

Edward A. Hunter (Utah Bar No. 1592)
John M. Eriksson (Utah Bar No. 4827)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 328-3131
Fax: (801) 578-6999

James M. Van Nostrand
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, Washington 98101
Telephone: (206) 624-0900
Fax: (206) 386-7500

Attorneys for PacifiCorp

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application : Docket No. 01-035-01
of PacifiCorp for an Increase :
in its Rates and Charges : PACIFICORP'S PETITION FOR
REHEARING OR RECONSIDERATION

PacifiCorp, doing business as Utah Power & Light Company ("PacifiCorp" or "Company"), pursuant to Utah Code Ann. §§ 54-7-15 and 63-46b-13, hereby seeks rehearing or reconsideration of the Commission's Report and Order of September 10, 2001 ("Order") with regard to the issue set forth herein.

I. THE ORDER ERRONEOUSLY IMPUTES REVENUES TO LONG-TERM FIRM WHOLESALE SALES.

Based on the recommendations of the Division of Public Utilities ("Division"), the Committee of Consumer Services ("Committee"), UAE Intervention Group and Nucor Corporation ("UAE/Nucor"), the Order imputes revenues to "underpriced" long-term firm wholesale sales contracts entered into after 1995. The imputation was made, not on the basis of

an imprudence finding, but in order to “protect retail ratepayers from the consequences of bearing *unwarranted risk*.” Order at 33 (emphasis added). The Order errs in making such revenue imputation.

A. The Order’s Imputation Based on an “Unwarranted Risk” Standard Is Arbitrary and Capricious.

The Order states that the parties recommending the imputation did so *not* on the basis of a claim of imprudent contracting, but on the basis of protecting retail customers. The Order then discusses criteria adopted by the Commission in Docket No. 90-035-06 regarding revenue credit treatment for wholesale and wheeling activity and concludes that “the basis for the imputation here, contrary to the Company’s assertion, is not whether the contracts were prudent when entered, but rather what is required to protect retail ratepayers.” Order at 27-28. Ultimately, the Order concludes that “imputation of revenues to long-term firm wholesale sales contracts must occur to, as the purpose of the 1990 criteria reveals, protect retail ratepayers from the consequences of bearing *unwarranted risk*.” Order at 33 (emphasis added). The adoption of the undefined “*unwarranted risk*” standard as a basis for revenue imputations is arbitrary and capricious.

The “*unwarranted risk*” standard adopted and applied in the Order is contrary to the prudence review standard previously adopted by the Commission. In determining whether the rates are “just, reasonable and adequate” under Utah Code Ann. § 54-4a-6(2), the Commission employs the prudent investment standard. *Utah Power & Light Co. v. Public Serv. Comm’n*, 107 Utah 155, 152 P.2d 542 (1944) (“*Utah Power*”) (noting that the Commission held the just and proper rate base is the amount actually and “prudently invested.”) The Commission has consistently applied that standard since *Utah Power*. In *Mountain Fuel Supply*, Dockets No. 91-057-11 and 91-057-17 (Utah Pub. Serv. Comm’n, September 10, 1993), for example, the Commission stated as follows with respect to the prudence standard:

In considering whether Mountain Fuel’s gas acquisition decision were prudent, we are bound to consider Mountain Fuel’s decisions in light of the circumstances which existed at the time the decisions were made. The decisions must be judged

in light of what Mountain Fuel knew or reasonably should have known. We must consider that Mountain fuel was making its decisions prospectively rather than in reliance on hindsight. *Prudence recognizes that reasonable persons can have honest differences of opinion without one or the other being imprudent.*

1993 WL 501430 at 22 (emphasis added). There was no suggestion that Mountain Fuel's gas acquisition decisions would be evaluated on the basis of whether "*unwarranted risks*" were imposed on customers. *See, also, Re Questar Gas Co.*, Docket No. 98-057012 (Utah Pub. Serv. Comm'n, December 3, 1999); *Re Mountain Fuel Supply Co.*, Docket No. 93-057-04 (Utah Pub. Serv. Comm'n, August 22, 1994); *Re US West Communications*, Docket Nos. 90-049-03, 90-049-06 (Utah Pub. Serv. Comm'n, August 13, 1991).

Under the prudent investment standard, the utility is entitled to the presumption that the investments were prudent, unless the contrary is shown. *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n of Missouri*, 262 U.S. 276, 289, n. 1, 43 S.Ct. 544, 67 L.Ed. 981 (1923) (Brandeis, concurring). Here, the Commission has made no such finding that the Company's actions were imprudent; rather the decision is based on a new "*unwarranted risk*" standard. The adoption and application of this "*unwarranted risk*" standard in lieu of the prudent investment rule is arbitrary and capricious. *See Cities Service Gas Co. v. FERC*, 627 F.2d 1027, 1031 (10th Cir. 1980) (holding FERC decision excluding actual average balance of unrecovered purchased gas costs from company's rate base was arbitrary and capricious where FERC did not dispute that investments were prudently incurred.)

Indeed, the Commission's "misuse or inconsistent use of a crucial rate making method, such as the prudent investment rule, even without a showing of confiscatoriness by the utility, may amount to a denial of due process." *See South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 594 So.2d 357, 364-365 (Sup. Ct. LA 1992) ("*South Central*"). In *South Central*, the Louisiana PSC disregarded the telephone company's actual capital structure and instead used a hypothetical capital structure for ratemaking purposes without first determining that the actual structure was imprudent or unreasonable. 594 So. 2d at 362. The Louisiana Supreme Court reversed the Louisiana PSC and held that the commission acted arbitrarily, capriciously and

unreasonably in its unexplained departure from the prudent investment rule. According to the court's decision:

Without finding that the utility's capital investments were imprudent or that the capital structure resulting therefrom was unreasonable, the Commission disqualified the capital as actually invested and structured. *Applying hindsight the Commission hypothesized the composition of a theoretical capital investment and structure for the utility. . . . [B]y applying the prudent investment rule to value property and assets for the rate base but not to appraise the cost of capital, the Commission switched back and forth between methodologies in a way that deprived investors of any benefit of appreciation in their property value while penalizing them for have a prudent, rather than a theoretically optimal, capital structure.*

594 So.2d at 365 (emphasis added). Citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 109 S.Ct. 609, 619, 102 L.Ed.2d 646 (1989), the court stated:

A state's decision to switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefits of good investments at others [raises] serious constitutional questions.

594 So.2d at 365. Similarly, it is improper for the Order to impose a revenue imputation with respect to the post-1995 wholesale contracts without any finding that such contracts were imprudent. Another course of action with respect to such contracts may have been "*theoretically optimal*" (*South Central*), i.e., under an "*unwarranted risk*" standard, but that does not amount to the required finding of imprudence.

Moreover, the "*unwarranted risk*" standard adopted and applied in the Order suggests an unwise regulatory policy. Such a standard would likely be used to render prudence and public interest determinations meaningless, creating an avenue for parties to propose cost disallowances and revenue imputations regardless of the prudence of the utility's actions. For instance, under such a "standard," a utility could embark on a fuel procurement strategy that every party and the Commission agrees is prudent, and which for years provides benefits to its customers. Later, however, the Commission could later disallow costs when other opportunities become available that the utility was precluded from taking advantage of because of its commitment to its prudent

strategy. The disallowance would be proposed, and could, consistent with this Order, be adopted on the basis that the utility's strategy, although prudent, created risk that ratepayers may have to pay costs that turn out to be higher at some point in time. Such a hindsight analysis disregards the prudence standard previously adopted by this Commission and creates an untenable regulatory regime in the state of Utah. While "unwarranted risk," as applied in the Order, is apparently something other than an imprudently incurred risk, it is also apparently something that utilities will only find the meaning of after hindsight reviews in rate cases in which costs are disallowed or revenues are imputed.

The Order's departure from the prudent investment rule and instead basing its revenue imputation on an "*unwarranted risk*" standard is arbitrary and capricious, suggests an unwise regulatory policy, and should be reconsidered.

B. The Order Erroneously Applies Only Part of the Criteria from the 1990 Decision.

The Order concludes that the criteria adopted by the Commission in its 1990 decision in Docket No. 90-035-06 ("1990 Decision") remain the applicable regulatory policy. The Order also disagrees with the Company's argument that "a decision to apply certain of the criteria but not all [of] them in the present Docket would be wrong." The Order, citing *Salt Lake Citizens Congress v. Mountain States Telephone and Telegraph Co.*, 846 P.2d 1245 (Utah), concludes that "the criteria are applicable until the Commission alters them subsequently and on this record the Commission does not alter them." Order at 30.

However, application of the criteria of the 1990 Decision, recited at page 29 of the Order, *would require the long-term firm wholesale contracts at issue to be assigned to a FERC jurisdiction* rather than be given revenue credit treatment. The Order specifically recognizes that "the Company did not seek regulatory approval for the contracts it entered after 1995" (Order at 30), but erroneously disregards the result of such failure under the 1990 Decision: *the contracts would be assigned to a FERC jurisdiction*. In their selective application of the 1990 criteria, other parties did not submit the results of assigning the contracts to a FERC jurisdiction. The

analysis prepared by the Company showing the impact of a FERC jurisdictional approach was rejected by the Commission. Order at 31. Thus, if a revenue imputation is to be made regarding the contracts, the only approach to doing so which has support in the record and is consistent with precedent (Docket No. 99-035-10) is an imputation based on the “filed in Utah” avoided cost standard.

The revenue imputation adopted by the Order is contrary to the Commission’s own rule adopted in the 1990 Decision. It is arbitrary and capricious for Order to apply only part of the criteria of the 1990 Decision.

II. CONCLUSION

For all the foregoing reasons, the Commission should grant PacifiCorp’s Petition for Rehearing or Reconsideration.

Dated: October 1, 2001

Stoel Rives LLP

By _____
Edward A. Hunter
John M. Eriksson
James M. Van Nostrand
Attorneys for PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2001, I caused to be served, via United States mail, postage prepaid, a true and correct copy of the foregoing PacifiCorp's Petition for Rehearing or Reconsideration to the following:

Michael Ginsberg
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, Utah 84111

Lee Brown
Tony J. Rudman
Counsel for MagCorp
Magnesium Corporation of America
238 North 2200 West
Salt Lake City, Utah 84116

Reed Warnick
Assistant Attorney General
500 Heber M. Wells Building
160 East 300 South
Salt Lake City, Utah 84111

Peter J. Mattheis
Matthew J. Jones
Brickfield, Burchette & Ritts, P.C.
1025 Thomas Jefferson Street, N.W.
800 West Tower
Washington, D.C. 20007

Jeff Burks - Director
Utah Energy Office
Utah Department of Natural Resources
1594 West North Temple, Suite 3610
Salt Lake City, Utah 84114-6480

Captain Robert C. Cottrell, Jr.
Utility Litigation and Negotiation Attorney
AFLS/ULT
139 Barnes Drive, Suite 1
Tyndall AFB, Florida 32403-5319

Glen E. Davies
Parsons Davies Kinghorn & Peters
185 South State Street, Suite 700
Salt Lake City, Utah 84111

Stephen R. Randle
RANDLE, DEAMER, MCCONKIE & LEE
139 East South Temple, Suite 330
Salt Lake City, Utah 84111-1169

Gary Dodge
Hatch James & Dodge
10 West Broadway, Suite 400
Salt Lake City, Utah 84101

Bill Thomas Peters
Parsons Davies Kinghorn & Peters
185 South State Street, Suite 700
Salt Lake City, Utah 84111

Dr. Charles E. Johnson
1338 Foothill Boulevard, PMB 134
Salt Lake City, Utah 84108

Cheryl Murray
Committee of Consumer Services
Heber M. Wells Building, Room 410
160 East 300 South
Salt Lake City, Utah 84111

Scott Gutting
Rick Anderson

Eric C. Guidry
LAW Fund Energy Project

Energy Strategies, Inc.
39 Market Street, Suite 200
Salt Lake City, Utah 84101

2260 Baseline Road, Suite 200
Boulder, CO 8032-7740

Betsy Wolf
SLCAP/CUC
764 South 200 West
Salt Lake City, Utah 84101

Jeff Fox
Crossroads Urban Center
149 South Windsor Street
Salt Lake City, Utah 84102
