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Parowan Pumpers Association, Cedar Valley Pumpers Association, And Beryl Bumpers Association v. Public Service Commission of Utah, Milly O. Bernard, Olof E. Zundel, And Kenneth Rigtrup (As Successor To Joseph C. Foley), Commissioners of The Public Service Commission of Utah And California-Pacific Utilities Company, A Corporation v. Public Service Commission of Utah, Case No. 15144 Milly 0. Bernard, Olof E. Zundel And Kenneth Rigtrup (As Successor To Joseph C. Foley), Commissioners of The Public Service Commission of Utah : Answer And Reply Brief of California-Pacific Utilities Company

Utah Supreme Court

Wolcott, Bagley, Cornwall & McCarthy; Attorneys for California-Pacific Utilities CompanyStephen R. Randle; Attorney for Respondents and DefendantsClyde & Pratt, Attorneys for Parowan Pumpers

IN THE SUPREME COURT OF THE STATE OF UTAH

PAROWAN PUMPERS ASSOCIATION, CEDAR VALLEY PUMPERS ASSOCIATION, and BERYL PUMPERS ASSOCIATION, Petitioners, v. PUBLIC SERVICE COMMISSION OF UTAH, MILLY O. BERNARD, OLOF E. ZUNDEL, and KENNETH RIGTRUP (As Successor to JOSEPH C. FOLEY), COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF UTAH, Respondents.	Case No. 15143
CALIFORNIA-PACIFIC UTILITIES COMPANY, a corporation, Plaintiff, v. PUBLIC SERVICE COMMISSION OF UTAH, MILLY O. BERNARD, OLOF E. ZUNDEL and KENNETH RIGTRUP (As Successor to JOSEPH C. FOLEY), COMMISSIONERS OF THE PUBLIC SERVICE COMMISSION OF UTAH, Defendants.	Case No. 15144

ANSWER AND REPLY BRIEF OF CALIFORNIA-PACIFIC UTILITIES COMPANY

Review of Report and Order of the Public Service Commission of the State of Utah

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AUTHORITIES CITED

NATURE OF THE CASE

This is an action for review of a Report and Order of the Utah Public Service Commission in a "pass-thru" rate case filed by California-Pacific Utilities Company for recovery of the expense associated with a new transmission line.

DISPOSITION OF THE CASE BY THE PUBLIC SERVICE COMMISSION

The Report and Order of the Commission allows partial recovery of the expense and both the utility and protestants seek review by the court.

RELIEF SOUGHT ON APPEAL

California-Pacific Utilities Company seeks reversal of the Order of the Commission, and a mandate directing the Commission to grant an increase in rates to allow recovery of the entire expense (including a surcharge for deficiencies accrued to the date of the increase) or, that failing, a rehearing consistent with the law applicable to the case.

Parowan Pumpers Association, et al., seeks reversal of the Order of the Commission and a mandate directing the Commission to deny the application in its entirety.

STATEMENT OF FACTS

The facts germane to this controversy are set forth in the initial brief of Cal-Pac and supplemented by Protestants'

Brief. We shall supplement those statements by a brief respon
to the Protestants' statement regarding the cost and the mann
of financing the new line. The agreement for construction
the line is referred to as "the Electric Service Agreement" a
the agreement for wheeling of Bureau power is referred to as
"Wheeling Agreement".

In comparing costs of the new transmission line un
alternate methods of financing, counsel for Protestants sta
that the projected cost under the Electric Service Agreem
totals $32,000,000 and that costs under an alternate means
financing would be $23,000,000 (Pages 8 and 9 of Petitione
Brief). Protestants' counsel bases this argument in part o
Exhibit 47 which was offered by him without sponsorship of
witness. That exhibit is nothing more than a mathemati
calculation assuming arbitrary facts not related to this ca
(Tr 1174, Pages 337-380). The evidence offered by the utili
shows an entirely different projection of costs under the
methods of financing. Assuming the capital requirements of t
Companies to be 10.85 percent, the total costs under the El
tric Service Agreement are projected to be 25.6 million
under Cal-Pac's financing would be 25.3 million (R 455-467).
Cal-Pac's cost of capital were less, costs under its finan
would be correspondingly less (see R 477-480). Likewise, P
testants' arbitrary calculations that initial annual pay

under Cal-Pac's ownership would be $781,750 is clearly erroneous. UP&L's Exhibit 34 (R 385) shows that the initial annual installments for line and substation under Cal-Pac financing would be $921,509, which is substantially more than under the existing arrangement. Further, the statement by Protestants' counsel that "Mr. Workman testified that if California-Pacific owned the line, the first five years would cost 6.6 million dollars less than under the present arrangement' is a misstatement of the record. By reference to the transcript page quoted by Protestants' counsel (Tr 11/2, Page 150), one can easily see that the substance of Mr. Workman's testimony was that one must consider the time value of money and that taking that into account, the costs under the two approaches are "about a push" (Tr 11/2, Page 150). Also, it is apparent that the "5 year" period referred to by counsel was actually a 45-year period (Mr. Workman was being examined on Exhibit 40 which compared the 45-year costs under the two approaches. (See Tr 11/2, Pages 149-150)

There were other management considerations for determining the method for financing the line. One significant consideration is that at the time the line was needed, Cal-Pac did not have the financial ability to finance the line (Exhibits 40 and 41; see R 407-409; Tr 11/2, Page 128). Another major consideration was that UP&L financing provided the advantage of

level fixed charges over the life of the line as opposed to very high charges in the early years and declining charges in later years. The management considerations are set forth in the record by Cal-Pac's President. (Tr 11/2, Page 129)

The decision to construct the new line under the terms provided for in the UP&L Electric Service Agreement was a management decision. That decision was based upon sound business considerations and was made in good faith and with consideration of the best interests of the Company and its customers. There was no evidence of any bad faith or gross inefficiency in the financial arrangements for construction of the new line and no findings whatever to that effect.

In their arguments Protestants place considerable reliance upon the Commission's Findings that the Wheeling Agreement and the Electric Service Agreement are not in the public interest. A more detailed statement of the proceedings and the evidence is necessary to place these arguments in context.

The Commission demonstrated considerable concern with respect to the reasonableness of the Electric Service Agreement. The hearings were recessed at one time with a view to full exploring this agreement, and the Commission entered an Order directing that Utah Power & Light Company be made a party to the proceedings. (Report and Third Tentative Order and Order to Show Cause, R 101-104). That Order provided:

"Utah Power & Light Company is hereby made a respondent to these proceedings ... it is hereby ordered to show cause ... why the rates of the contract between them and the applicant relating to the 230-KV transmission line ... should not be modified, and/or to further show cause why they should not be required to sell and why California-Pacific Utilities should not be required to buy said 230-KV transmission line at the cost to construct said transmission line."

Utah Power & Light Company appeared pursuant to that Order to Show Cause and offered the testimony of several witnesses with supporting exhibits, all bearing upon the reasonableness of the Electric Service Agreement. (See Tr 11/2 Testimony of Taylor, Bryner, Dunn and Colby. See also Exhibits 26-34 inclusive.) The Commission in its Final Report and Order (R 228-233) neither directed modification of the Agreement nor ordered Cal-Pac to purchase the line. With respect to this matter, the Final Report and Order simply stated:

"The contract between Utah Power & Light and California-Pacific Utilities Company has never been submitted to the Utah Public Service Commission for its approval." [Finding No. 9]

and

"The contract between Utah Power & Light and California-Pacific is not in the best interests of the customers of California-Pacific Utilities." [Finding No. 18]

and

"The contract between California-Pacific Utilities and Utah Power & Light Company was required by law to be submitted for review and approval by the Utah Public Service Commission prior to the time it

became effective." [Conclusion of Law No. 2]

and

"...[T]his Commission has the power to modify or amend any of the contracts in question in this case, including those contracts between Utah Power & Light and California-Pacific... "[Conclusion of Law No. 4]

There is no finding that the arrangement for construction of the new line, or the costs or financing of the same, were entered into in bad faith or were inefficient, wasteful, unreasonable or unnecessary. Further, the decision to disallow part of the expense was completely unrelated to any consideration of the reasonableness of the Electric Service Agreement or the provisions thereof. In disallowing the expense, the Commission accepted the evidence as to the amount thereof, but concluded to allow only a portion thereof which it determined to be allocable to Cal-Pac's customers.

The Commission was likewise troubled with the reasonableness of the 1962 Wheeling Agreement with the Bureau of Reclamation. To fully explore the reasonableness of that Agreement, the Commission issued a separate Order to Show Cause directed to the United States Bureau of Reclamation (see Order to Show Cause, R 111-114). That Order provided:

"NOW, THEREFORE, IT IS HEREBY ORDERED that the United States of America, acting by the Department of the Interior, Bureau of Reclamation, be made a respondent to these proceedings and that the applicant, California-Pacific Utilities Company and the

respondent, The United States of America, Department of the Interior, Bureau of Reclamation be, and they are hereby ordered to appear ... to show cause, if any there be, why the intrastate rates of the intrastate wheeling contract should not be increased, or, in the alternative, why California-Pacific Utilities Company should not be ordered to cancel the wheeling contract ..." (R 113-114)

The Bureau of Reclamation appeared on the Order to Show Cause and offered testimony setting forth its position with respect to the Wheeling Agreement (see statement of John W. Mueller, Exhibit 45, R 462-465). In its Final Report and Order (R 228-233) the Commission restated some of the historical facts regarding the execution of the Wheeling Agreement between Cal-Pac and the Bureau and then stated:

"The 1962 contract between California-Pacific Utilities Company and the United States Department of the Interior, Bureau of Reclamation, was not submitted to this Commission for its approval, and has never been approved by this Commission." [Finding No. 16]

and

"The Commission finds that the Agreement between California-Pacific and the United States Department of the Interior is not in the public interest insofar as it fails to provide any means for any increase in rates over 35 years to cover the additional costs caused by inflation, particularly the additional investment required to continue providing that wheeling service, when such additional equipment must be paid for at the prices greatly inflated since 1962." [Finding No. 17]

and

"The Agreement between California-Pacific Utilities and the United States Department of Interior,

Bureau of Reclamation, was required by law to have been submitted to the Utah Public Service Commission for its review and approval." [Conclusion No. 1]

and

"The Utah Public Service Commission does have jurisdiction over all rates for all intrastate utility service ... including the wheeling rates between California-Pacific and the United States Department of Interior, Bureau of Reclamation." [Conclusion of Law No. 3]

and

"... This Commission has the power to modify or amend any of the contracts in question in this case, including those contracts between ... the Bureau of Reclamation and California-Pacific." [Conclusion of Law No. 4]

and

"IT IS FURTHER ORDERED that California-Pacific Utilities and the Division of Public Utilities immediately enter into negotiations with the Solicitor General of the Department of Interior, Bureau of Reclamation, to seek an increase in the fee paid by said Bureau to California-Pacific for wheeling of power, and Utah Power & Light Company is further ordered to cooperate and participate in said renegotiations with the Bureau of Reclamation to the fullest extent possible."

IT IS FURTHER ORDERED that in the event such contract will not or cannot be renegotiated by the United States Department of Interior, Bureau of Reclamation, then the Commission will entertain further motions or petitions from any of the parties herein, including the Division of Public Utilities, to determine whether California-Pacific may continue wheeling power for said Bureau, and if so, under what terms and conditions." [7th and 8th Ordering paragraphs]

The Commission's Order did not specifically find or conclu

that the wheeling rate was unreasonable and did not purport to amend the rate or to relieve Cal-Pac in any particular from the obligation to continue to wheel energy for the Bureau of Reclamation. [As a postscript, California-Pacific has conducted negotiations pursuant to the Commission's Order; the Bureau, consistent with its position in this case (R 462-465) has declined to increase the wheeling rate; the utility reported the matter to the Commission on May 30, 1977, more than a year prior to the date of this brief, and the Commission has taken no further action to modify the Wheeling Agreement or to relieve Cal-Pac of its wheeling obligation.]

The revenues received for wheeling under the Wheeling Agreement are reported in the Company's earning statements. (See Line 2, "Miscellaneous Revenue" on Exhibit 37, R 388 and Exhibit 39, R 392). Accounting for these revenues and taking into account the partial increase in rates to recover 53 percent of the transmission line expense, the Company's rate of return is 3.36 percent (Line 20, Exhibit 39, R 392) as compared to a return of 9.5 percent which the Commission allowed for Cal-Pac in its other Utah operating district (Page 8, Exhibit 44, R 459-461).

The evidence produced by Cal-Pac through its officers and engineers unequivocally shows that the new transmission line was absolutely essential to continued service to Cal-Pac's

customers and that if the line had not been energized when it was, there would likely have been an electric blackout. The testimony of engineers testifying for Cal-Pac and for UP&L shows that the line was reasonably sized. No testimony was offered to rebut either of these premises. The Commission does not find that the new transmission line was not required or that it was unreasonably sized. The only reference to this matter is Finding No. 14 where the Commission finds that "if California-Pacific were not wheeling ... power for the United States Government ... it would not have been necessary at this time ... to construct an additional 230-KV transmission line, and ... it would not have been necessary to construct a transmission line as large as 230-KV...'

The effect of the Commission's decision in this case is to include all of the wheeling revenues for rate-making purposes but to exclude approximately 50 percent of the transmission line expense for the same purpose. [In fact, the Commission has since done exactly this, out of loyalty to the decision in the case now before the Court. In the general rate case (Case No. 77-023-08) decided in May 1977, the Commission required the utility to account for all wheeling revenue for rate-making purposes, but disallowed 46.97% of the UP&L fixed charge expense for rate-making purposes.] Having undertaken the commitment to wheel energy in 1962, the Company had no reasonable alternative

except to construct the 230-KV transmission line in 1976. Absent findings of management bad faith or gross inefficiency or wastefulness, the Commission's Order which acknowledges the utility's accounting for wheeling revenues and at the same time disallows recovery of necessary expenses is entirely arbitrary and capricious and deprives the utility of its property without just compensation.

ARGUMENT

POINT I

THE ARGUMENTS OF THE PROTESTANTS (POINTS I AND II OF PETITIONERS' BRIEF) THAT THE ELECTRIC SERVICE AGREEMENT IS "VOID" AND "LACKS PROPER CONTRACT ELEMENTS" IS WITHOUT MERIT, BUT, MORE IMPORTANTLY, IS BESIDE THE POINT, BECAUSE THE ONLY ISSUE BEFORE THE COMMISSION IN THIS PROCEEDING WAS WHETHER, UNDER THE FACTS HERE PRESENTED, THE EXPENSES SOUGHT TO BE RECOVERED ARE REASONABLE.

A. In fixing rates the Commission acts in a legislative capacity as an arm of the Legislature. Its duty is to find the facts and to determine "just and reasonable" rates, and not to adjudicate a controversy as to whether a supply contract is "void" or "lacks proper contract elements."

Points I and II of the Protestants' Brief state arguments of the Protestants for reversal of the partial increase granted by the Commission. The substance of the argument is that the expenses for the new transmission line were incurred under a contract which is unenforceable. In support of this position, counsel for Protestants relies upon two statutes and a

general order issued by the Commission and a vague argument that the agreement "lacks proper contract elements."

The Public Service Commission in a rate case is engaged in the legislative process. The Commission is not engaged in deciding a judicial controversy. This Court has recognized the Commission's functions in rate cases in its recent decision in Terra Utilities, Inc. v. Public Service Commission, 575 P.2d 1029 (Utah 1978) where the Court said:

(575 P.2d 1029, 1032)

> "The regulation and establishment of rates is strictly a legislative power, and the Commission acts in these matters, as an arm of the legislature. This court may not interfere with or review a legislative act unless some judicial question is presented for review. Unless a rate established by the Commission is clearly oppressive or confiscatory, no judicial question is presented. Whether there is any substantial evidence to support a finding of fact made by the Commission is a judicial question and may be determined by this court. Thus all this court can review in this case is whether there is any evidence to sustain the findings of the Commission, whether it has exercised its authority according to law, and whether any of plaintiff's constitutional rights have been invaded or disregarded."

To the same effect see Boise Water Corp. v. Idaho Public Utilities Commission, 97 Idaho 832, 555 P.2d 163, wherein the Idaho Supreme Court said:

(555 P.2d 163, 169)

> "The Commission is a fact finding, quasi-legislative body authorized to investigate and determine issues presented by a utility's petition for

increased rates. Where its findings are supported by competent and substantial evidence this Court is obliged to affirm its decision. Application of Pacific Tel. & Tel. Co., 71 Idaho 476, 480, 233 P.2d 1024 (1951). The Commission is not bound by technical rules of evidence in deciding such issues, since it is a quasi-legislative body."

The single issue to be determined by the Commission in this particular case is whether the expense for transmission line service is a reasonable operating expense. If it is, the company has a constitutional right to recover it in rates. The process is fact-finding and legislative. Contrary to Protestants' arguments, the Commission is not obliged to concern itself with whether any given contract is valid, voidable or subject to review by any regulatory agency. Counsel for Protestants has not cited a single case in which any Court has directed a regulatory agency to disallow a rate fixed by it on the grounds that the agency erred in determining a legal issue with respect to the contractual rights of the Utility.

B. Assuming, arguendo, that the validity of the supply contract is properly in issue, there is no showing that the contract is unenforceable.

Protestants apparently argue in this case that the Commission was without authority to allow recovery of an operating expense actually incurred unless the contract for such expense was approved by the Commission in a prior proceeding (Section 54-4-30 and Section 54-4-26 U.S.C. 1953) and because

the contract lacked "proper contract elements." For reasc already stated, it was not necessary for the Commission t assume a judicial role in this legislative proceeding and t base its determination upon judicial conclusions as opposed t the facts which it was required to find with respect to expens The factual inquiry is not complicated. Simply stated: "Is t operating expense sought to be recovered a reasonable operati expense?" Nevertheless, Protestants' arguments, even if germa to the issues of this case, are without merit.

Protestants' first attack upon the Electric Servi Agreement is that the utilities who are parties thereto ha failed to comply with Section 54-4-30, U.C.A. (1953) which pr vide :

> "Acquiring Properties of Like Utility Only on Consent of Commission. - Hereafter no public utility shall acquire by lease, purchase or otherwise the plants, facilities, equipment, or properties of any other public utility engaged in the same general line of business in this state, without the consent and approval of the public utility commission. Such consent shall be given only after investigation and hearing and finding that said purchase, lease or acquisition of said plants, equipment, facilities and properties will be in the public interest."

This statute must be read in context with the legislation which it was adopted. The quoted statute is part of House Bi No. 48 passed by the Utah Legislature on March 14, 1935. Th legislation is published as Chapter 68 of the laws of Uta

1935. A copy of the entire Bill is shown at page 225 of the Record on Appeal. A reading of the entire Bill shows that the Legislature in adopting the legislation was concerned with "Regulating Merger of Like Utilities." Applying that intent and the language of the statute to the transaction here in question, one can readily see that the statute has no application.

This case involves nothing more than an extension of UP&L's transmission facilities to serve one of its customers. The contention that the transaction should be construed as one involving a "lease" by Cal-Pac on the "plants, facilities, equipment or properties" of UP&L is ridiculous when the situation is viewed in perspective of the purpose of the statute. The title of the Bill, "Regulating Merger of Like Utilities" states the basic purpose of the legislation. Section 1 prohibits "merger" without Commission consent. Section 2 is designed to avoid subversion of the legislative intent by one utility's acquisition of voting control of another and Section 3 (the statute here in question) is obviously intended to avoid subversion of that same intent by one utility's lease or purchase of "the plants, facilities, equipment or properties" of another utility. In asserting the arguments which are made by the Division and by the Protestants, we believe that counsel have failed to consider the entire legislation in context and have instead looked to a single section of the Act and now seek

a strained construction clearly not intended by the legislation.

The only authorities cited in support of Protestants' argument in this section of their Brief are the Restatement of Contracts, Shasta County v. Moody, 265 Pac. 1032 (California 1928) and Silver Beehive Telephone Company v. Public Service Commission of Utah, 30 Utah 2d 44, 512 P.2d 1327. None of these authorities have even a remote connection with the principles involved in this case. The quotation from the Restatement of Contracts has no application whatever to a rate making proceeding. Assuming, arguendo, that there was a violation of the statute, the quotation from the Restatement deals only with the issue of enforceability of the agreement as between the two utilities. It has nothing to do with the issue of whether operating expenses incurred under the agreement are reasonable Utility operating expenses. Shasta County v. Moody involves a suit by a County to recover monies received by a county employee contrary to a statute precluding self-dealing. The Silver Beehive case has nothing to do with utility expenses or the rate making process.

Protestants next contend that Cal-Pac has violated the provisions of Section 54-4-26 U.C.A. (1953) which provides:

> "Every public utility when ordered by the commission shall, before entering into any contract for construction work or for the purchase of new facilities or with respect to any other expenditures, submit such proposed contract, purchase or other

> expenditure to the commission for its approval; and, if the commission finds that any such proposed contract, purchase or other expenditure diverts, directly or indirectly, the funds of such public utility to any of its officers or stockholders or to any corporation in which they are interested, or is not proposed in good faith for the economic benefit of such public utility, the commission shall withhold its approval of such contract, purchase or other expenditure, and may order other contracts, purchases or expenditures in lieu thereof for the legitimate purpose and economic welfare of such public utility." (Emphasis added.)

The response to the Protestants' argument lies in the first sentence of the statute. The statute itself purports to require advance approval of the Commission only "when ordered by the Commission." Cal-Pac was not ordered to submit the proposed contract in advance for Commission approval. The stated purpose of the statute is to avoid diversion of funds of the public utility to its officers or stockholders or to companies in which they may have an interest and to avoid construction of facilities not proposed in good faith for the economic benefit of the utility. In their Brief, Protestants quote only the first phrase of the statute, omitting the language which follows which provides "and if the Commission finds that any such proposed contract ... diverts ... funds of such public utility to any of its officers or stockholders or to any corporation in which they are interested, or is not proposed in good faith for the economic benefit of such utility, the Commission shall withhold its approval of such contract ..." There is no allegation in this

case nor any evidence or finding by the Commission which would in any manner authorize the Commission to withhold approval of the contract, even if the utility had been ordered to obtain Commission approval.

Protestants call attention to Commission Regulation 67-05-95 (General Order No. 95) which they say constitutes an "order by the Commission" requiring advance submission of the contract in this instance. The Commission took administrative notice and the Court may take judicial notice of this regulation. Paragraph 3 of the Regulation provides:

> "3. This amended Order shall have no application to any transaction which is subject to the regulatory jurisdiction of any federal regulatory agency."

The Electric Service Agreement of which the transmission line provisions are an integral part is subject to the regulatory jurisdiction of the Federal Power Commission since it is a contract for "the sale of electric energy at wholesale" and as such, regulatory jurisdiction is expressly conferred by the Federal Power Act (16 U.S.C.A., Section 824.) The Electric Service Agreement was filed with the Federal Power Commission and acknowledged jurisdiction by acceptance of the filing (Exhibit 15, R 333-338; see R 8/10, Pg 75). In pointing out these facts we do not assert that the Commission is without jurisdiction in the matter, but simply that there was no violation of

Commission's General Order in failing to seek and obtain advance approval.

As legal support for this feature of their argument, counsel for Protestants rely upon Napa Valley Electric Company v. Calistoga Electric Co., (California 1918) and Shasta County v. Moody, supra. The Napa case had nothing to do with regulatory jurisdiction or the rate making process. Instead, it involved litigation in a state court between two utilities. Further, the California Code provision construed in that case (unlike Section 54-4-26, U.C.A., 1953) expressly proclaims that any unauthorized transaction "shall be void." The Shasta case has no more application to this feature of the Protestants' argument than it did when cited for the first provision. Again, Shasta involves a controversy between a county and a former employee and was adjudicated in a state court.

In any event, both the Wheeling Agreement and the Electric Service Agreement were filed with the Commission in this case. The Commission ordered all parties to appear and conducted a full-scale investigation of the contracts. Certainly, there was a full and complete hearing accorded to the rate payers. Protestants participated in these hearings and have not heretofore and cannot now be heard to say that they have been foreclosed of any opportunity to challenge the merit of the contracts. Several witnesses from both utilities (UP&L and

Cal-Pac) testified with respect to the reasonableness of the Electric Service Agreement. They were painstakingly cross-examined by Protestants' counsel. Although the Commission states in finding number 18 that the contract "is not in the best interests of the customers of California-Pacific Utilities," it has not at any place in the Report and Order set forth the basic facts or legal authorities which are claimed to support this conclusion nor is the conclusion connected with the ultimate decision. On the contrary, the Commission's Report and Order contains no finding anywhere within the confines of that document that the transmission line expense is excessive, unwarranted or incurred in bad faith. The obvious conclusion of the Commission was that the expense should be allocated. This presumes a finding that the amount of the expense itself is reasonable for otherwise a lesser amount should have been employed as the basis for allocation.

As a final attack on the Commission's Report and Order the Protestants urge that the contract "lacks proper contract elements." This argument settles around three basic allegations. First, Protestants say that "essential elements" are subject to future negotiations because in the event that UPL elects to tap the transmission line at some time in the future "there is no formula established" for determining adjustment of the annual fixed charge under the contract. Obviously, this ha

nothing to do with the completeness of the basic contract. UP&L will have no right to tap the transmission line, except with the consent and upon terms agreed to by Cal-Pac. This will require separate negotiations and an independent agreement, neither of which in any manner reflects upon the enforceability of the basic agreement.

Protestants next contend that the Electric Service Agreement works an "unconscionable forfeiture upon California-Pacific" (Page 18, Petitioners' Brief) because Cal-Pac is obligated to pay for the extension, even in the event it discontinues the purchase of power from UP&L. The Protestants argue that this provision "imposes an unconscionable burden upon the consumers without affording them any corresponding benefits." The 230-KV line is in use for service to Cal-Pac customers and under the Electric Service Agreement Cal-Pac has the continued right to use of that line without limitation. If UP&L had constructed this major extension of its transmission system under terms which would have excused Cal-Pac from payment should it unilaterally determine to discontinue the purchase of power from UP&L, we would certainly hear justified criticism from the shareholders and/or rate payers of UP&L. The line was constructed for the use of Cal-Pac and it should pay for the same, except to the extent that UP&L may use a part of it for its own transmission requirements. In the latter event Cal-Pac will be

reimbursed or excused from payment of a proportionate share of the fixed charges.

Finally, Protestants complain because the agreement provides that fixed charges will be applied to the "actual" cost of construction, whereas, the costs used to determine fixed charges are "estimated." This argument proceeds upon the mistaken assumption that fixed charges will be determined on the basis of "estimated" rather than "actual" costs. Since all of the costs of the line cannot be determined as of the moment of its completion, it was necessary to include some estimate in order to implement billing for the fixed charges at the time the line was energized. The witnesses testified, however, that there are no material differences between the actual and estimated figures. Billing is an administrative and procedural matter to implement the contract and does not in any manner affect its enforceability.

By way of summary, the Commission's Order granting partial recovery is not invalid for lack of prior Commission approval of the Electric Service Agreement or on account of any technical legal deficit in the form of the contract.

POINT II

THE COMMISSION IN REFUSING THE FULL INCREASE REQUESTED ACTED ARBITRARILY AND IN VIOLATION OF THE UTILITIES' RIGHTS UNDER THE CONSTITUTION (POINTS III AND IV OF PROTESTANTS' BRIEF)

A. The evidence fully justifies the expense and there is no legal basis for disallowing the same.

The conduct of the business of a public utility requires the exercise of the discretion of management in the making of innumerable decisions relating to its business. Cal-Pac's decision to enter into the 1962 Wheeling Agreement and to construct the 230-KV transmission line, including the method for financing for said line were decisions for its management involving the exercise of judgment and discretion. The Public Service Commission is vested with the right to regulate the Utility. The right to regulate does not include the right to "manage" its affairs. (Tr 9/24, Page 38)

The Commission in this case did not recognize this distinction. In speaking of the method selected for financing of the transmission line, Commissioner Zundel said to Cal-Pac's rate engineer, "Wouldn't it really have been better for your Company and for Utah Power & Light Company to have presented to this Commission one or two of these proposals, or alternatives, for us to make a decision on it...?" (Tr 9/24, Page 38) Utility management had the prerogative to make the decision. The

Commission had the right to review the decision within the limited framework of the statute (Section 54-4-26, U.C.A. 1953).

Regulatory bodies have no right to disallow or reduce expenses incurred by management unless it clearly appears that such expenses are excessive, unwarranted or incurred in bad faith. There must be substantial, competent evidence and explicit findings to support a disallowance of utility expenses which have actually been incurred by management decisions. These principles are recognized in Logan City v. Public Utility Commission, 77 Utah 442, 269 Pac. 1006, where the Court said that in matters of business judgment there should be no interference by the Commission "unless it is made to appear that the policy and consequent expenditure is actuated by bad faith, or involves dishonesty, wastefulness, or gross inefficiency" (77 Utah 442, 447). In Latourneau v. Citizen's Utility Company, 209 A2d. 307 (Vermont 1965) the Vermont Public Service Commission disallowed portions of the cost of a new transmission line in a utility rate case and other utility expenses actually incurred. In reversing the Report and Order of the Commission, the Vermont Supreme Court said:

(209 A2d. 307, 311)

> "The functions of a public service commission is that of control and not of management, and regulation should not obtrude itself into the place of management . . . the price to be paid for such acquisition and the expenses relative thereto

called for the exercise of judgment on the part of management. Good faith on its part is to be presumed. Although expenses chargeable to this matter should be scrutinized with care, the Commission had no authority to disallow or reduce them unless it clearly appeared that they were excessive, unwarranted or incurred in bad faith."

[The Latourneau case is of particular interest in this case because the Commission in that case refused to allow the full expense for new transmission line because the greater part of the capacity of the line was not in service to the rate payers at the time of the hearing. The Court reversed and directed the Commission to allow the full amount of the expense.]

It is acknowledged that the Utility carries the initial burden of showing the need for the expense. The cases hold, however, that when the Utility produces evidence that the expense has actually been incurred, the burden shifts to the Protestants to show that the expenses are unreasonable by reason of inefficiency or bad faith. The rule is set forth in well-reasoned opinion of the Idaho Supreme Court. Boise Water Corporation v. Idaho Public Utilities Commission, 97 Idaho 832, 555 P.2d 163. In that case the Idaho Supreme Court says:

(555 P.2d 163, 169)

"The Company contends in any event that it met its burden of production with respect to the other non-affiliated expenses by showing actual incurrence of the expense. We agree. The utility established a prima facie case for the reasonableness of its operating expenses to non-affiliates by showing actual incurrence. The burden then shifted to the

> Commission to show by substantial, competent evidence that the expenditures were unreasonable by reason of inefficiency or bad faith. West Ohio Gas Co. v. Public Utilities Comm'n of Ohio, 294 U.S. 63, 55 S. Ct. 316, 79 L.Ed. 761 (1935); New England Tel. & Tel. Co. v. Dept. of Public Utilities, 360 Mass. 443, 275 N.E.2d 493, 517 (1971). See also, City of Norfolk v. Chesapeake & Potomac Tel. Co., 192 Va. 292, 64 S.E.2d 772 (1951); Public Service Comm'n v. Ely Light & Power Co., 80 Nev. 312, 393 P.2d 305 (1964). Contra: Petition of Public Service Transport, 5 N.J. 196, 74 A.2d 580 (1950)."

The Utility's evidence in this case fully justified the transmission line expenses. The 1962 decision to enter into the Wheeling Agreement involved issues of company policy which were particularly within the realm of management judgment. The 138-KV transmission system constructed for the purposes of fulfilling the Wheeling Agreement is more than adequate to handle the 40 megawatt commitment of the Wheeling Agreement. Again, the decision to enlarge transmission facilities by selection of a 230-KV line and determination of means to finance the line were matters of management discretion. The evidence offered by the Utility demonstrated that no part of the new 230-KV transmission system was required for the wheeling of government energy under the Wheeling Agreement; that total transmission capacity, including the new 230-KV transmission line, between points of origin and termination of that line is 213 megawatts; that the total extent of the wheeling commitment is only 40 megawatts or 18.8% of the total line capacity, and that the

Utility will require $850,910 to offset the annual costs for construction of the new transmission line. There is no evidence in the record which contradicts these facts. Under this state of the record the Utility was entitled, as a matter of law, to an increase in rates sufficient to recover its increased costs. Even assuming, however, that there was some rational basis for requiring the Company to segregate the transmission system, there could be no logical basis for allocation of expenses to the wheeling commitment in excess of 18.8%.

B. The Commission's findings wholly fail to justify disallowance of the expense.

In St. Joseph Stockyard Company v. United States, 298 U.S. 38, 56 S.Ct. 720, Chief Justice Hughes, speaking for the Court, explains the application of constitutional due process requirements to the rate-making process in public utilities cases. The opinion says:

> "The fixing of rates is a legislative act. *** Exercising its rate-making authority, the Legislature has a broad discretion. *** When the Legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process *** are met, as in according a fair hearing and acting upon evidence and not arbitrarily. *** But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation *** Legislative declaration or

finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land, may be maintained. *** Confiscation is merely the taking of private property without just compensation, and offends the Constitution. If the property itself is taken by eminent domain, just compensation is its value at the time of taking. If the legislature, either by its own act or through the creation of an administrative agency, prescribes rates or charges for a public utility, the use of the property is taken, and just compensation is a reasonable rate of return upon the value of the property at the time it is being used for the public service. In other words, a utility is entitled to rates that will yield a reasonable rate of return after payment of operating expenses, taxes and financial charges, for the use of the property devoted to public service. Anything less than that is unfair and unreasonable."

There can be no meaningful judicial review unless the regulatory agency makes sufficient findings to explain the basis for its decision. Only by that means may the reviewing court determine whether there is substantial competent evidence to support the findings relied upon in the rate-making process and whether there is any reasonable (not arbitrary) connection between these findings and the ultimate decision of the Commission. The duty to make adequate findings is particularly important where constitutional issues are involved. Speaking to this matter, the United States Supreme Court has said:

"To make such review adequate the record must exhibit in some way the facts relied upon by the court to repel unimpeached evidence submitted for the company. If that were not so, a complainant would be helpless, for the inference would always

be possible that the court and the commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." (West Ohio Gas Company v. Public Utilities Commission, 294 U.S. 63, 55 S. Ct. 316)

Where a utility expense is disallowed, the Commission's findings must be sufficient to show that it has acted non-arbitrarily. In Boise Water Corporation v. Idaho Public Commission, supra, the Court said:

(555 P.2d 163, 171)

"What is essential are sufficient findings to permit the reviewing court to determine that the Commission has acted non-arbitrarily. That function we cannot perform here."

and the Commission's findings must set forth the basic facts which support its conclusions.

(555 P.2d 163, 171)

"In making its determinations the Commission must present in its order the basic (not merely "ultimate") facts necessary to support reasonably its conclusion regarding facts in issue. An "ultimate fact" is generally expressed in the language of a statutory standard, such as 'the rate is reasonable'; 'the action is in the public interest.' 'Basic facts' are those upon which the ultimate fact rests. They are more detailed, but are not so detailed as a summary of the evidence. 'The findings need not take any particular form so long as they fairly disclose *** the basic facts upon which the board relies and its ultimate conclusions therefrom ***.' Pennsylvania R. Co. v. Dept. of Publ. Utilities, 14 N.J. 411, 102 A.2d 618, 631 (N.J. 1954); Davis, Administrative Law, §16.06, 450-451 (1958). See, Davis, Administrative Law, §16.06, 449-454 (1958); Idaho Underground Water User's Assoc. v. Idaho Power Co., supra, 89 Idaho

at 155, 404 P.2d 859; Mountain View Rural Tel. Co. v. Interstate Tel. Co., 55 Idaho 514, 45 P.2d 723 (1935)." (Emphasis added)

The Commission's Report and Order in this case cannot withstand judicial scrutiny under the foregoing principles. The apparent segregation of wheeling as separate and independent from the rest of the utility's business is wholly unsupported by necessary findings. The Commission gives no indication of its reasons for segregation and no justification for the ultimate effect which is to require the utility and/or its shareholders to bear the loss of approximately $400,000 in unrecovered expense. For example, there is no finding that the Wheeling Agreement was made in bad faith or is not compensatory. (By its disapproval of the fixed rate in the Wheeling Agreement, the Commission may have been thinking that the wheeling rate is to be viewed in light of the cost of all transmission lines including the new 230-KV line rather than on the basis of imbedded cost of the 138-KV system which was to provide the wheeling. This rationale cannot be derived from the Report and Order. Further, the method of allocation is inconsistent with the evidence. The Commission's Report and Order fails to deal with the evidence which shows that only 18.8% (not 46.97%) of total transmission capacity is committed to wheeling. To add further confusion to the Commission's rationale, the Report and Order includes meaningless findings regarding lack of approval of the

Electric Service Agreement and the Wheeling Agreement; jurisdiction of the Commission to modify the agreements and general statements that the agreements are not in the public interest. These Findings and Conclusions are not connected in any way with the Commission's ultimate decision. The Commission assumed jurisdiction of the two contracts; directed all of the parties to appear and heard evidence in an adversary proceeding. However, it has failed to make any finding of basic fact with respect to the Agreements and has side stepped its alleged jurisdiction to either approve or amend the same. In summary, the Commission's Order wholly fails to show that the Commission acted non-arbitrarily in disallowing the expense.

CONCLUSION

The Commission's inquiry in this case is whether the expense sought to be recovered is reasonable. Protestants' argument that the Electric Service Agreement is void and lacks proper contract elements is wholly without merit and in any event fails to address the issue before the Commission. The utility has demonstrated by competent and substantial evidence that the transmission line expense was incurred by it for the discharge of its public utility obligation. There is no competent evidence to impeach the utility's prima facie case. The Final Report and Order of the Commission wholly fails to

demonstrate that the Commission has acted non-arbitrarily in denying a portion of the expense.

The case should be remanded to the Commission with directions to grant an increase in rates sufficient to allow recovery of the entire expense incurred or that failing, a rehearing consistent with the law applicable to the case. By its further Order in this matter, the Commission should be directed to authorize a surcharge or other appropriate form of rate relief to make the utility whole for the entire transmission line expense incurred to the effective date of the new rates.

Respectfully submitted,

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