Edward A. Hunter
Jennifer H. Martin
Stoel Rives LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
(801) 328-3131
(801) 578-6999 (fax)
eahunter@stoel.com
jhmartin@stoel.com

Attorneys for PacifiCorp

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 MEMORANDUM IN SUPPORT OF PACIFICORP'S MOTION TO DISMISS**

PacifiCorp ("PacifiCorp" or the "Company") hereby replies to Utah Committee of Consumer Services' Response to PacifiCorp's Motion to Dismiss ("Committee Response") submitted by the Committee Of Consumer Services ("Committee") and the Petition of the Utah Industrial Energy Consumers to File a Brief in Opposition to PacifiCorp's Motion to Dismiss and Brief ("UIEC Response") submitted by the Utah Industrial Energy Consumers ("UIEC").

I. INTRODUCTION

The Responses of the Committee and UIEC fail to demonstrate that any of the facts they allege, could, even if proven, justify denial of PacifiCorp's Motion to Dismiss ("Motion"). The facts alleged are irrelevant to the issue. Further, it is insufficient as a matter of law to raise questions regarding factual issues that are not relevant to the legal questions before the Commission, merely as a means to resist a motion to dismiss. Both Responses rely heavily on allegations the Committee and UIEC claim they may be able to support after further investigation or discovery that are irrelevant to the legal questions before the Commission. The question before the Commission is whether the facts alleged or that could be proven provide some legal basis upon which the requested relief can be granted. The answer to that question does not involve the myriad of inquiries raised by the Committee and UIEC; rather the answer turns on an affirmative response to one question: Does one of the two exceptions to the rule against retroactive ratemaking apply based on the facts alleged or that could be proven?

The answer to that question is neither complex nor wanting on the allegations already available to the Commission in this proceeding. The answer is that neither exception applies. As PacifiCorp's Motion demonstrated and as will be discussed in greater detail below, the facts alleged or that could be proved cannot demonstrate that the Securities and Exchange Commission ("SEC") Public Utility Holding Company Act of 1935, as amended ("PUHCA"),

compliance audit ("SEC PUHCA Audit") had an extraordinary impact on the Company's earnings and therefore, the unforeseen and extraordinary event exception to rule against retroactive ratemaking does not apply. Likewise, the allegations regarding disclosure are insufficient for the Commission to determine that the Company did not satisfy the requirements established under the misconduct exception to the rule against retroactive ratemaking.

Both Responses mischaracterize the findings of the SEC PUHCA Audit, asserting that there was a finding of illegal or unlawful conduct on the part of PacifiCorp. While these mischaracterizations are not factually accurate and are not supported by the SEC PUHCA Audit or staff, the Commission need not decide those factual issues for purposes of the Motion. The Motion does not depend on the characterization of the SEC PUHCA Audit; rather, even if the Commission accepted the Responses' unwarranted allegations as true, the Committee is still not entitled to relief. As discussed herein, even if the Commission accepted as true, for purposes of deciding the Motion, that PacifiCorp should not have paid its stand-alone tax expense to PacifiCorp Holdings, Incorporated ("PHI") during the SEC PUHCA Audit timeframe, that factual allegation does not evidence unlawful or illegal conduct on the part of PacifiCorp nor does it further the Committee's and UIEC's legal theory of the case. Because the utility tax expense included in setting rates was and has always been properly calculated on a stand-alone basis, the actual tax expense paid at the holding company level to the United States Treasury is, and has always been, irrelevant to the Company's rates and, therefore, irrelevant to the question of retroactive ratemaking. Rates would not have been lower whether PacifiCorp paid the tax expense to PHI or not. Therefore, there is no basis for a claim of refund based on the fact that the tax expense was paid to PHI, whether such payment was assumed to be unlawful or not in deciding this Motion.

PacifiCorp's Motion should be granted because the relief requested by the Committee is barred by the rule against retroactive ratemaking and otherwise precluded by law.

II. ARGUMENT

Dismissal under Rule 12(b)(6) is appropriate in circumstances where "even if the factual assertions in the complaint were correct, they provide no legal basis for recovery." *Mackey v. Cannon*, 2000 UT App 36,¶ 13, 996 P.2d 1081. Moreover, while the Committee accurately notes that facts set forth in a complaint are assumed to be true for purposes of a 12(b)(6) motion, the same cannot be said of mere conclusions. Thus, the "sufficiency of [the] pleadings must be determined by the facts pleaded rather than the conclusions stated," *Franco v. The Church of Jesus Christ of Latter-day Saints*, 2001 UT 25, ¶ 26, 21 P.3d 198, 206 (internal quotation omitted), and as PacifiCorp noted in its Motion, the Commission need not credit conclusory allegations. *See* Motion at 15 (citing *Chapman v. Primary Children's Hospital*, 784 P.2d 1181, 1186 (Utah 1989)). Nor must the Commission accept new factual allegations or causes of action included only in a response to a motion to dismiss. *See Wright v. Univ. of Utah*, 876 P.2d 380, 384 (Utah 1994). The sufficiency of the pleading must be determined on the facts alleged in the complaint. *Id.*

Both Responses attempt to turn what is a simple legal issue into a complicated factual dispute. However, the Commission need not be distracted by these statements. It is well-understood that the authority of the Commission is limited to that which is expressly granted or clearly implied by statute,[1] and "any reasonable doubt of the existence of any power must be

[1] *See, e.g., Basin Flying Service v. Public Service Comm'n*, 531 P.2d 1303 (Utah 1975); *see also* Report and Order, *In the Matter of the Formal Complaint of Olympus Clinic Inc. against Qwest Corporation*, Docket No. 03-049-17 (March 15, 2004) ("*Olympus Order*") at 5 ("While we recognize that Olympus' complaint follows an approach cognizable in courts with broad law and equity powers, we are not a court. Our powers are those conferred by statute enacted by the legislature.").

resolved against the exercise thereof."[2] Neither Response takes issue with the legal standard set forth in the PacifiCorp's Motion. For the reasons set forth in PacifiCorp's Motion (unrebutted by the both Committee and UIEC), the only way the Committee could even theoretically be entitled to the relief it seeks would be if an exception to the rule against retroactive ratemaking applies. The Utah Supreme Court has held that the applicability of an exception to the rule against retroactive ratemaking is ultimately a question of law.[3]

Thus, the issue presented to the Commission in this proceeding is a simple, legal issue: whether an exception to the rule against retroactive ratemaking applies based on the SEC PUHCA Audit. The legal rules governing retrospective relief are well-defined and recently applied by the Commission. The Responses devote little attention to any alleged facts relevant to these exceptions (1 page of the 17 page Committee Response; 2 and 1/2 pages of the 15 page UIEC Response). The additional discussion of the policy implications of a stand-alone versus consolidated calculation for utility income tax expense is irrelevant to the determination of the applicability of the exceptions. The Commission need only look at the facts that can support the legal theories under which it can grant relief. It should not entertain new facts or new theories now presented in the Responses.[4]

A. THE "ULTIMATE ISSUE" IN THIS CASE IS THE LEGAL QUESTION OF WHETHER AN EXCEPTION TO THE RULE AGAINST RETROACTIVE RATEMAKING APPLIES.

In spite of the fact that the rule against retroactive ratemaking is an absolute bar to the Committee's requested relief if no exception is applicable, the Responses devote very little discussion to whether sufficient facts, rather than mere argument, have been alleged or could be

---

[2] *See Hi-Country Estates Homeowners Assoc. v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) ("The P.S.C. has only the rights and powers granted to it by statute.") (citation omitted).

[3] *MCI Telecomm. Corp. v. Public Serv. Comm'n*, 840 P.2d 765, 770 (Utah 1992).

[4] *See Wright*, 876 P.2d at 384.

proven to support the applicability of an exception. Instead, the Responses either restate the applicable legal standard for applying the exception or make unsupported conclusory statements regarding facts that could support their theories. Each of these attempts to avoid a motion to dismiss are insufficient as a matter of law.

1. No Facts Have Been Alleged or Could Be Proven to Support Relief Under the Utah Supreme Court's Definition of the Misconduct Exception.

In support of the application of the utility misconduct exception, the Committee asserts that there was a "failure to *properly* inform regulatory parties" of the SEC PUHCA Audit and its effect. (Committee Response at 19 (emphasis added).) In expanding on this alleged failure, the Committee invents for Commission consideration, the question of whether regulatory parties "were in possession of information *to sufficiently understand* the meaning and import of what was happening" with respect to the SEC PUHCA Audit and consolidated taxes in general. (*Id.* at 18 (emphasis added).) In addition to the information provided directly to the Committee prior to the 04-035-42 rate case, the Committee asked dozens of additional data requests regarding the SEC PUHCA Audit during the course of the proceeding; yet, without providing any rationale for the delay, the Committee admits that its own process "of becoming aware of the implications of the Audit *did not even begin* until after" the settlement negotiations in that case. (*Id.* at 17 (emphasis added).) The Committee goes on to state that whatever information was provided, it could not be understood by the Committee until after additional analysis. (*Id.*)

UIEC, for its part, asserts that PacifiCorp had a duty to disclose the SEC PUHCA Audit and the subsequent "refund" in the filing of its rate case. (UIEC Response at 14.) UIEC also alleges that it only "accidentally uncovered" information regarding the SEC PUHCA Audit

through the discovery process and that the "treatment of the refund was not disclosed until after the rate case was settled."[5] (*Id.* at 13.)

The Responses have turned the misconduct exception (and its rationale) on its head, broadly expanding the scope of the exception and greatly increasing the burden on utilities. Before the Commission determines if the facts alleged or that could be proven would support the Committee's claims, it must first properly define the scope of the exceptions under which the Committee may be entitled to the relief it seeks.

The utility misconduct exception to the rule against retroactive ratemaking was defined in *MCI Telecomm. Corp. v. Public Serv. Comm'n*, 840 P.2d 765, 775 (Utah 1992), in which the Court stated:

> 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.

The rationale for adopting the exception was that where relevant information is not disclosed, then the rates previously fixed by the Commission "cannot be based on reasonable projections of the utility's revenues and expenses." *Id.*

[5] Through the discovery process, UIEC was in possession of information regarding the Audit during the course of the rate case. In fact, contrary to UIEC's assertions, UIEC had a copy of the SEC Audit Report and therefore, it had actual knowledge of how the company treated the SEC reallocations before its entry into the Stipulation. Further, notice was provided in February 2003 of the $150 million capital infusion, which makes up the bulk of the reallocation. Finally, UIEC witness, Maurice Brubaker, filed direct testimony in PacifiCorp's last rate case which specifically addressed the SEC Audit and the Audit Report. Docket No. 04-035-42, UIEC Direct Testimony of Maurice Brubaker, page 3, line 19 to page 4, line 2 ("Scottish Power sought and received permission from the SEC to retain these income tax benefits in PacifiCorp Holdings Inc. rather than allocate them to other operations, including PacifiCorp. Although Scottish Power was doing this from the beginning it apparently was without SEC approval.") It is simply disingenuous for UIEC to now claim it did not have full access to this information until after the settlement of the rate case.

In the *MCI* case, the facts before the Court established that the Division's analysis of the utility's earnings was "complicated" by changes in accounting systems and delays in budgets. 840 P.2d at 775. However, the Court was not concerned with whether the regulatory agency did or did not understand the information provided; rather, the Court held that the relevant inquiry should have been whether the utility "acted forthrightly and made timely and accurate information available to the Division, the Commission, and the Committee so that each could accurately analyze [the utility's] actual and projected earnings." *Id.*

Under this actual definition of the exception, the facts alleged or that could be proven do not support the Committee's claim. It is simply not relevant to the Commission's decision whether the Committee understood the data provided to it. Rather, the only relevant inquiry before this Commission focuses on the utility's conduct in disclosing information, not the recipients' understanding. In fact, according to Black's Law Dictionary, the word "disclosure," as used in *MCI*, means "the act or process of making known something that was previously undisclosed; a revelation of facts." While the utility must be forthright in its disclosures, it is not required to educate, enlighten, explain or ensure that the recipient understands its disclosures.

A careful analysis of the *MCI* case conclusively demonstrates that the "recipient understanding standard" is not within the proper scope of the exception. Nor should it be. To read the exception in that manner would expand the utility burden beyond any reasonable standard and could ensure that it would never be satisfied and would eviscerate the rule against retroactive ratemaking. Entities could revisit any case merely based on a claim that they failed to comprehend matters or the effect of matters at the relevant time. For example, the Committee has used a number of different outside consultants in the Company's past rate cases and it would not be possible or practical to expect the Company to know how much information or

explanation is required for each of those consultants to understand what they are provided. If the Committee and its consultants do not understand information or documents provided to them, they have the opportunity and the burden to ask questions. The utility has the burden to support its requested rate increase and to respond forthrightly to those discovery requests.

Notably, the facts that have been alleged in the Committee Response do not state that PacifiCorp intentionally misled or failed to provide information regarding the SEC PUHCA Audit or consolidated taxes. Indeed, in responding to the Motion, the Committee simply ignores that deficiency in its allegations regarding the key legal element of the exception. (Committee Response at 17 ("The Committee neither accepts nor denies PacifiCorp's allegations regarding past information provided to the Committee and other regulatory parties.").) Under the standard governing a motion to dismiss, it is the Committee's affirmative obligation to have alleged facts sufficient to support its claimed relief. [6] Where, as here, the facts pled are irrelevant to the legal theory of recovery, and the complainant refuses to include facts that would be relevant to the legal theory of relief, a motion to dismiss is entirely appropriate.[7]

Nor does the UIEC Response advance the sufficiency of the allegations in the pleadings. Rather, this Response focuses only on allegations regarding whether the information to be disclosed had to be provided in the Company's direct filings or whether it was sufficient for the information to be disclosed during the discovery process. UIEC has cited no caselaw or Commission precedent that would require disclosure of all information "that may or may not affect the rate making proceedings" to "all interested parties" at the filing of the rate case. (UIEC Response at 10.) Nor should the utility be required to assume in advance which pieces of

[6] *See Wright*, 876 P.2d at 384 ("Although we accept the allegations in the complaint as true and affirm dismissal only if no set of facts exists to support the complaint, we cannot add facts or causes of action to the complaint that do not exist that [complainant] has consistently declined to include.")

[7] *Id.*

data will have significance to which "interested parties."[8] To determine otherwise on these points would make each and every rate case decision not final and perpetually open for review. For example, while the Company provided data regarding many different expenses and revenues in response to data requests in the last general rate case, it fundamentally disagreed with the relevance of some of that data to the ratesetting process. It would be inappropriate to require the Company to anticipate such irrelevant requests in filing its application.

The Responses have provided no compelling reasons for any expansion of the definition of the utility misconduct exception. Further, this Commission has shown a reluctance to expand the previously recognized definitions. *In the Matter of Beaver County et al.*, Docket No. 01-049-75, Order Granting Motion for Summary Judgment at 45 (Utah PSC June 17, 2005) ("*Beaver County*"). Accordingly, the Commission should apply the exception as defined and interpreted by the Utah Supreme Court. Under that definition, no facts have been alleged to support its application and therefore, the Motion to Dismiss should be granted.

2. No Facts Have Been Alleged or Could Be Proven to Support Relief Under the Utah Supreme Court's definition of the Extraordinary and Unforeseen Event Exception.

With respect to the "extraordinary and unforeseen event" exception, the Committee and UIEC have failed to allege any facts that support the Committee Request, nor could they prove any facts to support the exception. This exception is completely inapplicable because of one simple, legal point—the SEC, which does not have jurisdiction over tax expense, did not change tax expense in any way through the SEC PUHCA Audit. Because there was no impact on

[8] Notably, UIEC states that PacifiCorp has the burden to inform "all interested parties . . . of all relevant facts." UIEC cites no caselaw that extends the burden of disclosure to "all interested parties." Indeed, before interventions have been filed, PacifiCorp cannot be reasonably held to a burden to presume who "all interested parties" would be in order to fulfill this broadly expanded disclosure requirement.

expense, the SEC PUHCA Audit findings are irrelevant for ratemaking purposes in general and for application of an exception to the rule against retroactive ratemaking in particular.

Although the Committee and UIEC cannot overcome the fact that the SEC PUHCA Audit cannot, and did not, change tax expense, each Response simply asserts, without any supporting factual allegations, that the total reallocation, $229 million over four years, is so large that it must have had an effect on earnings. UIEC states that the reallocation "must certainly have had an extraordinary effect on the utility's earnings." (UIEC Response at 13.) The Committee simply asserts that the total reallocation "is an extraordinary sum by any measure, as is its effect on earnings." (Committee Response at 19.) The Commission must not give any credit to these conclusory allegations in ruling on the Motion.[9]

Again, reference to the actual definition of the exception is the appropriate starting point for the Commission's analysis. For the extraordinary component of the extraordinary-and-unforeseeable exception to apply, the event "must have an extraordinary effect on the utility's *earnings*." 840 P.2d at 771 (emphasis added).

As noted in the Motion, the SEC PUHCA Audit itself required absolutely no change to tax expense, stated earnings or financial statements. Therefore, the exception is wholly inapplicable. However, even if the Commission were to assume as true for purposes of deciding the Motion, the unsupported allegation that the SEC reallocations would have had an impact on expense, PacifiCorp would not have earned more than its authorized rate of return, and therefore, under *MCI* no refunds are available. [10] *See* Motion at 25-26. Further discovery or investigation

[9] *Chapman*, 784 P.2d at 1186.

[10] The Committee's Request is ambiguous on its theory of how these dollars might have become available to PacifiCorp. Whether the tax expense would have changed, which is, as noted above, inconsistent with federal law governing the jurisdiction of the Internal Revenue Service ("IRS") and SEC, or whether the expense would have stayed the same but no payment would have been made to PHI or to

on this issue will not create a factual dispute relevant to this legal theory of relief. Rather, for purposes of the Motion, PacifiCorp, accepting the impact on expense allegation as true for purposes of the Motion only, made the extreme assumption that over 2/3 of the reallocation would apply to the year in which PacifiCorp achieved its highest return, an assumption that certainly overstates the effect on earnings. Further discovery will only serve to more accurately allocate the capital infusion over the timeframe of the SEC PUHCA Audit and therefore, decrease the impact on PacifiCorp's earnings from year to year (were such impact assumed to be true).

Under the Utah Supreme Court's definition of this exception, there are no additional relevant factual allegations contained within the Committee's Request nor are there additional facts that could be proven under which the Committee would be entitled to relief. Therefore, dismissal of the Request is warranted.

B. THE DISCUSSION OF THE COMMISSION'S STAND-ALONE METHODOLOGY DOES NOT PROVIDE ANY BASIS FOR THE REQUESTED RELIEF.

As stated above, the Commission can only grant the requested relief if an exception to the rule against retroactive ratemaking applies. Having found no support for the application of either exception, the Responses also argue that the Commission should reconsider its long-standing stand-alone tax expense methodology. The relevance of the stand-alone methodology to this proceeding is not in whether the Commission should change it as a policy matter on a going-forward basis; its relevance is more straightforward and simple—it establishes that PacifiCorp did not mislead the Commission or any other party in reporting its tax expense as filed in its previous rate cases because it was simply following the Commission's long-standing precedent.

---

affiliate companies, the result is nevertheless the same—PacifiCorp would not have earned above its authorized rate of return.

The situation is that: the Commission's long-standing policy has been the use of a stand-alone methodology;[11] PacifiCorp filed all of its rate cases during the SEC PUHCA Audit period using that methodology; while some parties challenged the methodology in the most recent general rate case,[12] no party has brought the issue of a change to this precedent for a Commission resolution. Accordingly, under Utah law,[13] the prior precedent remains unchanged, and all rates collected during the timeframe of the SEC PUHCA Audit were collected pursuant to the stand-

[11] While UIEC agrees with PacifiCorp that the question of the stand-alone methodology is not the primary issue before the Commission in this case, a brief response to UIEC's unsupported statements is nevertheless warranted. UIEC asserts that the issue of upstream tax savings had "never been decided" by this Commission and that PacifiCorp's citation to past precedent ignores the facts that (1) ScottishPower is the first foreign-utility owner of a Utah utility and (2) the issue of the upstream tax savings was reserved in the merger docket. UIEC misses the point. First, and most importantly, there cannot be any reasonable argument that this Commission has previously expressly adopted and consistently applied the stand-alone methodology to Utah utilities. *See, e.g., In re Mountain States Telephone and Telegraph Company*, Report and Order, Docket No. 88-049-07 (Utah PSC Oct. 18, 1989). While it is true that ScottishPower is a foreign company, the question of whether that single fact should change the stand-alone methodology has never been put to and resolved by the Commission. Thus, until changed, under Utah law, the prior precedent stands as the rule of law with respect to taxes. *See Salt Lake Citizens Congress v. Mountain States Telephone & Telegraph Co.*, 846 P.2d 1245, 1254 (Utah 1992). The Commission cannot change a rule of law "by silence." *Id.* Finally, the reservation of rights in the merger order was with respect to all issues. The reservation did not stand for the proposition that PacifiCorp agreed that the question of taxes was now an open issue and past precedent was irrelevant; rather, the reservation simply permitted parties to raise the consolidated tax argument in future rate case proceedings if they so chose, while at the same time permitting PacifiCorp to respond that as a legal matter, the prior rule of law should not be abandoned. *See In re Application of PacifiCorp and ScottishPower plc for an Order Approving the Issuance of PacifiCorp Common Stock*, Report and Order at 19, Docket No. 98-2035-04 (Utah PSC Nov. 23, 1999) ("Merger Order") ("The parties to this docket preserve their right to raise the issue of the treatment of upstream tax savings and costs in future rate cases. All parties preserve their positions and have not waived their rights on this issue.")

[12] Notably, the Committee spends a number of pages in its Response rehashing the very same arguments in support of a consolidated tax adjustment that its witness, Mr. Arndt, made in his prefiled testimony in Docket No. 04-035-42. For example, on page 13 of its Response, the Committee argues that consolidated income tax savings only come about when a loss and a gain are added together and therefore, the result (savings) should "belong[] to all the subsidiaries that created it." This argument is nothing more than a restatement of Mr. Arndt's testimony wherein he testified that "There is one tax paid to the federal government based upon the combined taxable income of the affiliated companies. The consolidated tax savings calculation recognizes this fact." Docket No. 04-035-42, Committee Direct Testimony of Michael Arndt, page 8, line 24 to page 9, line 1. Although, the Committee settled that rate case without requiring a Commission decision on whether its adjustment should be adopted, it now insists that the Commission should accept that argument with retroactive application.

[13] *See Salt Lake Citizens Congress*, 846 P.2d at 1253-54.

alone methodology. The parties have not alleged nor could they prove a different set of facts. Accordingly, whether the Commission should consider a change to the methodology is entirely irrelevant to this case and may only be germane, if at all, to future rate cases if raised by a party therein.[14]

In an attempt to change retroactively the Commission's methodology, the Responses make much of the allegation that, had they known of the actual taxes paid to the federal government versus the stand-alone calculation, they may have argued for a different ratemaking treatment. In fact, testimony or discovery in rate cases since the ScottishPower merger have disclosed (1) the taxes paid to the federal government and (2) the taxes calculated under the stand-alone methodology. In other words, the utility disclosed in general rate cases the very information the Responses now say they would have needed to argue for a different method. The UIEC and Committee's own failure to argue to the Commission for a change in precedent in past rate cases cannot serve as a basis for retroactively adjusting rates now.

---

[14] The Committee cites to the U.S. Supreme Court decision in *FPC v. United Gas Pipeline Co.*, 386 US. 237, 243-44 (1967), for the proposition that the U.S. Supreme Court has "categorically reject[ed] the idea of ratepayers not participating in consolidated income tax savings" where actual federal income tax liability is less than stand-alone calculated tax liability. (Committee Response at 11.) In fact, that is not the holding of *FPC.* Instead, the Supreme Court held that the FPC (now FERC) could adopt a consolidated tax adjustment but it did not mandate that it do so. *See Charlottesville*, 774 F.2d at 1216; *Tennaco Oil Co. v. Federal Energy Reg. Comm'n*, 571 F.2d 834, 843 (5th Cir. 1978) (rejecting argument that *United Gas* held that utilities must share in consolidated tax savings). In fact, as the *Charlottesville* case discussed in both the Motion and Committee Response makes clear, FERC has in fact rejected the use of a consolidated tax adjustment in all cases. *See Charlottesville v. Federal Energy Reg. Comm'n*, 774 F.2d 1205 (D.C. Circuit 1984).

The Committee also misreads FERC's recent Policy Statement on income taxes. The Policy Statement did not create an exception to the stand-alone methodology and calculating utility tax expense based on utility-created income rather than focusing on consolidated parent tax expense. Rather, FERC reaffirmed its stand-alone policy and extended it to partnerships and other pass-through entities. *See Inquiry Regarding Income Tax Allowances*, Docket No. PL05-05, 111 FERC ¶ 61,139 at n. 12 (May 4, 2005) (citing *Charlottesville*) ("The stand-alone policy provides that income tax allowance of a corporate subsidiary should be determined based on the actual or potential income tax obligation of that subsidiary. Thus, the amount of the allowance is not based on the tax obligation of the parent company in the test year in which the consolidated return is filed.").

The Responses also argue adequate disclosure of the consolidated tax payments was "particularly applicable in this case" in light of the reservation of rights language from the Merger Order where parties reserved the right to raise the issue of "upstream tax savings" in future rate cases. (Committee Response at 15, n 17.) In fact, the reservation agreement already provides a mechanism for disclosure of this information. According to the language of the agreement, ScottishPower committed to retaining records related to any upstream tax savings and to "make these records available to the DPU, CCS and other parties in accordance with Stipulation Ex. 1 and the discovery rules of the Commission." Merger Order at 19. Thus, the agreement of the parties contemplated that this information would be available to parties *through the discovery process*, not as part of the general rate case filing as asserted by UIEC. PacifiCorp has complied with this requirement in each of the rate cases since the merger.

Because all rates were lawfully collected in compliance with the stand-alone methodology, UIEC's assertion that the SEC reallocation results in "cost-free capital" is simply incorrect. At all times, customers only paid rates based on the stand-alone tax expense included in rates. No party has alleged that customers paid more than tariffed rates. Once the rates are lawfully collected from ratepayers, the revenues are shareholder funds, not customer-supplied capital. The SEC actions did not change actual tax expense in any way. In other words, contrary to UIEC's assertions, the SEC's actions were not a "refund" of tax expense.

C. THE RESPONSES HAVE PROVIDED NO LEGAL JUSTIFICATION FOR THE COMMISSION TO ALLOW REPUDIATION OF PRIOR SETTLEMENTS.

The Responses argue that the Committee and UIEC should not be bound by the terms of the prior rate case settlements because the "boilerplate" terms of the stipulations do not merit application of estoppel theories; relevant information had not been fully and timely disclosed;

and, under affiliate transaction rules, proper prudence reviews have never been conducted. None of these novel theories is legally sufficient to overcome the express agreement of the parties.

1. The "Boilerplate" Language Included in Prior Rate Case Stipulations Does Not Prevent the Application of Estoppel to the Committee's Claims.

Both the Committee and UIEC argue that the Committee's participation in settlements of the Company's last three rate cases should not bar the Committee from pursuing the relief sought in the Request. The Committee argues that it is not bound by its own prior participation in and entry into the revenue requirement stipulations by asking the rhetorical question of "where in any of the past rate case agreements . . . has the matter of income tax savings allocated to PacifiCorp at the consolidated level ever been addressed?" (Committee Response at 15-16.) UIEC similarly states that "the issue of how to deal with the refund ordered by the SEC has never been put before the Commission" and that "the parties [to the stipulation] reserved their right to raise any issues not specifically addressed in the last rate case . . . ." (UIEC Response at 12.) Neither the Committee nor UIEC even attempt to refute the binding, preclusive nature of a settlement stipulation.[15] Instead, they submit unsupportable arguments that, when stripped to their essence, amount to an unspoken claim that the Company's final rates were somehow not part of the settlements. Such a conclusion cannot withstand even cursory scrutiny. The Committee is squarely and impermissibly attempting to repudiate its prior agreements and for the Committee's

[15] *See, e.g., Yeargin, Inc. v. Auditing Div. of Utah State Tax Comm'n*, 2001 UT 11, ¶ 20, 20 P.3d 287, 293 ("A stipulation of fact filed with and accepted by a court 'acts as an estoppel upon the parties thereto and is conclusive of all matters necessarily included in the stipulation.'") (quoting *Deseret Sav. Bank v. Walker*, 2 P.2d 609 (1931)); *Johnson v. Peoples Finance & Thrift Co*., 272 P.2d 171, 172 (Utah 1954) ("It would indeed be a serious reflection upon our system of jurisprudence if parties could stipulate an agreement of settlement but refuse with impunity from performing."); *Myers v. Olson*, 100 N.M. 745, 748, 676 P.2d 822, 825 (1984) ("Properly authorized and acknowledged consent judgments and judgments rendered on stipulations are conclusive of all claims determined therein and may not be collaterally attacked by the parties thereto."); Utah Admin. Code R746-100-10.F.4 ("Stipulations may be received in evidence, and if received, are binding on the participants with respect to any matter stipulated.").

and UIEC's arguments to succeed would amount to a finding that rate case settlements are meaningless and never final.

The core bargain of the three relevant stipulations was the party agreement on the appropriate revenue requirement amounts. No plausible argument could be made to the contrary. Indeed, each of the three stipulations was expressly titled a revenue requirement stipulation,[16] and each stipulation identified the parties' settlement of the appropriate revenue requirement amount that was only reached after hard-fought negotiation. In each case, the parties agreed that the terms of the stipulation—necessarily including the revenue requirement amount that would in turn determine the Company's rates—were just, reasonable, and in the public interest.[17] Yet the Request now seeks to "return to Utah ratepayers . . . monies which PacifiCorp since its 1999 merger collected in Utah rates,"[18] because "the rates that included . . . excess tax cost monies were . . .necessarily unjust, unreasonable and unlawful under Utah law . . . ."[19] There is no way to characterize this as anything other than an attempt by the Committee to escape from its three previous settlements—whereas the Committee previously stipulated that the Company's revenue requirement (and necessarily, therefore, the resulting rates) were just, reasonable, and in the public interest, it now seeks a finding by the Commission that those rates were in fact not just, reasonable, or in the public interest.

The Committee and UIEC both seek to cling to the reservations included in the stipulations as a basis for their repudiation of the prior settlements, but nowhere in any of the

---

[16] *See* Stipulation on Certain Revenue Requirement Issues, Docket No. 01-035-01 (July 12, 2001) ("2001 Stipulation"); Revenue Requirement Stipulation, Docket No. 03-2035-02 (Jan. 30, 2004) ("2004 Stipulation"); Stipulation Regarding Revenue Requirement, Rate Spread and Rate Design, Docket No. 04-035-42 (Feb. 14, 2005) ("2005 Stipulation").

[17] *See, e.g.*, 2001 Stipulation at 2; 2004 Stipulation at 1; 2005 Stipulation at 1.

[18] *See* Request at ¶ 1.

[19] *Id*. at ¶ 17.

stipulations is there a reservation that would allow a party to claim that it retained the right to later argue that the rates covered by the settlement—the very rates that the parties were stipulating to be just and reasonable—were unjust and unreasonable. Instead, the reservations covered "future proceedings,"[20] and were clearly meant to preserve the right to argue positions in future rate cases that would not necessarily be consistent, as a matter of ratemaking principle, with the prior settlements. That is a very different thing from reserving the right to retroactively undo the core terms of a binding, final stipulation and take back money that was promised in the essential bargain of the settlement. The only reservation that allowed parties to repudiate the binding stipulations was the one allowing for withdrawal in the event that the Commission or an appellate court rejected or changed any of the terms of the deal,[21] which did not happen in any of the three stipulations at issue in this case. Indeed, the reservation that the Committee and UIEC seek would be wholly inconsistent with the very notion of settlement. It would be tantamount to a party stating that it settled the case now subject to the right to later un-settle part of the case if it deemed doing so advantageous (in this case, after extracting from PacifiCorp all of the benefits

[20] *See, e.g.*, 2005 Stipulation at ¶ 23 ("Execution of this Stipulation shall not be deemed to constitute an acknowledgement by any Party of the validity or invalidity of any particular method, theory or principle of regulation or cost recovery, and no Party shall be deemed to have agreed that any method, theory or principle of regulation or cost recovery employed in arriving at this Stipulation is appropriate for resolving any issues in any other proceeding in the future and shall not be deemed to constitute precedent nor prejudice the rights of any party in future proceedings."); 2004 Stipulation at ¶ 14 (same); 2001 Stipulation at ¶ 4 (same).

[21] *See, e.g.*, 2005 Stipulation at ¶ 21 ("In the event the Commission rejects any or all of this Stipulation, or imposes any additional material conditions on approval of this Stipulation, or in the event the Commission's approval of this Stipulation is rejected or conditioned in whole or in part by an appellate court, each Party reserves the right, upon written notice to the Commission and the other Parties to this proceeding delivered no later than five (5) business days after the issuance date of the applicable Commission or court order, to withdraw from this Stipulation."); 2004 Stipulation at 12 (same); 2001 Stipulation at ¶ 3 ("The Parties have negotiated this Stipulation as an integrated whole. Accordingly, in the event this Stipulation is not approved in its entirety, then no Party shall be bound, or prejudiced, by the terms of this Stipulation and the Stipulation shall be null and void and each Party shall be entitled to file testimony and in general to put on such case as it deems appropriate.")

of settlement—up to $220 million in rates that PacifiCorp agreed to forgo in return for settling the cases).

This is precisely why the Request is so inappropriate. The Committee does not seek to fully unwind the relevant rate cases and allow PacifiCorp the opportunity to argue for $220 million in additional rates. It does not seek to consider any of the broader ratemaking issues that would help avoid the problems of single-item ratemaking. Instead, it seeks to retroactively change the bargains it previously struck, at no risk to itself but to PacifiCorp's detriment. As PacifiCorp argued in its Motion, multiple principles of law preclude such repudiation,[22] and "[t]he Commission cannot in fairness . . . deprive [the utility] of the benefit of the bargain it struck in entering into . . . settlement."[23] The Committee entered a final, binding settlement and is required to abide by the terms of that settlement.[24]

2. The Disclosure Requirement Is Misstated.

Citing the *EBA* case[25], both Responses have sought to articulate a greatly-expanded duty on utilities to disclose all information relevant to the rate case proceeding. This duty is no more than the corollary to the misconduct exception stated above. Under the *EBA* case, utilities must disclose all information relevant to the rate case proceeding; if they do not, under the *MCI* case, the rule against retroactive ratemaking will not prevent retrospective adjustments to rates.

---

[22] *See* Motion at 39-43.

[23] *Beaver County* at 54.

[24] *See, e.g., Cerbone v. Cerbone*, 428 N.Y.S.2d 777, 780 (N.Y. Civ. 1979) ("Having received substantial benefit from the stipulation of settlement, respondent . . . should be estopped from questioning its result, or his own acts; from claiming the benefits of a part of the agreement and repudiating the rest; from misleading the other parties; and, from retracting the stipulation of settlement and taking advantage of the forbearance of his adversaries thereby induced.") (citations omitted).

[25] *Utah Department of Business Regulation v. Public Serv. Comm'n of Utah*, 614 P.2d 1242 (Utah 1980) ("*EBA*").

Rather than reading the disclosure requirement in this context, both Responses state it in an unjustified, greatly expanded manner. The Committee turns the focus from one of disclosure of information to one of ensuring recipients understand what they have received. For the reasons discussed above, this expanded interpretation must be rejected.

The UIEC interpretation inserts a never-before-articulated restriction on the timing of the disclosure and expands the definition of "relevant" information. Specifically, UIEC would require the utility to predict the adjustments that may be proposed by parties and then disclose information relevant to those possible adjustments at the time of the rate case filing. This interpretation turns traditional regulation on its head. Under the long-standing principles applied by this Commission, the utility files its case with information that supports its revenue requirement. In putting together that filing, the utility must abide by applicable Commission precedent. If the utility wishes to propose recovery on some basis that would overturn Commission precedent, the utility is required to disclose that fact and provide support for its proposed treatment.[26] The utility has not had the obligation to also disclose information not relevant to any Commission-approved precedent or its own calculated revenue requirement.

This past practice is tied to common sense. In contrast, the UIEC interpretation of the disclosure requirement would require a utility "in its filing" to presume what other parties might propose as an adjustment and to provide information relevant to that adjustment even though it is not used in calculating the utility's revenue requirement or in any Commission-approved adjustment. The UIEC proposal is unworkable and conflicts with the law, custom, practice and procedure with respect to such matters. If having to anticipate other parties' proposed adjustments were the burden, it could never be satisfied. Moreover, if the Commission were to

[26] *See Salt Lake Citizens*, 846 P.2d at 1253-54.

adopt this interpretation, the utility would have legitimate procedural concerns with being able to comply with the filing requirements. If the parties wish to propose an adjustment, the long-standing and more reasonable solution for getting the information necessary to calculate that adjustment has been to seek that information through the discovery process.

3. There Was No Affiliate Transaction; Therefore the Commission's Standard of Review for Affiliate Transactions Is Irrelevant.

UIEC has included in its Response a novel legal claim not proffered by the Committee. Specifically, UIEC is arguing that estoppel is inapplicable because PacifiCorp failed to seek approval of the "transaction with PHI" as an affiliate transaction under the Commission's prudence review standards for affiliate transactions. Because this legal claim is not included in the Committee's Request, it is not relevant to resolution of the Motion and cannot serve as its own legal basis for denying the Motion.[27] In any event, the legal precedent cited by UIEC is wholly inapplicable to the issues before the Commission and therefore, this novel argument must be rejected.

Although somewhat ambiguous in its Response, UIEC asserts that the affiliate transaction that is relevant to this proceeding was the "transaction involving the refund" between PHI and PacifiCorp. The capital infusion from PHI to PacifiCorp is not an "affiliate" transaction in the manner in which that term has previously been interpreted by this Commission. There is no Utah precedent for the assertion that a holding company parent cannot infuse capital into a subsidiary without prior consent and approval or a prudence review by the Commission. Rather, the Commission has traditionally defined affiliate transactions requiring prudence review as transactions between a regulated utility and its affiliates that involve the provision or purchase of services or goods for which there is a market alternative and for which the utility seeks rate

[27] *See Wright*, 876 P.2d at 384.

recovery of the expense.[28] Indeed, the case cited by UIEC dealt with whether rate recovery was available for the provision of services to a utility by an affiliate.[29]

PacifiCorp regularly files an affiliate transaction report with Utah regulators and the Commission and reports all of its affiliate transactions. Moreover, it has a Commission-approved transfer pricing policy which sets methodology for an approved pricing scheme for transactions between PacifiCorp and its affiliates. Neither this actual experience nor the prior cases decided by the Commission extend the Commission's definition of an affiliate transaction to capital infusions. Because there was no affiliate transaction in the capital infusion from PHI to PacifiCorp requiring a prudence review, UIEC's specious argument should be rejected.

D. THERE WAS NO VIOLATION OF THE MERGER ORDER.

Both Responses argue that the payment of tax expense from PacifiCorp to PHI constituted a violation of the Merger Order because it resulted in ratepayers paying the acquisition costs incurred by ScottishPower in the merger. Once again the Responses have deliberately missed the point.

The Company has collected the rates allowed by the Commission, including tax expense calculated in accordance with the Commission's stand-alone tax methodology. The fact that PHI's consolidated tax expense would be different than PacifiCorp's stand-alone tax expense has been previously recognized by both the Committee and UIEC. For example, in the last general rate case, witnesses for both parties proposed adjustments based on this fact and ultimately settled the case. During the merger proceedings themselves, all parties knew of the potential differences in tax expense and that was precisely why they wished to reserve the tax issue for

[28] *See, e.g., U.S. West Comm., Inc.,* Docket No. 95-049-05, Report and Order (Utah PSC Nov. 27, 1995) (discussing application of lower of cost or market test to affiliate transactions).

[29] *See Committee of Consumer Services v. Public Serv. Comm'n of Utah*, 2003 Utah 29, 75 P.3d 481.

consideration if raised in a future rate case. The fact that there is a difference between consolidated and stand-alone tax expense does not constitute a violation of the merger order but rather, merely reflects ratemaking based on long-standing Commission principles.

III. CONCLUSION

Based upon the foregoing, PacifiCorp requests that the Commission issue an order dismissing the Request with prejudice.

RESPECTFULLY SUBMITTED: December 1, 2005.

_____

Edward A. Hunter
Jennifer H. Martin
Stoel Rives LLP

Attorneys for PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF PACIFICORP'S MOTION TO DISMISS** was served on the following by electronic mail on December 1, 2005:

Michael Ginsberg
Assistant Attorney General
Patricia E. Schmid
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84114
mginsberg@utah.gov
pschmid@utah.gov

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

Barrie L. McKay
State Regulatory Affairs
Questar Gas Company
180 East 100 South
P.O. Box 45360
Salt Lake City, UT 84145-0360
barrie.mckay@questar.com

Colleen L. Bell
Senior Corporate Counsel
Questar Gas Company
180 East 100 South
P.O. Box 45360
Salt Lake City, UT 84145-0360
colleen.bell@questar.com

F. Robert Reeder
Vicki M. Baldwin
Parsons Behle & Latimer
201 South Main St., Ste. 1800
Salt Lake City, Utah 84111