (1966); Mulcahy v. Public Service Comm'n, 101 Utah 245, 117 P.2d 298 (1941); 2 Davis, Administrative Law Treatise, § 1808 (1958). On the one hand, the Commission cannot waive jurisdiction it has to make a decision, but having exercised its jurisdiction it can and will in the process, relinquish further powers over the Agreement by approving it.

The Commission's findings and conclusions set forth above may be based upon its confusion with the concept that where the Commission enters an order that incorporates an erroneous interpretation of law or where the Commission acts in excess of its authority, its order may be set aside as being beyond its jurisdiction. Utah Hotel Co. v. Industrial Comm'n, 107 Utah 24, 151 P.2d 467 (1944). For example, the Commission cannot lawfully, under its statutory mandate, order that it no longer will regulate the operations of a public utility such as MFS. The concept is analogous to the legal principle that a decision of a court tribunal may be vacated for want of subject matter jurisdiction. Contrary to the findings and conclusions in the Order, the Commission can, and in effect does, limit its further regulatory power to amend or repeal the terms of the Agreement, if its Order meets the requirements of a res judicata decision.

The Commission's finding of fact contained in Inconsistent Provision No. 5 that it does not and cannot waive its regulatory power by adopting the Agreement is wholly unfounded and contrary to the evidence. Similarly, the Commission's conclusion of law found in Inconsistent Provision No. 9 is an inaccurate statement of law.

This Court has held on numerous occasions that a decision of the Commission may be set aside where its findings are not supported by evidence or law. Union Pac. R. Co. v. Public Service Comm'n, 102 Utah 465, 132 P.2d 128 (1942); Bamberger Electric R. Co. v. Public Utilities Comm'n, 59 Utah 357, 204 P. 314 (1922). Plaintiffs submit that the findings and conclusions contained in the Order are not so supported and that the Order must be set aside.

III. THE FAILURE OF THE COMMISSION TO ENTER A RES JUDICATA ORDER CONSTITUTES AN ARBITRARY ACTION AND AN UNCONSTITUTIONAL TAKING OF PROPERTY.

The Association supported the Commission's adoption and approval of the Agreement based on its understanding that the Commission intended to enter an order that would be binding upon this Commission and all future Commissions and not be subject to collateral attack in subsequent proceedings, i.e., the Commission would make a clear and unambiguous Order containing findings and conclusions which are essential to a res judicata order.

The Association expressed its view throughout the proceedings that the Agreement is based on an unduly broad interpretation of the Wexpro Decision and that provision for royalty payments on After Acquired Properties is particularly inappropriate inasmuch as the customers have no justifiable claim in such properties. Relying upon its understanding that the Commission would render a res judicata order, the Association gave up the opportunity to object to the terms of the Agreement and assert its views as to what it deemed to be a valid consideration to be received for the division and exploration and development of the properties. Without notice and contrary to the purpose of the Agreement and the view expressed by the Commission itself, the Commission entered an order which is not res judicata.¹² In so doing the Commission acted arbitrarily and capriciously, thereby

¹² Commissioner Cameron stated in response to Edward Clyde's discussion of the finality aspects of the Agreement: "I don't believe in good faith I could agree to a stipulation and then a week and a half later notice up a hearing as to whether or not Celsius and Wexpro were, indeed, public utilities. It would seem to me we'd be defeating the entire purpose of the stipulation. Tr. at 1611. Commissioner Bernard recognized the unfairness resulting from future regulatory power: "Well, Mr. Holbrook, would part of that decision be arrived at because of the, call it the capriciousness or whatever you want to call it, of ordering the Company to explore for several years and then governmental agencies stepping in and saying don't do it anymore? It's the ebb and flow of the people in power of the regulatory process that causes doubt, isn't it, in the mind of the shareholder?" Tr. at 1919.

depriving Plaintiffs of property without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States of America and Article I, Section 7 of the Utah Constitution. In Washington ex rel. Oregon R. & N. Co. v. Fairchild, 224 U.S. 510, 56 L.Ed. 863 (1912), the United States Supreme Court stated that a determination of due process is not based merely upon the fact that a party is given an opportunity to be heard, but that it extends to the nature of the order itself. Concerning the order at issue, the Court stated:

Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all of the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights,--to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.' (Citations omitted.) So that where the taking is under an administrative regulation, the defendant must not be denied the right to show that as a matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the Fourteenth Amendment. (Citations omitted; Emphasis added.) 244 U.S. at 524.

In response to a defendant's assertion that a statute was unconstitutional because it prevented a court from receiving evidence proving defendant's point, the Supreme Court stated in Fairchild:

This position would be true if the defendant had not been put on notice as to what order was asked for and then given ample opportunity to show that it would be unjust or unreasonable to grant it. In this case, and under the statute, it was given such notice. The complaint alleged that some of the towns were important shipping points and that at all of them there was a public necessity that the roads be connected. The defendant denied each of these allegations. The hearing, both on the law and on the facts, was necessarily limited to that issue. There could have been no valid order which was broader than that claim. Id. at 525-526. (Emphasis added.)

By not being provided notice by the Commission that it did not intend to enter a res judicata decision and thereby giving up the right to litigate their view of the proper consideration to be received for the transfer, and exploration and development of the properties, particularly royalties on the After Acquired Properties in which customers have no justifiable claim, the Plaintiffs have been deprived of property without due process of law.

Where an order of the Commission is arbitrary and capricious and invades a person's constitutional rights, this Court has consistently held that such order should properly be

set aside. Barton Truck Line, Inc. v. Public Service Comm'n, 29 Utah 2d 392, 510 P.2d 927 (1973); Salt Lake Transfer Co. v. Public Service Comm'n, 11 Utah 2d 121, 355 P.2d 706 (1960); Lake Shore Motor Coach Lines, Inc. v. Welling, 9 Utah 2d 114, 339 P.2d 1011 (1959); Union Pacific R. Co. v. Public Service Comm'n, 102 Utah 465, 132 P.2d 128 (1942). Plaintiffs submit that the Order is the product of an arbitrary and capricious action on the part of the Commission resulting in deprivation of property without due process and that the Order should be set aside.

CONCLUSION

The Parties entered into the Agreement to resolve those complex and divisive issues emanating from the Wexpro Decision rendered over three years ago. The Agreement is the product of difficult arm's length negotiations wherein the Parties agree that MFS and Wexpro made substantial concessions in their views of what would be required had the Wexpro Decision been fully litigated. The inclusion in the Agreement of royalty payments to the utility on After Acquired Properties was a particularly generous concession on the part of Wexpro inasmuch as the utility has only an extremely questionable claim, if any, in such properties. The sole motivation for entering the difficult and seemingly impossible negotiations

for a settlement of the issues raised by the Wexpro Decision is to at last achieve a final disposition of the matter. A final and res judicata decision is essential so that the Company will have the continued support of its shareholders and investors and so that management may act in reliance thereon. The Company and Wexpro may lose substantial property interests and valued employees if the matter is not finally resolved. In such event all parties concerned, including customers, lose valuable interests.

During the course of the proceedings the Association voiced its serious reservations concerning the fairness of the Agreement to shareholders on the basis that the Agreement was entered into upon an overly broad interpretation of the Wexpro Decision. However, the Association supported the Commission's adoption of the Agreement with the important condition that the Commission order adopting the Agreement be rendered in a form susceptible to the application of res judicata, i.e., the order be clear and unambiguous as to its intended finality and incorporate findings and conclusions which are essential to a decision entered on the basis of consent. The Association briefed the Commission on the requirements of an order based upon consent and specifically advised the Commission with respect to those findings and conclusions which are essential to a res judicata order.

In contravention of the purpose of the Agreement, the Commission included in the Order extraneous, unnecessary and

improper statements creating ambiguity as to its res judicata effect. In addition to creating ambiguity, certain findings and conclusions are wholly unsupported by fact or law. Furthermore, the Commission refused to incorporate in the Order those findings and conclusions which are essential to a final and conclusive decision based upon stipulation.

By entering an order which is not res judicata, the Commission has left the door ajar for adversaries of MFS or its subsidiaries to attack the Order or petition in the future for its amendment or repeal on the basis that the Commission retains continuing jurisdiction to change the provisions of the Agreement. By leaving the door ajar, the Commission undermines the paramount purpose of the Agreement that it be absolutely final so that MFS and its subsidiaries may proceed with business in reliance thereon. If the order can be modified or repealed in the future, MFS, its subsidiaries and shareholders lose a substantial benefit of the bargain represented by the Agreement and the Plaintiffs assume an unfair and unreasonable risk.


The Order represents an arbitrary and capricious action and an unconstitutional taking of property without due process of law. Because of its understanding that the Commission intended to enter an order which would be res judicata, the Association gave up its right to litigate its view of a proper distribution of the properties pursuant to the Wexpro Decision.

This Court has recognized that its duties in reviewing a decision of the Commission are not merely perfunctory, but that it should provide substantial and meaningful review for the purpose of giving correction and guidance when the actions of the Commission are clearly inconsistent with its purpose. Silver Beehive Telephone Co. v. Public Service Comm'n, 30 Utah 2d 44, 512 P.2d 1327 (1973). For the reasons stated herein, Plaintiffs respectfully request this Court to set aside the Order with instructions that the Commission render a new order consistent with the intent of the Agreement and in a form that can properly be accorded res judicata finality. Such order should be particularly explicit with respect to the res judicata finality of those provisions of the Agreement dealing with the conveyance and exploration and development of the properties as well as provisions for monetary expenditures.

RESPECTFULLY SUBMITTED this 17 day of May, 1982.

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CERTIFICATE OF SERVICE

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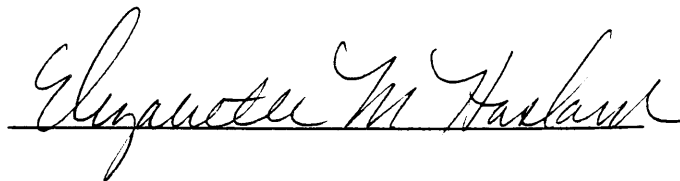
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A handwritten signature in cursive script, reading "Elizabeth M. Haskins", written over a horizontal line.