

2000

Westside Dixon Associates v. Utah Power & Light/ PacifiCorp; Utah Public Service Commision : Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

WESTSIDE DIXON ASSOCIATES,

Appellant,

v.

UTAH POWER &
LIGHT/PACIFICORP; UTAH
PUBLIC SERVICE COMMISSION.

Appellees.

**BRIEF OF APPELLEE
PACIFICORP**

Docket Number 20000731-SC

PSC Number 00-035-01

Argument Priority No. 14

APPEAL FROM THE PUBLIC SERVICE COMMISSION

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PARTIES

Pursuant to Rule 24(a) of the Utah Rules of Appellate Procedure, the following are parties to this appeal:

Westside Dixon Associates, L.L.C. as Appellant (“Westside”).

PacifiCorp, dba Utah Power & Light as Appellee (“PacifiCorp”).

The Utah Public **S**ervice **C**ommission as Appellee (the “Commission”).

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JURISDICTION

The Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(e)(i).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

A. Issues Properly Before this Court:

1. Whether the Commission correctly interpreted the term “new building” in Utah Administrative Rule 746-210 to encompass Westside’s Broadway Lofts Building.

a. Standard of Review. When reviewing an agency’s interpretation of its own rules, Utah courts apply an intermediate standard of review, deferring to an agency’s interpretation of a rule so long as it is within the bounds of reasonableness and rationality. Thorup Bros. Constr. v. Auditing Div., 860 P.2d 324, 327 (Utah 1993).

2. Whether the Commission properly determined that Westside did not meet the requirements of the “cost effectiveness” exception to the master metering prohibition contained in Utah Administrative Rule 746-210-3.

a. Standard of Review. When reviewing an agency’s factual determination, Utah courts give substantial deference to the agency and will reverse only if the findings are not supported by substantial evidence. Drake v. Industrial Comm’n of

Utah, 939 P.2d 177, 181 (Utah 1997); Stokes v. Board of Review, 832 P.2d 56,60 (Utah App. 1992).

B. Issues Not Properly Before this Court

1. Whether PacifiCorp waived any right under Utah Administrative Rule 746-210 to object to Westside’s master metering of the Broadway Lofts Building.

a. Not a Proper Issue Before the Court. This issue is not properly before this Court because it was not raised in a timely manner before the Commission. (See R. 1, Formal Complaint; R. 31, Westside’s Hearing Br.; R. 115 Hearing Transcript; R. 68, Order; R. 76, Westside’s Petition for Review; R. 116, Order on Review.) Because this issue was not timely raised, the Commission made no factual or legal determinations on it. Thus, there is nothing for this Court to review.¹

2. Whether Utah Administrative Rule 746-210 deprives the Broadway Lofts Condominium Association due process and equal protection under the Fourteenth Amendment to the United States Constitution.

a. Not a Proper Issue Before the Court. This issue is not properly before this Court because it was not raised in a timely manner before the Commission. (See R. 1, Formal Complaint; R. 31, Westside’s Hearing Br.; R. 115

¹ Had the Commission addressed this issue, the proper standard of review would be correction of error. Utah Code Ann. § 63-46b-16(4)(d). Waiver is “a highly fact-dependent question, one that [an appellate court] cannot profitably review de novo in every case because we cannot hope to work out a coherent statement of the law through a course of such decisions.” State v. Pena, 869 P.2d 932, 938 (Utah 1994).

Hearing Transcript; R. 68, Order; R. 76, Westside's Petition for Review; R. 116, Order on Review.) Because this issue was not timely raised, the Commission made no factual or legal determinations on it. Thus, there is nothing for this Court to review.

STATEMENT OF THE CASE

A. Nature of the Case

This case arises from Petitioner Westside Development Associates L.L.C.'s ("Westside") improper installation of a "master meter" and submetering (defined below) to provide electric service to its Broadway Lofts condominiums in Salt Lake City (the "Broadway Lofts Building"). (R. 1, Formal Complaint.) PacifiCorp contends that master metering and submetering is not permitted under Administrative Code Rule 746-210 (the "Rule," attached as Appendix 1). Upon learning of Westside's improper metering, PacifiCorp notified Westside that it would discontinue electrical service to the Broadway Loft Building on January 3, 2000 unless the metering were corrected. (R. 9, Letter from PacifiCorp's counsel to Mr. Kent Holland, Dec. 10, 1999; R. 3, Letter from PacifiCorp to Westside, Dec. 21, 1999).

B. Procedural History

On January 4, 2000, Westside filed a Formal Complaint with the Public Service Commission of Utah (the "Commission"). (R. 1.) On February 3, 2000, PacifiCorp filed an Answer and Motion to Dismiss. On April 20, 2000, after briefing on the issues, the Commission held an evidentiary hearing. (R. 115.) The issues raised by Westside

included the interpretation of the term “new building” in the Rule and the application of the Rule’s cost-effectiveness exemption. (R. at 31, Westside’s Hearing Br.; R. 115 Hearing Transcript, at 5-28 & 43-48 & 51-53.)

On June 28, 2000, the Commission issued its Order dismissing Westside’s Complaint (R. 68, Report & Order (the “Order,” attached as Appendix 2).) On July 18, 2000, Westside filed its Petition for Review in the Commission. (R. 76.) On August 7, 2000, the Commission granted Westside’s Petition for Review for the sole purpose of allowing Westside an additional opportunity to make the required cost-benefit analysis under the Rule’s cost-effectiveness exemption. (R. 79.) On September 8, 2000, after receiving evidence from Westside of its cost-benefit analysis, the Court issued its Order on Review affirming its prior dismissal of Westside’s Complaint. (R. 116, Order on Review, attached as Appendix 3.)

C. Disposition in the Commission

In its Order, the Commission recognized that Rule 746-210, which adopts certain standards of the Public Utility Regulatory Policies Act (“PURPA”), 16 U.S.C. § 2601 et seq., prohibits master metering except under certain limited exceptions. (R. 68, 3-6.) The Commission found that the Rule applied to the meters at Westside’s condominiums because the building constituted a “new building” as that term is defined in the Rule. (*Id.* at 4, Conclusion of Law No. 3.) Moreover, the Commission found that Westside did not fit within any of the exceptions under the Rule, including the “cost-effectiveness”

exception under Rule 746-210-3. (Id. at 4-6, Conclusion of Law Nos. 5(A)-(C) & 7.)

Accordingly, the Commission held that under the Rule, PacifiCorp “is not only allowed, but is required, to refuse to provide electrical service to [Westside] until [Westside] properly meters its condominiums.” (Id. at 6, Conclusion of Law No. 8.)

In the Order on Review, the Commission affirmed its dismissal of the Complaint in the Order, finding that Westside “failed to submit a study meeting the requirements” of the Rule and “failed to meet its burden of proof” to show that it fell within the cost-effectiveness exception. (R. 116.)

STATEMENT OF FACTS

A. Undisputed Facts

Westside’s Broadway Lofts Building

1. The Broadway Lofts Building is located at 159 West 300 South, Salt Lake City, Utah. (R. 66, Stipulation of Facts, ¶ 1.) This Building was originally built in or around 1901. (Id.)

2. In or around December 1999, Westside completed a renovation and conversion of the Broadway Lofts Building from an old warehouse into approximately 60 new condominium units. (Id. at ¶ 2; R. 115, Hearing Transcript, Test. of Thomas Halliday, at 15; R. 7, Letter from Construction Company indicating that the construction work was “substantially completed” as of December 6, 1999.)

3. This renovation of the Broadway Lofts Building was a complete renovation. In other words, Westside constructed all of the interior walls and, for each of the units, installed separate heating and cooling systems. (R. 115, Hearing Transcript, Test. of Thomas Halliday, at 33-34.)

4. To renovate and convert the original building into condominiums, Westside was required to obtain a building permit, which it or its agents obtained on or about July 1, 1998. (R. 66, Stipulation of Facts, ¶ 3; R. 115, Hearing Transcript, Test. of Thomas Halliday, at 15.)

5. The building permit states that the permit is issued to “convert existing warehouse to condos[,] new parking structure with two levels[,] 58 units; condo multi fam[ily], change of use.” (Building Permit, attached hereto as Appendix 4.)²

6. As part of the conversion, Westside had installed a "master meter" system for metering electrical service to the condominiums. (R. 66, Stipulation of Facts, ¶ 5.) Master metering is the practice of metering and billing the electric usage of multiple tenants/individuals through one utility meter. (R. 68, Order, at 2, ¶ 5.)

7. Westside’s metering system is also a sub-metered system. (R. 66, Stipulation of Facts, ¶ 6.) Sub-metering is the practice where the tenant/individual is metered and billed by an entity other than the utility. (R. 68, Order, at 2, ¶ 6.) In this

²The Building Permit was admitted into evidence before the Commission as Exhibit No. 8. (R. 115, Hearing Transcript, at 15-16.) This Exhibit, however, was not included in the Record. By Order of this Court, dated February 26, 2001, the Record in this case was supplemented to include the Building Permit.

case, Complainant has contracted with Relms, Inc. (“Relms”) to provide the sub-metering and billing services for the condominiums. (R. 66, Stipulation of Facts, ¶ 7.)

8. Neither Westside nor any of its agents made a written request to PacifiCorp for permission to master meter or sub-meter the condominiums. (R. 115, Hearing Transcript, Test. of Douglas Marx, at 37; id. Test. of Thomas Halliday, at 28-29.)

9. According to Douglas Marx, PacifiCorp’s operations manager, Westside submitted two Requests for Electrical Service to PacifiCorp, but neither requested master metering. In fact, both Requests suggest that Utah Power would individually meter the condominium units. (R. 115, Hearing Transcript, Test. of Douglas Marx, at 38.) These Requests are attached hereto as Appendix 5 and 6.)³

10. According to Douglas Marx, Plaintiff submitted an electrical site plan, but that plan did not show or suggest master metering. (Id. at 39.)

PacifiCorp’s Electrical Service to the Condominiums

11. During construction of the condominiums, PacifiCorp supplied electrical power to the construction company, Culp Construction Company (“Culp”). (R. 66, Stipulation of Facts, ¶ 8.)

³ These documents were marked and received at the Commission as Exhibits 1 & 2 (R. 115, Hearing Transcript, at 38 & 54) and have been included in the Record by this Court by Order dated February 26, 2001.

12. On or about December 6, 1999, Culp requested that PacifiCorp discontinue its service because the project had been substantially completed, and notified Westside to request permanent power. (Id. ¶ 9.)

13. On or about December 10, 1999, PacifiCorp's counsel wrote a letter to Westside's counsel informing him that Westside's master metering system was not allowed under the Commission's rules. (R. 9, Letter from PacifiCorp's Counsel to Mr. Kent Holland.) In the letter, PacifiCorp affirmed its commitment to provide power to the condominiums if Westside allowed PacifiCorp to install its own meters. (Id.)

14. Westside refused to allow PacifiCorp to install its own meters. (R. 66, Stipulation of Facts, ¶ 10.) On or about December 21, 1999, PacifiCorp wrote a letter to Westside informing it that power to the condominiums would be disconnected on January 3, 2000. (Id. at ¶ 11; R. 3, Letter from PacifiCorp to Westside.) The basis for termination was that Westside's metering system to the condominiums did not comply with Rule 746-210 and PacifiCorp's Electric Service Regulation No. 7. (Id.)

15. On January 4, 2000, Westside filed its Formal Complaint with the Commission. (R. 1, Formal Complaint.)

B. Response to Westside's Facts

Westside's Brief does not contain a statement of facts as required Utah Rule of Appellate Procedure 24(7). Nevertheless, PacifiCorp responds to Westside's factual assertions as follows:

1. Response to Westside's assertion on Page 4 of its Brief that "The Plans sent to PacifiCorp showed that Westside intended to have master metering/sub metering for Broadway Lofts. Those submitted plans were approved by PacifiCorp."

Westside failed to support this assertion by citations to the record as required by Rule 24(7). The reason it failed to do so is simple: there is no support in the record. Recognizing the absence of such evidence, Westside has attached to its Brief its "Attachment No. 1." (Appellants' Br. at 11.)

Westside's reliance on Attachment No. 1 is misplaced for several reasons. First, this plan was not introduced before the Commission and therefore is not part of the record. PacifiCorp had no opportunity to review this document or examine any witness on its date, authenticity, or relevance. Because it is not part of the record, the Court should not consider it. Further, it has not been established by any finder of fact that this drawing accurately depicts master metering. The Commission certainly did not have an opportunity to make this determination.

Second, even if this plan were part of the record, there is no evidence that it was delivered to PacifiCorp. Indeed, Thomas Halliday, Westside's sole witness before the Commission (who actually works for Relms, not Westside) testified that he did not submit any plans to PacifiCorp and could not identify anyone who might have. (R. 115, Hearing Transcript, Test. of Thomas Halliday, at 30.) Moreover, Mr. Halliday could not identify the specific plans and did not have a copy of such plans at the Commission hearing, even though specifically requested. (*Id.* at 30 & 33.) Mr. Halliday also did not

know of any letter or other communication from PacifiCorp indicating that it had received the plans. (Id. at 30.)

Third, even if this plan were submitted to PacifiCorp, there is no evidence that they were “approved.” Attachment No. 1 itself does not evidence PacifiCorp’s approval. (Id. at 33.) In addition, Mr. Halliday had no letter or other communication from PacifiCorp approving any request for master metering. (Id. at 33.) Similarly, even assuming the plan was submitted, that does not constitute a “written request” for master metering as required under the Rule. Utah Admin. Code R746-210-3.

Westside’s lack of evidence supporting this assertion is eclipsed by the testimony of Douglas Marx, PacifiCorp’s operations manager. According to Mr. Marx, Westside never submitted a written request to PacifiCorp to be approved for master metering. (R. 115, Hearing Transcript, Test. of Douglas Marx, at 37.) While Westside did submit two requests for electrical service and one electrical site plan, those documents neither show nor even suggest master metering. (Id. at 38-39.) According to Mr. Marx, PacifiCorp has never approved master metering for the Broadway Lofts Building. (Id. at 39-40.)

Finally, as discussed below, this factual dispute is irrelevant because it is only offered by Westside in support of its “waiver” argument. (Appellant’s Br. at 10-11.) Westside never raised the issue of waiver before the Commission issued its Order and therefore it is not properly before this Court. Accordingly, this factual assertion is irrelevant.

C. Background on PURPA

Rule 746-210 is derived in part from the Federal Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601 et seq. (“PURPA”). The recognized purposes of PURPA are “conservation of energy,” “optimization of [electric utility] efficiency,” and “equitable rates to electric consumers.” 16 U.S.C. § 2611. PURPA is large in scope, touching upon various aspects of energy use, production, and conservation.

One of PURPA’s many focal points is master metering. On this issue, PURPA established a federal standard on master metering of electrical service, providing that “to the extent determined appropriate under section 2625(d) of this title, master metering of electric service in the case of new buildings shall be prohibited or restricted to the extent necessary to carry out the purposes of this title.” 16 U.S.C. § 2623(b)(1). Section 2625(d), in turn, states that “separate metering shall be determined appropriate for any new buildings for purposes of section 2623(b)(1) of this title if (1) there is more than one unit in such building; (2) the occupant of each such unit has control over a portion of the electric energy used in such unit; and (3) with respect to such portion of electric energy used in such unit, the long-run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building.” 16 U.S.C. § 2625(d). The individual state utility commissions were then left to craft rules implementing this policy.

In 1981, the Commission first adopted the PURPA standards (Report & Order, PSC Case No 80-999-03) and subsequently enacted the Rule.

SUMMARY OF ARGUMENT

1. **The Definition of the term “New Building.”** The Commission properly interpreted the Rule by concluding that the Broadway Lofts Building constitutes a “new building” as that term is defined in the Rule. A “new building” is defined as including those structures “for which a building permit is obtained on or after August 1, 1984.” Utah Admin. Code R746-210-3(A). Even though the Broadway Lofts Building was originally built in 1901, Westside was required to, and in fact did, obtain a building permit for the Building’s complete renovation and change of use. Thus, the Broadway Lofts Building is a “new building” under the Rule. Moreover, Westside’s collateral attack of the definition of “new building” is not properly before this Court because Westside has failed to exhaust its administrative remedies under the Utah Administrative Rulemaking Act.

2. **The Cost-Effectiveness Exception.** The Commission properly determined that Westside was not eligible for the “cost-effectiveness” exemption to the master metering proscription in the Rule. Not only is the Commission’s factual determination that Westside failed to make the required “written request” supported by substantial evidence, the Commission’s factual determination that Westside failed to make the required cost-benefit analysis is also supported by substantial evidence.

3. Waiver. This issue is not properly before this Court because it was waived by Westside by failing to timely raise it before the Commission. Even if it had been, Westside's waiver argument fails because (1) PacifiCorp's objection to improper master metering is not a "right" to be waived; and (2) even if it were a "right," there is no evidence in the record showing that PacifiCorp "intentionally relinquished" that right.

4. Constitutional Violation. Because Westside failed to raise this issue timely, it is waived. Moreover, because this argument is merely a collateral attack on the electrical rates established by the Commission, this issue is not properly before this Court because Westside has failed to exhaust its administrative remedies under the Utah Administrative Procedures Act.

ARGUMENT

Rule 746-210 prohibits master metering generally and specifically states that "master metering of electric service in the case of new buildings shall be prohibited or restricted to the extent necessary to carry out the purpose of this Title." Utah Admin. Code R746-210-1(A). A primary objection to master metering is that energy users do not receive a bill for their specific consumption, therefore, receive no pricing signal with regard to their usage. In addition, even when tenants do receive bills as a result of submetering, such metering is disfavored because tenants of a master metered facility are not customers of a regulated utility. Thus, neither the utility nor the Commission can

provide assistance in the event of a tenant/landlord dispute. Id. at R746-210-5. Because of these concerns, the Commission set forth its policy in Rule 746-210 that allows master metering and submetering only under very limited exceptions. Here, the Commission correctly determined that Westside does not fit within any of these exceptions. Accordingly, this Court should uphold the Commission's dismissal of Westside's complaint.

A. The Commission Properly Found that the Broadway Lofts Building Is a "New Building" Under the Rule.

The Rule's master-metering prohibition applies only to "new buildings." Rule 746-210-1(A). Westside argues that the Commission erred in its interpretation of the term "new building" in the Rule to encompass the Broadway Lofts Building because the Building was originally built in or around 1901.

Contrary to Westside's argument, the Commission properly interpreted the term "new building" to include the Broadway Lofts Building. When reviewing an agency's interpretation of its own rules, Utah Courts defer to an agency's interpretation of a rule so long as it is within the bounds of reasonableness and rationality. Thorup Bros. Constr., 860 P.2d at 327.

The term "new building" is specifically defined in the Rule to encompass two separate types of buildings. Specifically, the term "new building" encompasses "[1] those structures or mobile home parks for which a building permit was obtained on or after August 1, 1984 or [2] if no building permit is required, for which construction is

commenced on or after August 1, 1984.” Utah Admin. Code R746-210-3(A) (emphasis added).⁴

Here, the first definition applied, and the Commission interpreted the term “new building” according to the plain language of that definition: if a building permit was obtained after August 1, 1984. The Commission found that Westside was “required to obtain a building permit to convert the warehouse into a condominium, which it did on or about July 1, 1998.” (Ex. 3, Order, at 4, Conclusion of Law No. 3.) Westside does not challenge this factual finding.⁵ Thus, because Westside was required to, and in fact did, obtain a building permit for the Broadway Lofts Building after August 1, 1984, the Building falls squarely within the first definition of “new building.”

Realizing that it loses under the plain language of the Rule, Westside argues that the Commission’s interpretation of the term “new building” to include the Broadway Lofts Building is “absurd.” According to Westside, the term “building permit” cannot mean a building permit for anything other than the initial erection of a building because

⁴ For the second type of “new building,” the Rule provides that “[c]onstruction is defined to begin when footings are poured.” Utah Admin. Code R746-210-3(A). However, the second category of “new building”—i.e., when no building permit is required, for which construction is commenced on or after August 1, 1984—is not at issue. Thus, when the footings of the Broadway Lofts Building were poured is irrelevant.

⁵ Even if Westside wanted to challenge this factual finding, it has failed to marshal the evidence as required. Kennecott Corp. v. State Tax Comm’n, 858 P.2d 1381, 1385 (Utah 1993). Moreover, this factual finding is supported by more than substantial evidence. (See R. 66, Stipulation of Facts, ¶ 3; R. 115, Hearing Transcript, Test. of Thomas Halliday, at 15, 34; Appendix 4, Building Permit.)

otherwise the term could include construction permits for placing new water heaters in homes. This argument fails for various reasons.

First, there is nothing inherently unreasonable in defining “building permit” to include building permits other than those required for the initial construction of a building. Stated another way, to define the term “building permit” by its plain meaning to include permits beyond merely the permit needed for initial construction is more than reasonable given the policies of PURPA and the Rule. There are legitimate public policy reasons behind the Rule prohibiting master metering recognized by PURPA: conservation of energy, efficiency, and equitable rates. Moreover, the Commission has recognized public policy reasons for restricting submetering: “[s]ubmetering, while giving customers control over their energy consumption, still retains a primary objection to master metering; namely, that since customers of a master metered utility customer are not customers of a regulated public utility, the Commission is without authority to provide redress where appropriate, such as in cases of service or billing problems.” Utah Admin. Code R.746-210-5. These policies are fostered by applying the term “building permit” according to its plain meaning to include all building permits.

In addition, even if there were some level of repairs to a master metered building so minor (yet still requiring a building permit) that the Rule’s “building permit” definition of “new building” did not reasonably fit, this is not such a case. Here, Westside changed the use of the Building (from an old warehouse to a new 58-unit

multi-family condominium complex) and completely gutted and re-built its interior. To define the term “building permit” to include a permit to conduct such extensive structural and use changes (or to define the term “new building” to encompass such a building) is more than reasonable and rational; indeed, it is the only reasonable or rational interpretation given the plain language of the definition.

Finally, Westside’s argument constitutes nothing more than a collateral attack on the Rule: Westside simply does not like the Rule’s definition of “new building.” However, under Utah law, a person challenging a state agency rule (instead of its application) must comply with the provisions of the Administrative Rulemaking Act, Utah Code Ann. § 63-46a-1 et seq. Specifically, the Utah Code provides that “a person seeking judicial review [of an administrative rule] shall exhaust his administrative remedies by complying with the requirements of Section 63-46a-12.” *Id.* § 63-46a-12.1(2)(a). Section 63-46a-12, in turn, states that “an interested party may petition an agency requesting the making, amendment, or repeal of a rule.” Westside has not exhausted its administrative remedies, and therefore it cannot collaterally challenge the substance of the Rule.

B. The Commission Properly Applied the Cost-Effectiveness Test in Rule 746-210-3.

Westside’s second argument is that the Commission erred in interpreting and applying Rule 746-210-3, which encompasses the “cost-effectiveness test.” Westside is wrong. After giving Westside two bites at the apple to satisfy the cost-effectiveness test

in Rule 746-210-3,⁶ the Commission determined that Westside does not qualify for exemption. This finding was amply supported by substantial evidence.

First, to be entitled to the exemption, Westside was required to make a “written request” to PacifiCorp showing that it fell within its scope. *Id.* The Commission found that neither Westside nor any of its agents “made a written request to PacifiCorp for permission to master meter or sub-meter the condominiums.” (R. 68, Order, ¶ 7, at 2.) Westside does not challenge this factual finding.⁷ For this reason alone, Westside’s complaint was properly dismissed.

Second, even had Westside made the required written request for an exemption, the Commission properly applied Rule 746-210-3 to not apply in this case. This Rule allows an entity to master meter when it can show that “the benefit-to-cost ratio is less than one with respect to separate metering using the cost effectiveness test guidelines” described in the Rule. Utah Admin. Code R746-210-3. The burden of proof rests **with Westside** to “demonstrate that the long-run benefits of individual metering to the electric consumer are less than the costs of purchasing and installing separate meters.”

⁶ The first bite came at the evidentiary hearing. The second bite came in the form of the Order Granting Review. The Commission was generous in granting review on this issue because one of the requirements to invoke the cost-effectiveness exception is to provide a “[w]ritten request” to the utility showing that they qualify for the exemption. Utah Admin. Code R746-210-3. As stated above, however, the Commission found that no such request was made.

⁷ Even if Westside did challenge this factual finding, there is substantial evidence supporting it. (R. 115, Hearing Transcript, Test. of Douglas Marx, at 37; *id.* Test. of Thomas Halliday, at 28-29.)

Id.(emphasis added.) To satisfy its burden of proof, Westside would have had to show the following:

* * * *

B. The benefits shall be quantified in dollars of savings and shall reflect the difference in electricity use which results when separate metering is utilized rather than master-metering. The lump sum savings shall reflect a present worth analysis using as a discount rate the percentage interest rate of long-term debt such as the utility's latest long-term bond issue, or a mortgage rate, and a period equal to the estimated life of the building. Such analysis, including its preparation and expense, shall be the sole responsibility of the customer.

C. The customer's determination of benefit shall be based on electric service supplied by the utility at electric service rates and regulations approved by the Commission, including but not limited to, regulations that prohibit resale of electric service to any other person or entity unless taking service under rate schedules that specifically provide for reselling.

D. The cost shall be quantified in dollars and shall reflect the current difference in installed cost between master and individual metering. The lump sum differential cost reflecting the purchase and installation of separate meters versus a single meter shall be prepared by the utility. The preparation of the differential costs of meter bases and building wiring shall be the sole responsibility of the customer; and

E. The benefit-to-cost ratio shall equal the present worth of benefits described in paragraph (b) divided by the current (present worth) costs described in paragraph (d).

Utah Admin. Code R746-210-3(B)-(E).

For the two opportunities the Commission allowed Westside (first at the evidentiary hearing and again in response to the Commission's Order Granting Review), the Commission found that Westside did not satisfy its "burden of proof" to "demonstrate that the long-run benefits of individual metering to the electric consumer

are less than the costs of purchasing and installing separate meters.” Utah Admin. Code R746-210-3. At the evidentiary hearing, the Commission concluded that Westside “made no attempt” to apply the formula. (R. 68, Order ¶ 5(B), at 5.) In its response to the Commission’s Order Granting Review, Westside submitted additional information to try to meet its burden. (R. 87-97 & 104-12.) After reviewing this information, the Commission determined that Westside “has failed to submit a study meeting the requirements” of Rule 746-210-3 and “that [Westside] has failed to meet its burden of proof in this matter.” (R. 116, Order on Review.)

This factual determination is entitled to deference and should be upheld by this Court. Whatever Westside’s purported cost savings analysis is,⁸ it is not the cost-benefit analysis required by Rule R746-210. Specifically, to sustain its burden to demonstrate “that the long-run benefits of individual metering to the electric consumer are less than the costs of purchasing and installing separate meters,” Westside was required to quantify the benefits, reflecting “the difference in electricity use which results when separate metering is utilized rather than master-metering.” Utah Admin. Code R746-210-3.

⁸ See R. 107, Affidavit of L. Deane Smith, Aug. 23, 2000. The analysis, based on a different building (the Dakota Lofts), shows “Customer Savings” of \$138.00 when Relms has a fee of \$42.50 per meter compared to Utah Power’s charge of \$100.00 per meter. \$100 minus \$42.50 does not equal \$138. Also, based on PacifiCorp’s “Connection Fee” of \$10.00 and Relms’ “Connection Fee” of \$0.00, Westside inexplicably claims Customer Savings of \$20.00. Finally, Westside’s analysis shows a “Basic Charge” by both Utah Power and Relms of \$0.98, yet asserts Customer Savings related to that charge of \$411.60. These discrepancies in Westside’s analysis are unexplained.

Westside has failed to make this showing. Nowhere in its analysis does Westside present evidence on the difference in electricity use which results when separate metering is utilized rather than master-metering, as required by Rule R746-210-3(B).⁹ Nor has Westside quantified the difference in installed cost between master and individual metering, as required by Rule R746-210-3(D).¹⁰ Having failed to consider the criteria set forth in sections (B) and (D) of the Rule, Westside also failed to present a benefit-to-cost ratio equal to the present worth of benefits described in section (B) divided by the present worth costs described in section (D). Rule R746-210-3(E). Accordingly, the Court should uphold the Commission's determination that Westside has not met its burden and affirm its dismissal of the complaint. (R. 68, Order, ¶ 5(B), at 5.)¹¹

⁹ In fact, because the Broadway Loft Building is also submetered (individual metering for the individual units), there is no basis for concluding there would be a reduction in energy consumption even if master metering were permitted. In fact, the price savings which Westside asserts, due to the lower price of rate Schedule 6 (applicable to qualifying master-metered buildings) compared to rate Schedule 1, would send a price signal to the consumers which would tend not to encourage conservation, contrary to one of the purposes of PURPA.

¹⁰ Recognizing that it has failed to meet the requirements of the cost-effectiveness test, Westside blames PacifiCorp because it did not prepare the differential-cost analysis under R746-210-3(D). (Appellant's Br. at 10.) PacifiCorp has never received a request to provide such analysis; indeed, it has never received a request for anything relating to master metering at the Broadway Lofts Building. (R. 115, Hearing Transcript, Test. of Douglas Marx, at 37-38.)

¹¹ Again, Westside has failed to marshal the evidence to show that despite supporting facts and all reasonable inferences that can be drawn therefrom, the Commission's factual determination was not supported by substantial evidence. Kennecott Corp., 858 P.2d at 1385.

Instead of providing the required analysis, Westside's cost-savings analysis is derived solely by using the differences in Rate Schedule 6 and Rate Schedule 1. These figures are completely irrelevant to the cost-benefit analysis required under Rule 746-210-3(B). Instead of analyzing the benefit of "the difference in electricity use which results when separate metering is utilized rather than master-metering," Westside would have the Court simply consider the savings to the particular customers if they were to receive service under a lower-priced schedule—one they are not entitled to. This has no place in the analysis.

Third, not only did Westside fail to meet its burden of proof under the Rule, the Commission properly found that as a matter of law it cannot meet this burden. (Ex. 3, Order, ¶ 5(B).) The Rule requires that the requesting entity demonstrate that the long-run benefits of individual metering . . . are less than the costs of purchasing and installing separate meters. . . . The benefits . . . shall reflect the difference in electricity use which results when separate metering is utilized rather than master-metering." Utah Admin. Code R746-210-3 & -3(B). *However, Westside itself has installed "individual meters" (i.e., the sub-meters). (Order, ¶ 5(B), at 5.)* Thus, Westside cannot possibly show that the "benefits" of its metering system are less than the "costs" of individual metering because its own system is comprised of individual metering. Accordingly, Westside cannot be covered under the cost-effectiveness exemption.

In sum, Westside completely failed to provide an analysis reflecting a difference in energy consumption at the Building if it were master metered. Accordingly, the Commission correctly determined that it was not entitled exemption under the cost-effectiveness test.

C. PacifiCorp Has Not Waived Its Right to Object to Master Metering.

Westside's argument that PacifiCorp waived its right to object to master metering fails. First (and ironically), Westside has waived its wavier argument because Westside did not raise this issue before the Commission until the filing of its Petition for Review. (See R. 1, Formal Complaint; R. 31, Westside's Hearing Br.; R. 115 Hearing Transcript; R. 68, Order; R. 76, Westside's Petition for Review.) Issues raised for the first time in a petition for review before the Commission are not timely. Utah Code Ann. § 54-7-15 (stating that a party may seek rehearing on "any matters determined in the action or proceeding," not on new matters). Because Westside's waiver argument was not raised timely, it is now waived. Rodgers-Orduno v. Cecil-Genter, 728 N.E.2d 62, 65 (Ill App. 2000) (noting waiver argument waived when first raised in a motion for reconsideration.)

Second, even if it had been raised timely, Westside's waiver argument is wrong both legally and factually. Under Utah law, "[a] wavier is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it. . . . [T]he intent

to relinquish a right must be distinct. Under this legal standard, a fact finder need only determine whether the totality of the circumstances ‘warrant the inference of relinquishment.’” Soter’s, Inc. v. Deseret Fed. Sav., 857 P.2d 935, 942 (Utah 1993).

Legally, Westside’s argument fails because PacifiCorp could not have waived any “right” to object to master metering because it is not a *right*. PacifiCorp is bound by the Commission’s Rule 746-210, which specifically prohibits master metering except under certain circumstances. Utah Admin. R. 746-210-1. The exercise of utility discretion is not one of those circumstances. (Id.) Indeed, Rule 746-210-5 states: “[t]here are no circumstances, other than the exemptions, where submetering is an acceptable alternative to individual metering.” Thus, PacifiCorp can not waive the Commission’s authority and ability to enforce the Rule.

Westside’s argument also fails factually. Even if the ability to object to master metering were a “right” of PacifiCorp’s, there is no factual predicate in the record to establish waiver. Westside’s argument rests upon Westside’s assertion that PacifiCorp “accepted” plans showing the master metering. But, as discussed fully in the Statement of Facts section B. above, there is no evidence such site plans were submitted—let alone accepted. At the evidentiary hearing, Westside did not produce the plans it allegedly submitted and its sole witness testified that he neither submitted any plans himself nor knew of any person that did so. (R. 115, Hearing Transcript, Test. of Thomas Halliday, at 30.) Also, in support of its assertion, Westside has cited to Exhibits 1 and 2 from the

evidentiary hearing before the Commission. These two documents are Westside's "Requests for Electrical Service." (Appendix 5 & 6.) Neither of these Requests mention master metering and, in fact, as evidenced by the testimony of Douglas Marx, they imply that the building will not be master metered by requesting power from PacifiCorp for the individual condominium units. (R. 115, Hearing Transcript, Test. of Douglas Marx, at 38.)

Finally, even if Westside's Attachment No. 1 shows master metering and had been submitted to PacifiCorp, Plaintiffs' waiver argument would fail. As stated above, waiver is a distinct and intentional relinquishment of a right. Soter's, 857 P.2d at 942. The submission of one plan that cryptically shows master metering would not rise to the level of "intentional relinquishment."¹²

D. Westside Has Waived Its Constitutional Argument and Is Meritless.

Westside's final argument is that the Rule unconstitutionally denies Westside due process and equal protection under the Fourteenth Amendment to the U.S. Constitution. Besides being substantively wrong, Westside has waived this issue.¹³ Westside first

¹² At the very least, this is an issue of fact for a factfinder. However, as already discussed, Westside failed to present this issue to the factfinder in a timely manner.

¹³ There are numerous other problems with this argument that preclude review. First, Westside argues that "Those owners/tenants of buildings that contain central boiler and chiller are exempt from PURPA The discrimination between those with a central boiler and chiller and those without is not based on 'adequate findings of fact'" Westside has failed to marshal the evidence for this assertion. Kennecott Corp., 858 P.2d at 1385. Westside has done nothing but make a bald assertion without any

raised this issue in its docketing statement. (See R. 1, Formal Complaint; R. 31, Westside's Hearing Br.; R. 115 Hearing Transcript; R. 68, Report & Order; R. 76, Westside's Petition for Review; R. 116, Order on Review; Westside's Docketing Statement.) Because Westside failed to raise this issue timely, it is waived. Utah Code Ann. § 54-7-15(2)(b) ("No applicant may urge or rely on any ground not set forth in the application [for rehearing] in an appeal to any court."); State v. Belgard, 811 P.2d 211, 215 (Utah App. 1991) ("The waiver doctrine applies with equal force to claims of constitutional violations.")

Moreover, this argument is merely a collateral attack on the differences in pricing between Rate Schedule 1 and Rate Schedule 6. These rates were determined in

evidentiary support. Indeed, the evidence that Westside would need to review and cite to this Court is not in this docket, but presumably in the dockets approving the Rule. Besides being fatal to Westside's claim, this highlights the importance of taking the required step of exhausting administrative remedies under Utah Code Ann. § 63-46a-12.1 and the fact that Westside failed to do so.

Moreover, Westside's argument on this point fails to meet the minimum briefing requirements of Rule 24(a)(9). "Briefs must contain reasoned analysis based upon relevant legal authority." Smith v. Smith, 995 P.2d 14, 16 (Utah App. 1999). However, besides making a bald assertion of a constitutional violation, there is no analysis. Indeed, the only case cited by Westside is Mountain States Legal Foundation v. Utah Public Service Commission, 636 P.2d 1047 (Utah 1981). While this case addressed discriminatory rates (which, unlike Westside's argument, challenged a Commission Order in the relevant Commission docket), it did so in the context of Utah Code Ann. § 54-3-8, which prohibits preferential rates between persons similarly situated. There is no analysis in Mountain States even suggesting a constitutional violation. Because Westside's cursory statements are "so lacking as to shift the burden of research and argument to the reviewing court" (and to Appellees), this issue is inadequately briefed and should be rejected.

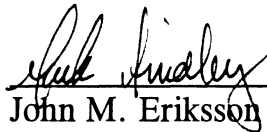
completely separate Commission dockets pursuant to general rate proceedings. (PSC Docket No. 97-035-01, Final Order, Dec. 13, 1999; PSC Docket No. 99-035-10, Final Order, Oct. 6, 2000.). Westside Dixon cannot attack these rates in this proceeding. To challenge these Rates, Westside is required to comply with the Administrative Procedures Act, Utah Code Ann. § 63-46b, et seq. See also § 54-7-9. Because Westside has not followed the proper procedure for challenging these rates, this Court should deny this claim.

CONCLUSION

For the foregoing reasons, PacifiCorp respectfully submits that this should Court affirm the Commission's Order dismissing Westside's Complaint.

Dated this 11 day of April, 2001.

STOEL RIVES LLP

A handwritten signature in dark ink, appearing to read "John M. Eriksson", is written over a horizontal line.

Mark E. Hindley

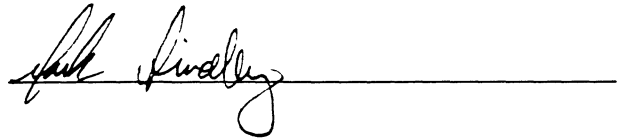
Attorneys for Appellee PacifiCorp

CERTIFICATE OF SERVICE

I hereby certify that on the 11 day of April, 2001, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE PACIFICORP** to be delivered by U.S. mail, postage prepaid to the following:

J. Kent Holland
Anderson & Holland
623 East First South
P.O. Box 11643
Salt Lake City, Utah 84147-0643

Sandy Mooy
Public Service Commission
Heber J. Wells Building
160 East 300 South
P.O. Box 45585
Salt Lake City, Utah 84145-0585



Tab 1

termination of electric service must be met before the installation of a load limiter.

2. Disputes about the level of load limitation are subject to the informal review procedure of Subsection R746-200-7.

3. Electric utilities shall submit load limiter policies and procedures to the Commission for their review before the implementation and use of those policies.

R746-200-7. Informal Review.

Subject to Subsection R746-100-3(F)(1), Consumer Complaints, a person who cannot resolve a dispute with the utility concerning a matter addressed in these rules may obtain informal review of the dispute by a designated employee within the Division of Public Utilities. This employee shall investigate the dispute, try to resolve it, and inform both the utility and the consumer of his findings within five business days from receipt of the informal review request. The Division of Public Utilities shall inform the consumer of his right to petition the Commission for a formal review of the dispute, and shall make available to the consumer a standardized complaint form with instructions approved by the Commission. While an account holder is proceeding with an informal or a formal review of a dispute, no termination of service shall be permitted, provided any amounts not disputed are paid when due, subject to the utility's right to terminate service pursuant to R746-200-6(F), Termination of Service Without Notice.

R746-200-8. Formal Review.

A. The Commission, upon its own motion or upon the petition of any person, may initiate formal or investigative proceedings upon matters arising out of informal complaints.

R746-200-9. Penalties.

A. A residential account holder who claims that a regulated utility has violated a provision of these customer service rules, other Commission rules, company tariff, or other approved company practices may use the informal and formal grievance procedures. If considered appropriate, the Commission may assess a penalty pursuant to Section 54-7-25.

B. Fines collected shall be used to assist low income Utahns to meet their basic energy needs.

54-4-1, 54-4-7, 54-7-9, 54-7-25.

History: 8839, PRO, 07/01/87; 8906, PRO, 09/01/87; 9604, AMD, 12/20/88; 10658, NSC, 04/10/90; 11018, NSC, 08/20/90; 13529, AMD, 12/15/92; 14007, NSC, 02/01/93; 18195, AMD, 03/14/97; 20350, 5YR, 12/08/97; 21794, AMD, 06/01/99.

R746-210. Utility Service Rules Applicable Only to Electric Utilities.

R746-210-1. Public Utility Regulatory Policy Act (PURPA) Standards for Master-Metered Multiple Tenancy Dwellings.

R746-210-2. Exemptions.

R746-210-3. Exemptions Requiring a Cost-Effectiveness Test.

R746-210-4. Exemption by Appeal.

R746-210-5. Submetering as an Alternative to Individual Metering.

R746-210-1. Public Utility Regulatory Policy Act (PURPA) Standards for Master-Metered Multiple Tenancy Dwellings.

A. The Public Utility Regulatory Policy Act (PURPA) standards for Master Metered Multiple Tenancy Dwellings as set forth below are hereby adopted by the Commission.

1. Section 113 of PURPA 16 USCA states:

"To the extent determined appropriate under Section 115(d), master metering of electric service in the case of new buildings

shall be prohibited or restricted to the extent necessary to carry out the purpose of this Title.

Section 115(d) states:

"Separate metering shall be determined appropriate for any new building for purposes of section 113(b)(1) if —

(1) there is more than one unit in such building,

(2) the occupant of each such unit has electric energy used in such unit, and

(3) with respect to such portion of electric energy used in such unit, the long-run benefits to the electric consumers in such building exceed the costs of purchasing and installing separate meters in such building.

R746-210-2. Exemptions.

A. Automatic Exemptions — Separate individual metering is not required for:

1. Those portions of transient multiple occupancy buildings and transient mobile home parks normally used as temporary domiciles in such buildings as hotels, motels, dormitories, rooming houses, hospitals, nursing homes and those mobile home park sections designated for travel trailers;

2. Residential unit space in multiple occupancy buildings where all space heating, water heating, ventilation and cooling are provided through central systems and where the electric load within each unit that is controlled by the tenant is projected to be near minimum bill requirements of the tariff;

3. Common building areas such as hallways, elevators, reception and/or washroom, security lighting areas.

4. Commercial unit space which is:

a. Subject to alternation with change in tenants as evidenced by temporary as distinguished from permanent type of load bearing wall and floor construction separating the commercial unit spaces, and

b. Non-energy intensive as evidenced by connected loads other than space heating, water heating, and air-conditioning of five watts or less per square foot of occupied space.

R746-210-3. Exemptions Requiring a Cost-Effectiveness Test.

Cases not covered under "automatic exemptions" will be granted an exemption if the benefit-to-cost ratio is less than one (1) with respect to separate metering using the cost effectiveness test guidelines described below. The burden of proof rests with the person requesting exemption and the evidence required to sustain that burden must demonstrate that the long-run benefits of individual metering to the electric consumer are less than the costs of purchasing and installing separate meters. Written requests to the utility for an exemption will be given consideration based upon the following criteria and conditions:

A. "New buildings" shall be defined as those structures or mobile home parks for which a building permit is obtained on or after August 1, 1984, or, if no permit is required, for which construction is commenced on or after August 1, 1984. Construction is defined to begin when footings are poured.

B. The benefits shall be quantified in dollars of savings and shall reflect the difference in electricity use which results when separate metering is utilized rather than master-metering. The lump sum savings shall reflect a present worth analysis using as a discount rate the percentage interest rate of long-term debt such as the utility's latest long-term bond issue, or a mortgage rate, and a period equal to the estimated life of the building. Such analysis, including its preparation and expense, shall be the sole responsibility of the customer.

C. The customer's determination of benefit shall be based on electric service supplied by the utility at electric service rates and regulations approved by the Commission, including but not limited to, regulations that prohibit resale of electric service to any other person or entity unless taking service under rate schedules that specifically permit such resale.

D The cost shall be quantified in dollars and shall reflect the current difference in installed cost between master and individual metering. The lump sum differential cost reflecting the purchase and installation of separate meters versus a single meter shall be prepared by the utility. The preparation of the differential costs of meter bases and building wiring shall be the sole responsibility of the customer and

E The benefit-to-cost ratio shall equal the present worth of benefits described in paragraph (b) divided by the current (present worth) costs described in paragraph (d)

R746-210-4. Exemption by Appeal.

In the event the customer disagrees with the utility's determination of the exemption, such dispute shall be resolved by the Commission. The Commission, upon its own motion or upon the petition of any person, may initiate formal or investigative proceedings upon any matter arising out of an informal complaint. Further, a formal investigation requires not only the benefit-to-cost determination, but also a showing by the customer that a granted exemption status will be consistent with the stated purposes of Title I of PURPA, i.e., conservation, efficiency, and equity. It is appropriate that equity, conservation and efficiency not be negatively impacted as required under the promulgated PURPA regulations.

R746-210-5. Submetering as an Alternative to Individual Metering.

There are no circumstances, other than exemptions, where submetering is an acceptable alternative to individual metering under the constraints of PURPA. Submetering, while giving consumers control over their energy consumption, still retains a primary objection to master metering, namely, that since customers of a master metered utility customer are not customers of a regulated public utility, the Commission is without authority to provide redress where appropriate, such as in cases of service or billing problems.

54-4-1.

History: 8840, PRO, 07/01/87; 8903, PRO, 09/01/87, 9605, AMD, 12/05/88; 14607, 5YR, 07/15/93; 14608, NSC, 09/01/93, 21249, 5YR, 06/26/98.

R746-240. Telecommunication Service Rules.

- R746-240-1 General Provisions
- R746-240-2 General Definitions
- R746-240-3 Deposits and Eligibility for Service
- R746-240-4 Account Billing
- R746-240-5 Deferred Payment Agreement
- R746-240-6 Termination
- R746-240-7 Informal Review
- R746-240-8 Formal Review
- R746-240-9 976 Services

R746-240-1. General Provisions.

A Authorization—The Utah Public Utility Code Sections 54-1-1, 54-4-4, 54-4-7, 54-4-8, and 54-4-14

B Title—These rules shall be known and may be cited as the Utah Service Rules for Telecommunication Corporations

C Purpose—The purpose of these rules is to establish and enforce uniform utility service practices and procedures governing eligibility, deposits, account billing, termination and deferred payment agreements

D Objective—The objective of these rules is to assure the adequate provision of residential and business utility service to restrict unreasonable termination of or refusal to provide residential and business utility service to provide functional alternatives to termination or refusal to provide residential or business utility service and to establish and enforce fair and

equitable procedures governing eligibility, deposits, account billing, termination and deferred payment agreements

E Nondiscrimination—Utility service shall be provided to qualified persons without regard to employment, occupation, race, handicap, creed, sex, national origin, marital status, or number of dependents

F Requirement of Good Faith—Every agreement or obligation within these rules imposes an obligation of good faith, honest, and fair dealings in its performance and enforcement

G Application of Rules—These telecommunications service rules shall apply to each local exchange carrier operating within Utah under the jurisdiction of the Public Service Commission

1 A local exchange carrier may petition the Commission for an exemption from specified portions of these rules in accordance with R746-100-16, Deviation from Rules

2 The adoption of these rules by the Commission shall in no way preclude it from altering or amending a specific rule pursuant to applicable statutory procedures

H. Customer's Statement of Rights and Responsibilities—When utility service is extended to an account holder, and annually thereafter, a local exchange carrier shall provide a copy of the "Customer's Statement of Rights and Responsibilities" as approved by the Public Service Commission. This statement shall be a single page document. It shall be prominently displayed in each customer service center

R746-240-2. General Definitions.

A. "Account Holder"—A person, corporation, partnership, or other entity which has agreed with a local exchange carrier to pay for receipt of utility services and to which the utility provides the utility services

B. "Applicant"—A person, corporation, partnership, or other entity that applies to a local exchange carrier for local access line services

C "Local Exchange Carrier/LEC"—A telephone utility that provides the local access line services within the geographic territory authorized by the Commission

D "Deferred Payment Agreement"—An agreement to receive or to continue to receive utility service pursuant to Section R746-240-5, Deferred Payment Agreement, and to pay an outstanding debt or delinquent account owed to a local exchange carrier

R746-240-3. Deposits and Eligibility for Service.

A Deposits and Guarantees—

1 Local exchange carriers shall have Commission approved tariffs on file relating to their security deposits and third party guarantor policies and procedures

2 Simple interest shall accrue on a deposit and shall be paid at the time the deposit is either refunded or applied to the customer's final bill for service. The interest rate used by a utility shall be set by the Commission

B Eligibility for Service—

1 Utility service is to be conditioned upon payment of deposits, when required, and of the outstanding debts for past utility service which are owed by the applicant to that local exchange carrier, subject to Section R746-240-7 Informal Review, and Section R746-240-8, Formal Review. That service may be denied when unsafe conditions exist, when the applicant has given false information in applying for utility service, or when the applicant has tampered with the utility's lines, equipment, or other properties

2 When an applicant is unable to pay an outstanding debt in full, service may be provided upon execution of a deferred payment agreement as set forth in Section R746-240-5, Deferred Payment Agreement

3 An applicant is ineligible for service if at the time of application the applicant is cohabiting with a delinquent account holder previously terminated for non-payment and

Tab 2

DOCKETED

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Complaint of)	
WESTSIDE DIXON ASSOCIATES,)	<u>DOCKET NO. 00-035-01</u>
L.L.C.,)	
Complainant)	
vs.)	
UTAH POWER & LIGHT COMPANY,)	<u>REPORT AND ORDER</u>
Respondent)	

ISSUED: June 28, 2000

Appearances:

J. Kent Holland For Westside Dixon Associates, L.L.C.

Mark E. Hindley “ Utah Power & Light Company

By the Commission:

PROCEDURAL HISTORY

Complainant, Westside Dixon Associates, L.L.C., filed its complaint on January 4, 2000, and Respondent, Utah Power & Light Company, filed its answer, together with a motion to dismiss, on February 3, 2000. Pursuant to notice duly served, the matter came on for hearing on Thursday, April 20, 2000, at 9:00 a.m., before A. Robert Thurman, Administrative Law Judge for the Commission, at the Commission offices, 160 East 300 South, Salt Lake City, Utah. Evidence was offered and received. The Administrative Law Judge, having been fully

advised of the issues in this matter, now enters the following Report, containing proposed Findings of Fact, Conclusions of Law, and the Order based thereon.

FINDINGS OF FACT

1. Complainant has converted a warehouse located at 159 West and 300 South, Salt Lake City, Utah into condominiums.
2. The original warehouse was constructed in the early 1900s.
3. Complainant was required to obtain a building permit for the construction of the condominiums, which it or its agents obtained on or about July 1, 1998.
4. The individual condominium units have separate space heating, water heating, ventilation, and cooling systems. There is no central boiler or central chiller servicing all of the condominium units.
5. A master metering system for metering electrical service to the condominiums is in place. Master metering is the practice of metering and billing the electric usage of multiple tenants/individuals through one utility meter.
6. Complainant's metering system is also a sub-metered system. Sub-metering is the practice where the tenant/individual is metered and billed by an entity other than the utility. In this case, Complainant has contracted with Relms, Inc., a Utah corporation, to provide the sub-metering and billing services for the condominiums.
7. Neither Complainant nor any of its agents made a written request to Utah Power for permission to master meter or sub-meter the condominiums.
8. During construction of the condominiums, Utah Power supplied electrical power

to the construction company, Culp Construction Company (“Culp”).

9. On or about December 6, 1999, Culp requested that Utah Power discontinue its service because the project had been substantially completed, and notified Complainant to request permanent power.

10. On or about December 10, 1999, Utah Power’s counsel wrote a letter to Complainant’s counsel informing Complainant that its metering system was not allowed under the Commission’s rules. Utah Power affirmed its commitment to provide power to the condominiums if Complainant allowed Utah Power to install its own meters.

11. Complainant refused to allow Utah Power to install its own meters. On or about December 21, 1999, Utah Power wrote a letter to Complainant informing it that power to the condominiums would be disconnected on January 3, 2000. The basis for termination was that Complainant’s metering system to the condominiums did not comply with Rule 746-210 and Utah Power’s Electric Service Regulation No. 7.

12. On January 4, 2000, Complainant filed a formal complaint with the Commission. Because Complainant filed a formal complaint, Utah Power did not discontinue service to the condominiums.

CONCLUSIONS OF LAW

1. The Commission has party and subject matter jurisdiction over this matter.
2. Rule 746-210, which adopts the Public Utility Regulatory Policy Act (“PURPA”) standard regarding master metering, states in part that “master metering of electric service in the case of new buildings shall be prohibited or restricted to the extent necessary to carry out the

purpose of this Title.”

3. This general prohibition against master metering applies in this case because the Complainant’s condominium building is a “new building.” The term “new building” is defined as a structure “for which a building permit was obtained on or after August 1, 1984.” Rule 746-210-3(A). Because Complainant was required to obtain a building permit to convert the warehouse into condominiums, which it did on or about July 1, 1998, the building is a “new building.”

4. The exception in Rule 746-210-2(2) to the prohibition against master metering does not apply in this case because each separate condominium unit in Complainant’s complex has separate space heating, water heating, ventilation, and cooling systems, and are not served by central boilers or chillers.

5. The exception in Rule 746-210-3¹ to the prohibition against master metering does

¹R746-210-3 Exemptions Requiring a Cost-Effectiveness Test

Cases not covered under "automatic exemptions" will be granted an exemption if the benefit-to-cost ratio is less than one (1) with respect to separate metering using the cost effectiveness test guidelines described below. The burden of proof rests with the person requesting exemption and the evidence required to sustain that burden must demonstrate that the long-run benefits of individual metering to the electric consumer are less than the costs of purchasing and installing separate meters. Written requests to the utility for an exemption will be given consideration based upon the following criteria and conditions:

* * *

B. The benefits shall be quantified in dollars of savings and shall reflect the difference in electricity use which results when separate metering is utilized rather than master-metering. The lump sum savings shall reflect a present worth analysis using as a discount rate the percentage interest rate of long-term debt such as the utility's latest long-term bond issue, or a mortgage rate, and a period equal to the estimated life of the building. Such analysis, including its preparation and expense, shall be the sole responsibility of the customer.

C. The customer's determination of benefit shall be based on electric service supplied by the utility at electric service rates and regulations approved by the Commission, including but not limited to, regulations that prohibit resale of electric service to any other person or entity unless taking service under rate schedules that specifically provide for reselling.

D. The cost shall be quantified in dollars and shall reflect the current difference in installed cost between master and individual metering. The lump sum differential cost reflecting the purchase and installation of separate meters versus a single meter shall be prepared by the utility. The preparation of the differential costs of meter bases and building wiring shall be the sole responsibility of the customer, and

E. The benefit-to-cost ratio shall equal the present worth of benefits described in paragraph (b) divided by the current (present worth) costs described in paragraph (d).

not apply to this case for the following reasons.

A. To be entitled to the exemption, Complainant was required to make a “written request” to Utah Power showing that it fell within the scope of this exception. Complainant failed to submit a written request, let alone an analysis showing that it fell within the scope of the exception.

B. For this exemption to apply, an applicant has the “burden of proof” to “demonstrate that the long-run benefits of individual metering to the electric consumer are less than the costs of purchasing and installing separate meters.” The rule, as set forth in footnote 1, provides a formula for determining the customers’ cost/benefit ratio. Complainant made no attempt to apply the formula as therein set forth.

Additionally, as a matter of law, Complainant is unable to meet this burden because Complainant itself (through Relms) has installed individual meters (i.e., the sub-meters), and is therefore unable to satisfy the required cost-benefit analysis, the meters having already been installed, thereby obviating any possible savings between master-metered and separate-metered service. Complainant attempted to meet the burden by claiming savings derived from service taken under a commercial or industrial rate would be passed on to tenants. However, under Respondent’s tariff, Complainant would not be eligible for such a rate. Accordingly, there would be no savings to pass on.

C. Complainant did not meet its burden of proof required to fall within this exception.

6. Complainant has made no argument that falls within any other exceptions in Rule

746-210 and the Commission finds that no other exception applies.

7. Because Complainant is not covered under any exception in Rule 746-210, Complainant is not allowed to sub-meter. Rule 746-210-5.

8. In sum, Complainant is not entitled to relief under Rule 746-210 and Utah Power's Electric Service Regulation No. 7. Under these provisions, Complainant is not entitled to master meter or sub-meter the Building. Accordingly, Respondent is not only allowed, but is required, to refuse to provide electrical service to Complainant until Complainant properly meters its condominiums.


ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. The complaint of Westside Dixon Associates, L.L.C., against Utah Power & Light Company be, and the same is, dismissed.

2. If Westside Dixon Associates, L.L.C., wishes to proceed further, Westside Dixon Associates, L.L.C., may file a written petition for review within 20 days of the date of this Order. Failure to do so will preclude the right to appeal to the Utah Supreme Court.

Dated at Salt Lake City, Utah, this 28th day of June, 2000.



A. Robert Thurman
Administrative Law Judge

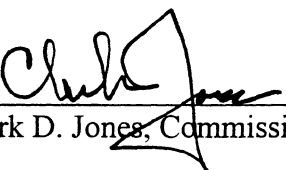
DOCKET NO. 00-035-01

-7-


Approved and Confirmed this 28th day of June, 2000, as the Report and Order of
the Public Service Commission of Utah.


Stephen F. Mecham, Chairman


Constance B. White, Commissioner



Clark D. Jones, Commissioner

Attest:


Julie Orchard
Commission Secretary
ss#21208

I hereby certify that on Wednesday, June 28, 2000, I served a true copy of the hereto attached REPORT AND ORDER on the persons whose names are set forth below by mailing such copy on said date in a post office in Salt Lake City, Utah, properly enclosed in a sealed envelope with postage prepaid thereon, legibly addressed to the addresses shown:

* See attached Mailing Lists and "E" Mailing Lists



Thomas M. Zarr
THOMAS M. ZARR, P.C.
1134 SOUTH 1700 EAST
P.O. BOX 17635
SALT LAKE CITY UT 84117-0635

E.A. PRAWITT
UTAH ASSOCIATION OF COUNTIES
5397 SOUTH VINE STREET
SALT LAKE CITY UT 84107

J. KENT HOLLAND
ANDERSON & HOLLAND
623 EAST FIRST SOUTH
SALT LAKE CITY, UTAH 84147

ERIC BLANK
LAND AND WATER FUND OF THE ROCKIES
2260 BASELINE RD STE 200
BOULDER CO 80302

Westside Dixon Associates, L.L.C.
9 Exchange Place, Ste.#1112
Salt Lake City, UT 84111

Tab 3

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint of)	
WESTSIDE DEVELOPMENT)	
ASSOCIATES, L.L.C., a Utah Limited)	<u>DOCKET NO. 00-035-01</u>
Liability Company,)	
Complainant,)	
)	
vs.)	
)	
PACIFICORP, an Oregon Corporation, dba)	<u>ORDER ON REVIEW</u>
UTAH POWER & LIGHT COMPANY,)	
Respondent.)	

ISSUED: September 8, 2000

SYNOPSIS

Complainant having failed to submit the cost-benefit analysis required in the Commission's Order granting limited review, the Commission affirmed its original dismissal of this matter.

By The Commission:

PROCEDURAL HISTORY

On August 7, 2000, we granted Complainant's petition for review to the limited extent of allowing it to file a cost-benefit study as set forth in § R746-210-3, Utah Administrative Code. Complainant has failed to submit a study meeting the requirements of said rule. Accordingly, we find Complainant has failed to meet its burden of proof in this matter, and our Order dismissing this matter should be affirmed.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

- Our Order of June 28, 2000, dismissing the Complaint of WESTSIDE DIXON

ASSOCIATES, LLC, against UTAH POWER & LIGHT CO., be, and the same hereby is, affirmed.

Dated at Salt Lake City, Utah, this 8th day of September, 2000.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Clark D. Jones, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

Tab 4

**SALT LAKE CITY CORPORATION**

Building Services

451 South State Street, Room 215

Salt Lake City, Utah 84111

(801) 535-7752

06 1 131287

07/01/1998

Date

Received From:

CULP CONSTRUCTION COMPANY

2320 SOUTH MAIN STREET

SALT LAKE CITY UT 84115

Phone:

3014862064

222257525501

Description	Dept. Fd/Cl.	Cost Center Fund	Object	Project	Amount
CONVERT EXISTING WAREHOUSE TO	1 0 6	0 0 2 0 0	1 2 5 1 0 1		22,071.19
CONDOS. NEW PARKING STRUCTURE	2 0 6	0 0 2 0 0	1 2 5 1 9 9		251.01
WITH 2 LEVELS. 58 UNITS.;	3				
CONDO MULTI FAM, CHANGE OF USE	4				
SQ FT: 23,479, SQ FT: 27824	5				
valuation:\$8,305,000.00	6				
	7				
	8				
	9				
	10				
BROADWAY LOFTS / DIXON	11				
159 W 300 S	12				
	13				
	14				
Total Received					\$ 22,322.20

PAYABLE TO: Salt Lake City Corp

FOR ALL INSPECTIONS PLEASE CALL: 535-6436

Signature

Date

Issued By

Cash

Check

Transfer

Credit Card

X

Tab 5

UTAH POWER Request for Electrical Service Information from Architect / Engineer / Contractor

Customer Service Representative - N

1569 West North Temple
Salt Lake City, Utah 84140
(801) 220-7340
FAX (801) 220-7318

Mr. Architect / Engineer / Contractor:

Please submit this form for each building to be served by Utah Power Co. for which you are preparing the electrical design specifications, and plans. With this requested data, Utah Power Co. will reply to you, giving the necessary electrical service information for you to complete your design. Two prints of plot plans showing building, proposed location of service entrance, and electrical room are required before we can proceed with design.

Your Name: Mansour Aghdasi Your Company: ECF Date: 2/3/98
Address: 939 South West Temple Phone Number: 521-8007
Building: The Broadway Lofts
Location: 159 West Broadway St City: SLC State: UT Zip Code: _____
Total Size of Building: 169,000 sq. ft. Office: _____ sq. ft.
If apartment or motel, number of units: 101 Warehouse: _____ sq. ft.
Manufacturing: _____ sq. ft.

Anticipated date for permanent electric service: _____

521 8057

Description of Electrical Loads For Each Unit

New Equipment	Load	New Equipment	Load
HVAC	Tons: <u>5</u> Tot: KW	X-Ray Equipment	KW
Refrigeration Equipment	Tons: <u>1</u> Tot: KW	Washer/Dryer	<u>4</u> KW
Elec. Heat	— KW	Machinery	Number: _____ Tot: HP
Water Heating	— KW	Exhaust Fans	Number: _____ Tot: HP
Lighting	<u>3</u> KW	Gas/Fuel/Sump Pumps	Number: _____ Tot: HP
Outlets	<u>2</u> KW	Small Motors	Number: _____ Tot: HP
Office Equipment	— KW	Compressors	Number: _____ Tot: HP
Kitchen Equipment	<u>5</u> KW	Misc.	KW
Computers	KW		KW
Thermoplastic Injection Equipment	KW		KW
Boiler	KW		KW
Elevators	KW	Future Equipment	
Signs	KW	Itemize equipment on separate page.	KW
Snow Melting	KW	Totals:	<u>20</u> KW

Existing Equipment: _____ KW
Existing Electrical Demand: _____ KW Do you have a similar facility? _____ Where: _____

Service Desired From Utah Power Co.

Delivery Voltage: 480/277 3-Phase ☒ 208/120 3-Phase ☒ 240/120 1-Phase
Customer Electric Panel Size: 100 Amps Conductor Size: #2 ALU Conductors per Phase: 1
Conduit Size: 1 1/2" Number of Conduits: 1 Secondary Service: Underground ☒ Overhead _____
Desired Location of Service(s) to Building: _____
Desired Location of Meter(s): _____
Desired Location of current transformers (metering)/secondary junction box: _____
Additional information or data required: _____

Motor-Start Calculations: Failure to supply this information may result in unsatisfactory performance during motor-starts.

Size of Largest Electrical Motor: _____ HP _____ Three-Phase
Starting Code Letter or KVA/HP: _____ Single-Phase

Please itemize all electrical motors larger than 25 horsepower on an attached sheet.

Are Variable Speed Drives or DC Motors in this Facility?
Yes _____ No _____

If yes, please attach a sheet showing number, size, usage, and anticipated current distortion.

Utah Power Use Only
Job Order # 12479809
Account # 368
Selected Transformer: 12470/7200-120/20 KVA 50

Kent

Tab 6

UTAH POWER Request for Electrical Service Information from Architect / Engineer / Contractor

1569 West North Temple
Salt Lake City, Utah 84140
(801) 220-7340
FAX (801) 220-7318

EX#2

Architect / Engineer / Contractor:

Please submit this form for each building to be served by Utah Power Co. for which you are preparing the electrical design specifications, and plans. With this requested data, Utah Power Co. will reply to you, giving the necessary electrical service information for you to complete your design. Two prints of plot plans showing building, proposed location of service entrance, and electrical room are required before we can proceed with design.

Our Name: _____ Date: _____
Address: _____ Your Company: _____
Building: The Broadway Lodge Phone Number: _____
Location: _____ City: _____ State: _____ Zip Code: _____
Total Size of Building: _____ sq. ft. Office: _____ sq. ft.
If apartment or motel, number of units: _____ Warehouse: _____ sq. ft.
Manufacturing: _____ sq. ft.

Anticipated date for permanent electric service: _____

Description of Electrical Loads House Panels

New Equipment		Load	New Equipment		Load
HVAC	Tons: _____	— Tot. KW	X-Ray Equipment		— KW
Refrigeration Equipment	Tons: _____	— Tot. KW	Washer/Dryer		— KW
Elec. Heat		10 KW	Machinery	Number: _____	— Tot. HP
Water Heating		— KW	Exhaust Fans	Number: <u>6</u>	18 Tot. HP
Lighting		45 KW	Gas/Fuel/Sump Pumps	Number: _____	— Tot. HP
Outlets		30 KW	Small Motors	Number: <u>4</u>	8 Tot. HP
Office Equipment		— KW	Compressors	Number: _____	— Tot. HP
Kitchen Equipment		— KW	Misc.		— KW
Computers		— KW			KW
Thermoplastic Injection Equipment		— KW			KW
Boiler		— KW			KW
Elevators <u>1x60 HP + 1x60 HP</u>		120 KW	Future Equipment		
Signs		2 KW	Itemize equipment on separate page.		KW
Snow Melting		— KW	Totals:		253 KW

Existing Equipment: _____ KW
Existing Electrical Demand: _____ KW Do you have a similar facility? _____ Where: _____

Service Desired From Utah Power Co.

Delivery Voltage: 480/277 3-Phase ☒ 208/120 3-Phase _____ 240/120 1-Phase _____
Customer Electric Panel Size: 2x400 Amps Conductor Size: _____ Conductors per Phase: _____
Conduit Size: _____ Number of Conduits: _____ Secondary Service: Underground _____ Overhead _____
Desired Location of Service(s) to Building: _____
Desired Location of Meter(s): _____
Desired Location of current transformers (metering)/secondary junction box: _____
Additional information or data required: In addition to the 101 units and the house panels we have to provide 2x800 AMP 39 Services for the future restaurants.

Motor-Start Calculations: _____ Failure to supply this information may result in unsatisfactory performance during motor-starts.
Size of Largest Electrical Motor: 60 HP ☒ Three-Phase _____
Starting Code Letter or KVA/HP: _____ ☐ Single-Phase _____
Please itemize all electrical motors larger than 25 horsepower on an attached sheet.

Are Variable Speed Drives or DC Motors in this Facility?
Yes _____ No ☒
If yes, please attach a sheet showing number, size, usage, and anticipated current distortion.

Utah Power Use Only
Job Order # _____
Account # _____
Selected Transformer: _____ KVA _____