

1991

Mountain Fuel Supply Company v. Public Service Commission of Utah : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gary G. Sackett; Counsel for Mountain Fuel Supply. Attorney for Petitioner

David L. Stott; Public Service Commission of Utah; Counsel for respondent Public Service Commission of Utah; Laurie Noda; Assistant Attorney General; Counsel for Intervenor Division of Public Utilities Services; Kent Walgren; Assistant Attorney General; Counsel for Intervenor Committee of Consumer. Attorneys for Respondent

Recommended Citation

Brief of Respondent, *Mountain Fuel Supply Company v. Public Service Commission of Utah*, No. 910051.00 (Utah Supreme Court, 1991).

https://digitalcommons.law.byu.edu/byu_sc1/3415

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

45.9
 .S9
 DOCKET NO.: 910051

CLERK SUPREME COURT
UTAH

LIST OF PARTIES

The principal parties to the proceeding below were Mountain Fuel Supply Company, the Utah Division of Public Utilities, the Utah Committee of Consumer Services, and the Utah Public Service Commission.

TABLE OF CONTENTS

LIST OF PARTIES	ii
JURISDICTION	1
ISSUES PRESENTED FOR REVIEW	1
DETERMINATIVE STATUTES	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
SUMMARY OF THE ARGUMENTS	5
ARGUMENT	7
PART I. TEST YEAR ISSUE	5
A. MOUNTAIN FUEL'S FAILURE TO MAKE A PROFFER OF FUTURE TEST YEAR EVIDENCE PRECLUDES IT FROM ASSERTING ON APPEAL THAT THE COMMISSION'S EXCLUSION OF THAT EVIDENCE WAS ERROR	7
B. SINCE MOUNTAIN FUEL FAILED TO REQUEST ANY RELIEF IN CONNECTION WITH THE TEST YEAR ISSUE, THE APPEAL ON THIS ISSUE IS MOOT	8
C. THE COMMISSION TOOK INTO ACCOUNT ECONOMIC CIRCUMSTANCES IN DECIDING TO USE AN HISTORIC TEAR YEAR AND PRECLUDE FORECASTED FIGURES	10
D. THE PLAIN LANGUAGE OF § 54-4-4(3) GIVES THE COMMISSION DISCRETION TO ADOPT OR NOT ADOPT A FORECASTED TEST YEAR	11
PART II. AVERAGE VERSUS YEAR-END RATE BASE.	13
A. SINCE MOUNTAIN FUEL HAS NOT MET ITS BURDEN OF MARSHALLING THE EVIDENCE, THE COMMISSION'S FINDINGS ARE CONCLUSIVE	14
B. THE COMMISSION'S DECISION TO USE AN AVERAGE RATE BASE IS BASED ON SUBSTANTIAL EVIDENCE	19
C. EVEN IF THE COMMISSION ERRED IN ORDERING AVERAGE RATE BASE, MOUNTAIN FUEL HAS NOT SHOWN SUBSTANTIAL PREJUDICE.	22

PART III. RATE OF RETURN PENALTY	23
A. WITHIN A ZONE OF REASONABLENESS, THE COMMISSION HAS BROAD AUTHORITY TO SET A UTILITY'S RATE OF RETURN	23
B. SINCE MOUNTAIN FUEL FAILED TO MARSHAL THE EVIDENCE ON RATE OF RETURN, THE COMMISSION'S FINDINGS ARE CONCLUSIVE	29
C. THE COMMISSION'S ADJUSTMENT TO RATE OF RETURN WAS SUPPORTED BY SUBSTANTIAL EVIDENCE	30
CONCLUSION	33

TABLE OF AUTHORITIES

CASES:

American Salt Co. v. W.S. Hatch Co., 748 P.2d 1060, 1063 (Utah 1987)	26
Application of Kauai Elec. Division, Etc., 590 P.2d 524 (Hawaii 1978)	27
Board of Educ. of Granite School Dist. v. Salt Lake County, 659 P.2d 1030, 1035 (Utah 1983)	12
Boston First Nat. v. Salt Lake Cty. Bd., 799 P.2d 1163, 1165 (Utah 1990)	14
Bradford v. Alvey & Sons, 621 P.2d 1240, 1243 (Utah 1980)	8
Committee of Consumer Services v. Public Serv. Comm'n, 595 P.2d 871 (Utah 1979)	33
Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286, 1288 (Utah 1978)	8
Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281 (1944)	25
Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 62 S.Ct. 736 (1942)	25
First Nat'l Bank v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990)	15
General Teleph. Co. of the Southwest v. New Mexico State Corp. Comm'n, 652 P.2d 1200 (New Mexico 1982)	27
Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67-8 (Utah App. 1989)	15
Grant v. Utah State Land Bd., 485 P.2d 1035, 1036-7 (Utah 1971)	12
Gulf Power Co. v. Cresse, 410 So.2d 492 (Florida 1982)	28
Heinecke v. Dept. of Commerce, 810 P.2d 459, 464 (Utah App. 1991)	15
LaSalle Teleph. Co. v. Louisiana Public Service Comm'n, 157 So.2d 455 (Louisiana 1963)	28

MacRae v. Jackson, 526 P.2d 1190, 1191 (Utah 1974)	9
Merriam v. Board of Review, 812 P.2d 447, 450 (Utah App. 1991)	15
Morton Intern., Inc. v. Auditing Div., 814 P.2d 581, 587 (Utah 1991)	6, 13, 23
New England Teleph. and Telegr. Co. v. New Hampshire, 183 A.2d 237 (New Hampshire 1962)	28
North Carolina ex rel. Utilities Comm'n v. General Teleph. Co. of the Southeast, 208 S.E.2d 681 (No. Carolina 1974)	27
Pro-Benefit Staffing v. Board of Review, 775 P.2d 439, 441 (Utah App. 1989)	15
Re Gas Service, Inc., 69 NH PUC 291, DR 83-345, Supplemental Order No. 17,061 dated June 4, 1984, cited at PUR Digest, 3d Series, § 36, Return, at p. 1000	28
Re Northwestern Bell Teleph. Co., 3 PUR4th 473 (1973)	27
Reynolds v. Reynolds, 788 P.2d 1044, 1045 (Utah App. 1990)	9
Savage Brothers Inc. v. Public Service Commission, 723 P.2d 1085 (Utah 1986)	14
South Central Bell Teleph. Co. v. Kentucky Utilities Comm'n, 637 S.W.2d 649 (Kentucky 1982)	27
State ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, 262 U.S. 276, 312, 43 S. Ct. 544, 555 (1923)	27
State v. Rammel, 721 P.2d 498, 499-50 (Utah 1986)	8
Town of New Shoreham v. Rhode Island Public Util. Comm'n, 464 A.2d 730 (Rhode Island 1983)	33
Utah Dep't of Business Regulation v. Public Service Comm'n, 614 P.2d 1242, 1249 (Utah 1980)	25
Utah Dept. of Business Regulation v. Public Serv. Comm'n, 614 P.2d 1242, 1248 (Utah 1980)	17

City of Los Angeles v. Public Utilities Comm'n, 497 P.2d 785, 797 (1972)	17
Utah Power & Light Co. v. Public Serv. Comm'n, 107 Utah 155, 152 P.2d 542, 555 (1944)	13
Utah Power and Light Co. v. Public Service Commission, 152 P.2d 542 (Utah 1944)	25
Wickham v. Fisher, 629 P.2d 896 (Utah 1981)	9

STATUTES:

Utah Code Ann. § 54-4-2	2
Utah Code Ann. § 54-1-1, et <u>seq.</u>	13
Utah Code Ann. § 54-4-4	2, 12
Utah Code Ann. § 54-7-19.	2
Utah Code Ann. § 54-3-1 (1990)	2, 25
Utah Code Ann. § 54-7-15	1
Utah Code Ann. § 63-46b-16(4)(g) (1991)	14
Utah Code Ann. § 78-2-2(3)(e)(i) (1990)	1
Utah Code Ann. § 63-46b-14,-16,-17 (1990)	1

RULES:

Rule 11(3)(e)(2), Utah Rules of Appellate Procedure	14
Rule 14, Utah Rules of Appellate Procedure	1
Rule 103(2), Utah Rules of Evidence	7

OTHER:

Priest, Principles of Public Utility Regulation, Vol. 1. p. 80	33
Webster's New Collegiate Dictionary 846 (1977)	24

APPENDICES

- Appendix 1 Utah Code Ann. §§ 54-3-1, 54-4-4, 54-4-21, 54-7-19
- Appendix 2 Memorandum from Public Service Commission to the
Parties dated August 27, 1990.
- Appendix 3 Letters of Gary Sackett (July 5, 1991), Laurie
Noda (July 10, 1991) and Kent Walgren (July 9,
1991) designating portions of the record to be
transmitted to the Supreme Court for appeal.
- Appendix 4 MFS James L. Balthaser Exhibit No. 6.20.
- Appendix 5 Joint Exhibit No. 3, pp. 23-4.

JURISDICTION

The Supreme Court of Utah has appellate jurisdiction over the appeal of this case by virtue of the following statutes and rules: Utah Code Ann. § 78-2-2(3)(e)(i) (1990); Utah Code Ann. §§ 63-46b-14,-16,-17 (1990), Utah Code Ann. § 54-7-15, and Rule 14 of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

1. Did Mountain Fuel fail to marshal the evidence before the Commission on the proper rate base and the adjustment to the rate of return?

2. Does Mountain Fuel's failure to proffer evidence on a future test year preclude the Company from arguing that the Commission's exclusion of that evidence was error?

3. Does Mountain Fuel's failure to request any relief on the test year issue render that issue moot?

4. Was there substantial evidence to support the Commission's findings on average rate base and the rate of return adjustment?

5. Does the Commission have discretion to order an historic or future test year?

6. Has Mountain Fuel been prejudiced by the Commission's choice of an average rate base?

7. Does the Commission have the authority, within a range of reasonableness, to adjust a utility's return for efficiency or mismanagement?

DETERMINATIVE STATUTES

The following statutes, which are reproduced in full in Appendix I, are determinative of the issues presented in this review: Utah Code Ann. §§ 54-3-1, 54-4-4, 54-4-21 and 54-7-19.

STATEMENT OF THE CASE

This case (PSC Docket No. 89-057-15) was initiated by the Public Service Commission in 1989 on its own motion to determine whether or not the rates Mountain Fuel was charging were just and reasonable. There had been no rate hearing for Mountain Fuel since 1985. On November 21, 1989, after hearing arguments from the parties and taking administrative notice of the current economic conditions, the Commission bench-ordered a 1989 historical test year. On January 22, 1990, the Division filed a motion to consolidate the rate hearing with Docket 90-057-02 (Mountain Fuel's gas cost pass-through proceeding). The Commission granted that motion. Hearings began on September 5, 1990 and continued through oral arguments on September 28, 1990.

On November 21, 1990, the Commission issued its Report and Order increasing Mountain Fuel's rates by approximately \$76,000. On December 21, 1990, Mountain Fuel filed an Application for Rehearing. On January 10, 1991, the Commission issued its Order denying Mountain Fuel's Application for Rehearing, except for one minor issue on which the Commission suggested a possible stipulation. R. at 2164. The parties were unable to reach a stipulation. On February 8, 1991, Mountain Fuel filed a Petition for Review and on March 1, 1991 filed its Docketing Statement

with the Court. On February 14, 1991 the Committee of Consumer Services filed a Motion for Leave to Intervene and on February 22, 1991, the Division of Public Utilities filed a similar Motion. These motions were subsequently granted by the Court.

STATEMENT OF FACTS

Respondent and Intervenors agree with Mountain Fuel's Statement of Facts with the following exceptions:

1. In the November 21, 1989 arguments on the proper test year, Mountain Fuel states that the PSC took no evidence.¹ The Commission did take administrative notice of the rate of inflation during the period since the Company's last rate case. R. at 39-40.

2. Although the Commission did not articulate in detail its reasons for ordering an historical test year on November 21, 1989, those reasons were articulated in its Report and Order issued on November 21, 1990. Mountain Fuel never requested that the Commission articulate its reasons prior to issuance of its November 21, 1990 Report and Order.

3. On August 27, 1990, a week before the hearings commenced, the Commission sent the parties of record a Memorandum which stated:

In this docket, parties differ on whether year-end or average rate base is appropriate for test period purposes. We intend to resolve the dispute early in the proceeding.

As the first matter to be taken up when the hearing begins, each party will be expected to present,

¹ Opening Brief of Mountain Fuel at 5.

through its attorney or a designated witness, a concise statement of the reasons for its choice. Among other things, each statement must address, first, our use in recent U S West and Utah Power & Light cases of average rate base in conjunction with historic test years, and second, the problem this choice creates for matching test year revenues, expenses, and rate base.²

In response, on August 31, 1990, the Division filed the surrebuttal testimony of Carl L. Mower. The Committee responded on September 4, 1990 by filing a "Statement on Year-end versus Average Rate Base..." consisting of pp. 3-8 of the prefiled surrebuttal testimony of Michael Arndt. On September 5, 1990, at the beginning of the rate hearing, James Balthaser testified on the issue for Mountain Fuel and Carl L. Mower for the Division. Committee witness Arndt, who lives in Iowa, was not scheduled to testify until September 12, 1990. Although the Commission had indicated a desire to rule immediately on the year-end versus average rate base issue (R. at 15-6), Mountain Fuel's objection to the receipt of Mr. Arndt's pre-filed testimony prior to cross-examination foreclosed the Commission from entering an early ruling on the issue. The Committee's statement on year end vs. average rate base (Arndt Surrebuttal, pp. 3-8) was admitted when Mr. Arndt appeared personally to testify on September 12, 1990.³ Mountain Fuel's assertion that the Committee's position statement on this issue was never made a part of the record⁴ is, therefore, mistaken.

² R. at 1672. Appendix 2.

³ See R. at 651-2, 45-7, 62, 94-6, 101-02..

⁴ Opening Brief of Mountain Fuel at 38.

4. Other misstatements of fact, and statements of fact not based upon the record before the Court on appeal, are noted in the text of the Brief.

SUMMARY OF THE ARGUMENTS

Test Year. Mountain Fuel's arguments against the Commission's choice of a 1989 historic test year must fail because: 1. The Company never proffered the results of a future test year. 2. Since Company failed to request any relief on the test year issue, the appeal moot. 3. The Commission has discretion under Utah law to order an appropriate test year.

Rate Base. Since Mountain Fuel failed to marshal the evidence supporting the Commission's use of an average rate base, the Commission's findings are conclusive. In addition, the findings on average rate base were based on substantial evidence. Finally, even if the Commission did err on this issue, the error was harmless.

Rate of Return. Since Mountain Fuel failed to marshal the evidence supporting the Commission's adjustment to the Company's rate of return, those findings are conclusive; nevertheless, the rate of return adjustment was supported by substantial evidence. Within a range of reasonableness, the Commission has broad authority to set a utility's rate of return.

PART I. TEST YEAR ISSUE

Standard of Review on Test Year Issue. The test year issue

raised by Mountain Fuel in this appeal⁵ has to do with whether or not as a matter of law Mountain Fuel has the right to submit, and the Commission is required to consider, a future or forecasted test period in a rate proceeding. The plain language of Section 54-4-4(3) (1990) gives the Commission discretion to consider a future test period:

The Commission, in its determination of just and reasonable rates, may consider recent changes in the utility's financial condition or changes reasonably expected, but not speculative, in the utility's revenues, expenses or investments and may adopt an appropriate future test period, not exceeding twelve months from the date of filing, including projections or projections together with a period of actual operations in determining the utility's test year for ratemaking purposes. (Emphasis added.)

Mountain Fuel argues that the term "may" really means "shall" and that the Commission is mandated to consider any forecasts of future economic circumstances Mountain Fuel wishes to put before it. The construction of terms in a statute would appear to be something for the Court to undertake as a purely legal function. However, the exclusion of a future test period in a given case is based upon practical considerations "subject to the Commission's expertise, gleaned from its accumulated practical, first-hand experience with the subject matter."⁶ But

⁵ Part I of the Brief of Respondent and Intervenors deals with Part I, Sections A-F of Mountain Fuel's Brief. Part I, Section G of that Brief, which deals with the proper rate base, is a separate issue from the proper test year and is addressed in Respondent's and Intervenors' Brief in Part II.

⁶ Morton Intern., Inc. v. Auditing Div., 814 P.2d 581, 587 (Utah 1991).

whether or not a correction-of-error standard is applied to this issue or a deference standard is applied because of the Commission's experience, the result should be the same.

ARGUMENT

A. MOUNTAIN FUEL'S FAILURE TO MAKE A PROFFER OF FUTURE TEST YEAR EVIDENCE PRECLUDES IT FROM ASSERTING ON APPEAL THAT THE COMMISSION'S EXCLUSION OF THAT EVIDENCE WAS ERROR.

Mountain Fuel has alleged that the Commission erred in ordering an historical test period based on actual hard data and in precluding the use of a future test period. There were several practical, common-sense reasons why the Commission decided to use historical information and those will be discussed hereafter. But quite apart from those reasons, Mountain Fuel never made a proffer of the potential difference in rates the use of a future test period would make. In other words, while Mountain Fuel argued very strenuously that it be allowed to place its forecasted test period before the Commission,⁷ it never explained to the Commission how and in what degree the use of projected data as opposed to actual data would make a difference in the Company's revenue requirement or rates ultimately arrived at by the Commission.

Rule 103(2) of the Utah Rules of Evidence states that error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected, and an offer of proof is made. This Court has consistently held that a

⁷ R. at 3-17, 18-36. Arguments on the proper test year were heard by the Commission on November 21, 1989.

party's failure to make a proffer as to what the excluded evidence would show precludes that party from asserting on appeal that the exclusion of the evidence was error.⁸ Mountain Fuel should be precluded from alleging error on the Commission's part because it failed to show that the allegation made any difference.

Mountain Fuel's failure to proffer is critical in considering the appeal it has filed. Its failure made it impossible for the Commission or this Court on review to conclude that the use of projected as opposed to actual historical data would make any difference. The consideration, therefore, of Mountain Fuel's argument at this point is moot, and the statutory interpretation which Mountain Fuel requests would amount to no more than an advisory opinion.

**B. SINCE MOUNTAIN FUEL FAILED TO REQUEST ANY RELIEF
IN CONNECTION WITH THE TEST YEAR ISSUE, THE APPEAL
ON THIS ISSUE IS MOOT.**

Mountain Fuel alleges that the Commission has erred in refusing to consider a future test period in this case and requests that the Court remand the issue to the Commission with instructions to require the Commission to consider a future test period. The Company's request does not specify what test period that would be. The forecasted test period Mountain Fuel wanted the Commission to consider in this case no longer exists. Mountain Fuel has nowhere requested that the Commission be

⁸ State v. Rammel, 721 P.2d 498, 499-50 (Utah 1986); Bradford v. Alvey & Sons, 621 P.2d 1240, 1243 (Utah 1980); Downey State Bank v. Major-Blakeney Corp., 578 P.2d 1286, 1288 (Utah 1978).

ordered to consider on remand what is now historical data and retroactively set rates. Mountain Fuel can only be asking the Court to order the Commission in the future to permit Mountain Fuel as a matter of legal right to present whatever forecasted test period data it wishes and to make findings.⁹ That request is very simply a request for an advisory opinion from the Court.¹⁰

⁹ In its Application for Rehearing, Mountain Fuel stated specifically that it did not want the Commission in this case to order a future test year:

The Company is not requesting that the Commission reopen the record in this case to establish a future test year. To do so would only worsen the effects of regulatory lag that the Report and Order has created. However, the Commission should modify the Report and Order to recognize that the test-year determination should be made only after the applicant for rate relief and other interested parties have presented evidence concerning the state of the economy.... (emphasis added)
R. at 2105.

¹⁰ The Utah Supreme Court has a judicial policy against rendering advisory opinions:

Because of a longstanding judicial policy in Utah to avoid advisory opinion, we do not generally consider mooted questions on appeal.... "The function of appellate courts, like that of courts generally, is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation, and it has been held that questions or cases which have become moot or academic are not a proper subject of review."
Reynolds v. Reynolds, 788 P.2d 1044, 1045 (Utah App. 1990), quoting MacRae v. Jackson, 526 P.2d 1190, 1191 (Utah 1974). But see, Wickham v. Fisher, 629 P.2d 896 (Utah 1981), where the Court recognized an exception to the mootness rule where the issue "is of wide concern, affects the public interest, is likely to recur in a similar manner, and, because of the brief time any one person is affected, would otherwise likely escape judicial review." Id. at 899 (citations omitted). In order to qualify for the exception, all four of the tests must be met. The exception would not apply to the instant case because the issue is of concern only to the
(continued...)

C. THE COMMISSION TOOK INTO ACCOUNT ECONOMIC CIRCUMSTANCES IN DECIDING TO USE AN HISTORIC TEST YEAR AND PRECLUDE FORECASTED FIGURES.

Mountain Fuel argues that the Commission arbitrarily rejected the Company's petition to submit a projected test year. That argument ignores several significant factors. First, this particular rate proceeding was initiated at Commission request. Mountain Fuel had not filed a rate case for over five years. Since a for-profit company such as Mountain Fuel will never ignore the bottom line in dealing with consumers, it is safe to conclude that the most significant reason why Mountain Fuel didn't file a rate case for so many years (in fact it has still not done so despite its allegations of mistreatment by the Commission in this case) is that economic conditions have been stable and the utility's rates adequate to cover expenses and return profits to shareholders. The Commission noted that fact in determining to use an historic test year. What the Commission wanted to learn out of this proceeding was whether or not a rate reduction might be justified; whether or not Mountain Fuel's costs should actually be lower than they were, especially given the extent of Mountain Fuel's affiliate relationships and in particular its dependence for gas supply upon its affiliate parent, Questar.¹¹

¹⁰(...continued)
Company and could be resolved through either an interlocutory appeal or a request for a declaratory ruling.

¹¹ Report and Order issued November 21, 1960 at 3-7. R. at 1965-7. Order on Application for Rehearing issued January 10, 1991 at 3. R. at 2163.

Second, the Commission took administrative notice of the fact that the rate of inflation had been consistently low for quite some time, suggesting that costs and investor expectations were relatively level, if not declining.¹²

What the Commission wished to avoid was extensive and time-consuming debate and argument in the case about the accuracy of forecasted data.¹³ While it is true that the Division of Public Utilities was willing to have Mountain Fuel submit forecasted data, it would necessarily have to analyze that data and doubtless would contest Mountain Fuel's accuracy on some or many points as it has in the past. Clearly, if economic conditions had been as volatile as they were for example in the mid-1970s and early 1980s, and Mountain Fuel had so argued, the Commission would have allowed the submission of the forecasted test period.

In summary, Mountain Fuel simply failed to argue persuasively that the time and effort required for the use of a forecasted test period were justified given prevailing economic circumstances.

D. THE PLAIN LANGUAGE OF § 54-4-4(3) GIVES THE COMMISSION DISCRETION TO ADOPT OR NOT ADOPT A FORECASTED TEST YEAR.¹⁴

Mountain Fuel argues that as a matter of legal right it is entitled to submit a forecasted test period and the Commission

¹² R. at 39-40.

¹³ Report and Order issued November 21, 1990 at 3. R. at 1965.

¹⁴ The Committee does not participate in this section of the Brief. It does, however, join in the arguments on mootness and failure to proffer.

must consider it. The plain language of the statute says otherwise:

(3) The Commission, in its determination of just and reasonable rates, may consider recent changes in the utility's financial condition...and may adopt an appropriate future test period....

Utah Code Ann. § 54-4-4(3) (1990). In effect Mountain Fuel is arguing that "may" actually means "shall." A more reasonable interpretation of 54-4-4(3), given the circumstances of the passage of the legislation, is that an historical test period based on hard historical data is the normal or default test period to be used.¹⁵ The burden is on the utility to show that general economic circumstances are sufficiently unstable as to warrant the use of forecasted data. In short, before the Commission elects to consider forecasted data, it would need to find first that the state of the economy required consideration of speculative future factors in order to justify a departure from the safety and reliability of hard historical data. In this case Mountain Fuel did not meet that burden. As the Commission stated on page 7 of its November 21, 1990 Order in this Docket:

In future proceedings, the Commission will decide

¹⁵ The general rule is that "may" is discretionary and "shall" mandatory. See Grant v. Utah State Land Bd., 485 P.2d 1035, 1036-7 (Utah 1971); Board of Educ. of Granite School Dist. v. Salt Lake County, 659 P.2d 1030, 1035 (Utah 1983).

The only exception to the rule is where it is clear from the context that the legislature intended otherwise. § 54-4-4(3) was passed by the Legislature in 1975 with the support of the Commission and at the request of public utility companies to allow the Commission to deal more effectively with high inflation and rapid increases in costs. It was never intended to require the Commission to consider evidence of a future test year during stable economic periods in which there was low inflation.

issues concerning test year, rate base, out-of-period adjustments, and related matters prior to the onset of hearings and based on the then existing conditions of the utility and the economy in which it is operating.¹⁶ (emphasis added.)

PART II. AVERAGE VERSUS YEAR-END RATE BASE.

Standard of Review on Rate Base Issue. The term "rate base" is not used in the Public Utilities Code (Utah Code Ann. § 54-1-1, et seq.). The following sections, however, speak broadly about valuation of a utility's assets: § 54-4-4(3) (the Commission may consider recent or reasonably expected future changes in the utility's "investments"); § 54-4-21 (the Commission has the power to value a utility's property); and § 54-7-19 (the procedure for valuation of utilities). The only judicially imposed limitations on the Commission's power to determine rate base in Utah are procedural due process and that the rate established be just and reasonable.¹⁷

Other than the question of whether there was "substantial evidence" to support the Commission's decision, it is apparent that on issues relating to the valuation of rate base the Commission's "expertise gleaned from its accumulated practical, first-hand experience with the subject matter"¹⁸ is fundamental. With the exception of reviewing the quantum of evidence the Court

¹⁶ R. at 1969, 2163.

¹⁷ Utah Power & Light Co. v. Public Serv. Comm'n, 107 Utah 155, 152 P.2d 542, 555 (1944).

¹⁸ Morton Intern. Inc. v. Auditing Div., 814 P.2d 581, 587 (Utah 1991).

should, therefore, grant considerable deference to the Commission's findings and conclusions in this area.¹⁹

A. SINCE MOUNTAIN FUEL HAS NOT MET ITS BURDEN OF MARSHALLING THE EVIDENCE, THE COMMISSION'S FINDINGS ARE CONCLUSIVE.

Mountain Fuel argues that the Commission's order to use an average rather than a year-end rate base is not based on sufficient record evidence. Rule 11(3)(e)(2) of the Utah Rules of Appellate Procedure requires that:

[I]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

Utah Code Ann. § 63-46b-16(4)(g) (1991) permits a court to grant relief on appeal if:

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court.

In Boston First Nat. v. Salt Lake Cty. Bd., the Utah Supreme Court interpreted this provision of Utah's Administrative Procedures Act:

An appellate court applying the "substantial evidence test" must consider both the evidence that supports the Tax Commission's factual findings and the evidence that detracts from the findings (citations omitted). Nevertheless, the party challenging the findings--in this case, the taxpayer--must marshal all of the evidence supporting the findings and show that despite the supporting facts, the Tax Commission's findings are not supported by substantial evidence (note omitted).

799 P.2d 1163, 1165 (Utah 1990). If an appellant fails to meet

¹⁹ Id. at 586-7. See also Savage Brothers Inc. v. Public Service Commission, 723 P.2d 1085 (Utah 1986).

its burden of marshalling the evidence, "the Board's findings of operative facts are conclusive."²⁰ In Heinecke v. Dept. of Commerce,²¹ the Utah Court of Appeals chided the appellant for marshalling not only the evidence supporting the Division's findings, but reviewing in minute detail all the evidence before the Board and "emphasizing the evidence that supported his position," leaving it to the court "to sort out what evidence actually supported the findings" (emphasis in original).²²

These cases require that Mountain Fuel not only designate the relevant record for appeal, but also gather together and refer in its Opening Brief to all of the evidence supporting the Commission's findings and then show that that evidence is not "substantial."²³ As detailed below, Mountain Fuel not only failed to cite the record evidence supporting the Commission's findings on average versus year-end rate base, it failed to

²⁰ Pro-Benefit Staffing v. Board of Review, 775 P.2d 439, 441 (Utah App. 1989). See also Merriam v. Board of Review, 812 P.2d 447, 450 (Utah App. 1991).

²¹ 810 P.2d 459, 464 (Utah App. 1991).

²² Id. In a note, the Court stated: Evidence contrary to the findings becomes relevant when the court scrutinizes the supporting evidence under the "substantial evidence viewed in light of the whole record" test (reference omitted), but this is a distinct and subsequent analytic step (citation omitted) (emphasis in original).

²³ Although the cases leave some room for dispute on the precise meaning of "substantial evidence," it is clear that it is something more than a scintilla and less than a preponderance. Grace Drilling Co. v. Board of Review, 776 P.2d 63, 67-8 (Utah App. 1989); First Nat'l Bank v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990).

request that the greater part of that evidence be designated as part of the record on appeal.

In the hearings before the Commission, the only party recommending an average rate base was the Committee. The Committee's witness on this issue was Michael Arndt, a Certified Public Accountant with 16 years' experience in public utility accounting. R. at 2414-16. Mr. Arndt presented the following testimony on the average versus year-end rate base issue: Direct Testimony (R. at 2620-22); Rebuttal Testimony (R. at 2590-92); Surrebuttal Testimony (R. at 2569-74); and he testified on the stand on that issue (R. at 652-5, 657-8, 673, 680-5, 686-91, 695-99, 715-18). Mountain Fuel did not designate any of these forty pages as part of the record on appeal,²⁴ and referred to only two of these pages in its Brief.²⁵ The Division of Public Utilities also presented evidence on the average versus year-end rate base issue.²⁶ The testimony of Division witness Mary

²⁴ See R. at 2247-8 for Mountain Fuel's designation of the record for appeal. The Committee requested that the evidence presented by Mr. Arndt be designated part of the record for appeal. See July 9, 1991 letter from Kent Walgren, Attorney for the Committee, to Stephen C. Hewlett, Commission Secretary. Appendix 3.

²⁵ See Mountain Fuel's Opening Brief at 32 (statement of the Committee position) and at 38 (brief summary of the Committee position). The two references to the record are: R. at 654, 680.

²⁶ Carl L. Mower: Surrebuttal (R. at 2404-25); Stand (R. at 84-101, 483-512). Chester Sullivant: Direct (R. at 2470-75); Exhibit 1.12 (R. at 2448); Surrebuttal (R. at 2454-8); Stand (R. at 519-20, 527, 531-40). Mary Cleveland: Surrebuttal (R. at 2902-05); Stand (R. at 625-34, 640-47); Exhibit 6.4 (R. at 2936-43).

In Mountain Fuel's letter of July 5, 1991 to the Commission Secretary designating portions of the record to be transmitted to
(continued...)

Cleveland, part of which supports the Commission's findings in this area, was neither designated for appeal by Mountain Fuel, nor mentioned in its Brief.²⁷

The critical problem with use of a year-end rate base is that adjustments must be made to company investment, revenues and expenses in order to "synchronize" the test-year.²⁸ The total revenues and expenses for the twelve months of a test year are in effect automatically averaged.²⁹ Thus if a year-end rate base is used, as proposed by Mountain Fuel, expenses and revenues must also be adjusted to year-end levels. To the extent that increasing revenues are not synchronized with an increasing year-

²⁶(...continued)
the Supreme Court (R. at 2247-8) the testimony of Mary Cleveland, the importance of which is discussed below, was excluded. The Division had to request that Ms. Cleveland's testimony be designated part of the record for appeal. See Appendix 3.

²⁷ R. at 2247-8. The Direct, Surrebuttal and Exhibits of Ms. Cleveland were made a part of the record by the Division. See letter dated July 10, 1991 from Laurie Noda, the Division's attorney, to Stephen C. Hewlett, Commission Secretary. Appendix 3.

²⁸ This Court has acknowledged the requirement that a test year be synchronized:

The commission may adjust all figures, revenue, expense, and investment for anticipated changes, but it may not adjust one side or part of the equation without adjusting the other; unless there is a finding the particular expense is extraordinary.

Utah Dept. of Business Regulation v. Public Serv. Comm'n, 614 P.2d 1242, 1248 (Utah 1980), quoting City of Los Angeles v. Public Utilities Comm'n, 497 P.2d 785, 797 (1972)..

²⁹ I.e., whether revenues and expenses during the test year are going up or down, the effect of totaling them for the 12 months of the test year is to effectively arrive at an average number for the year.

end rate base, the utility will receive a windfall.³⁰

Mountain Fuel argues in its Brief that by using an average rate-base, the Commission understated the Company's rate-base by \$9,542,000,³¹ the revenue effect of which is an understatement of approximately \$1,421,758.³² In addition to taking the \$9,542,000 figure from an exhibit which has not been designated part of this record for appeal,³³ Mountain Fuel nowhere mentions in its Brief that there was evidence before the Commission that the Company's revenues were increasing throughout the test-year:

The Company filed its case using a year end rate

³⁰ The "windfall" occurs because the test year does not take into account increased revenues that the company actually receives. For example, if, as here, rate-base is increasing and expenses are constant (R. at 644, 646), but the number of customers (and fuel consumption) is increasing throughout the test-year, revenues would have to be adjusted (moved six months forward) in order to "match" the rate base and expenses. The more matching required, the greater the impetus to move the test period forward six months. Mower, Surrebuttal, 8/31/90, R. at 15. In this case, the Division recommended that if the Commission were to accept the Company's proposed post-test year adjustments, the test-year be "rolled" forward six months. Mower Surrebuttal, 8/31/90, R. at 2419. When asked by Commissioner Byrne what that would entail, Mr. Mower stated that it would take "a month or so" to update all of the numbers. Mower, Redirect, 9/10/90, R. at 485. Mr. Mower testified that because the Commission had ordered a 1989 historical test-year, the Division had concentrated its auditing on the 1989 calendar year and had not examined 1990 data in detail. Mower Surrebuttal, 9/31/90, R. at 2415; Mower, Stand, 9/10/90, R. at 485-6; Mower, Stand, 9/5/90, R. at 100-01.

³¹ Opening Brief at 36.

³² The revenue impact is obtained by multiplying \$9,542,000 by the overall rate of return (11.03%) and a tax gross-up factor of 1.351.

³³ The Company obtains its figure of \$9,542,000 from page 9, line 4, of Joint Exhibit 2, dated September 26, 1990. Joint Exhibit 2 is part of the evidence which Mountain Fuel did not designate as part of the record in this appeal. R. at 2247-8.

base and certain expenses annualized to the end of year levels. The Company did not attempt to calculate revenues on year end levels.³⁴

The result is that in the rate hearing the Company was proposing an unsynchronized test year that failed to take into account the increase in customer levels and revenues between July 1, 1989 and December 31, 1989. Although the Company claimed that long-term trends indicated that its new customers were using less fuel than existing customers, that assertion was convincingly disputed by Division witness Mary Cleveland.³⁵

The above referenced record evidence, all of which is essential in order to reach a reasoned decision on the issue of average versus year-end rate base, was neither designated part of the record for appeal by Mountain Fuel nor discussed anywhere in its Brief.

B. THE COMMISSION'S DECISION TO USE AN AVERAGE RATE BASE IS BASED ON SUBSTANTIAL EVIDENCE.

In its Report and Order,³⁶ the Commission gave the following reasons for its decision to use average rather than year-end rate base:

³⁴ Division of Public Utilities Statement Concerning the Use of a Year End Test Year, September 5, 1990, sponsored by Carl Mower. R. at 2422-25, 2404-21, 483-512, esp. at 2424, 2414-15, 483-4. The "certain expenses" annualized to year-end levels (December 31, 1989) were wage and labor overhead expenses. The Commission approved these increased expenses, which totaled \$1,027,000. Report and Order issued November 21, 1990, at 13 (R. at 1975).

³⁵ R. at 625, 631, 633-4, 640-1. See also Mr. Sullivant's testimony on the stand: R. at 533.

³⁶ Report and Order issued November 21, 1990 at pp. 3-10 (R. at 1956-72).

1. There was no need for attrition adjustments because the rate of inflation was low and Mountain Fuel's rates had been stable or declining since 1985.³⁷

2. The Commission had relied on average rate base in recent U S West and Utah Power and Light dockets and Mountain Fuel produced no compelling reason to depart from that practice. R. at 1970.

3. Average rate base matches with annual flows of revenues and expenses. R. at 1970. Year-end rate base requires substantial, difficult adjustments to revenues and expenses, fraught with policy implications. R. at 1970.

4. Year-end rate base, "a mere snapshot", gives a potentially misleading picture of rate base at a given point in time. R. at 1970.

The following record evidence supports the Commission's findings:

1. Lack of need for an attrition adjustment: Transcript, Nov. 21, 1989 (R. at 39-40); Sullivant Surrebuttal (R. at 2456); Arndt Surrebuttal (R. at 2572-3); Arndt, Stand (R. at 673, 717).

2. Consistency with practice toward other utilities: Arndt Direct (R. at 2621); Arndt Rebuttal (R. at 2573); Arndt, Stand (R. at 685); Mower, Stand, 9/10/90 (R. at 497).

3. Average rate base matches revenues and expenses; year-end rate base requires difficult adjustments: Arndt Direct (R.

³⁷ R. at 1965-66. The Commission also noted that the Company had not sought rate relief since 1985.

at 2621-2; Arndt Rebuttal (R. at 2569-74, 2590-3); Arndt, Stand (R. at 654, 715-6); Mower, Stand 8/31/90 (R. at 2420-1); Division of Public Utilities' Statement on Average vs. Year End Rate Base (R. at 2425); Mower, Stand 9/10/90 (R. at 489); Cleveland, Stand (R. at 627).

4. Year-end rate base is a "snapshot" which is potentially misleading: Mower, Stand 8/31/90 (R. at 2420); Mower, Stand, 9/10/90 (R. at 490); Arndt, Stand (R. at 654).

Perhaps the most compelling testimony from the Division supporting the Committee's position and the Commission's decision was offered by Division witness Mower. In response to a question from Chairman Stewart, Mr. Mower testified that even though the Division was "officially" recommending a year-end rate base, his personal opinion was otherwise:

Com. Stewart: Again, Mr. Mower, you are answering questions about matching. Matching is an issue that we will talk about later. I'm asking you as a senior regulator in this state, one who has been around longer than just about anybody in this room, if you had your choice between an average test year and the year end test year, which would you select in advance of a case?

The Witness (Mr. Mower): I would feel most comfortable with an average test year, but in this case we feel that we have made those reasonable calculations to take it to year end.

Com. Stewart: Do you think the data then that is presented by the Division to the Commission, by all of your arguments regarding matching, is going to give us as accurate information as if we had selected an average test year at the beginning and instructed all parties to deal with an average test year?

The Witness (Mr. Mower): The calculations that we have made show that there would not be much difference in the revenue requirement from what we are recommending on a year end basis to what it would be on

an average basis even if you update the test year to more current data.

R. at 86-7. Finally, even Mountain Fuel offered evidence supporting the Committee recommendation and Commission decision. Company witness James L. Balthaser sponsored an exhibit which showed that the states of Washington, Montana, Louisiana, Tennessee, Maine, South Dakota, Iowa and New Hampshire all use an historic test year with an average rate base.³⁸

C. EVEN IF THE COMMISSION ERRED IN ORDERING AVERAGE RATE BASE, MOUNTAIN FUEL HAS NOT SHOWN SUBSTANTIAL PREJUDICE.

Section 63-46b-16(4) (1991) of Utah's Administrative Procedures Act permits the Court to grant relief "only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced" based upon a determination of fact that is not supported by substantial evidence.

The weight of evidence establishes that whether one uses an average or year-end rate base, once revenues are synchronized, the revenue requirement of the Company is approximately the same.³⁹ According to Division witness Mary Cleveland, annualization of customer use to December 31, 1989 (year-end),

³⁸ James L. Balthaser Exhibit No. 6.20. Since this exhibit was neither designated part of the record on appeal, nor marshaled by the Company as evidence supporting the Commission's findings, it is included herein as Appendix 4.

³⁹ Mower, Surrebuttal, August 31, 1990. R. at 2419. Mower, Stand, 9/10/90. R. at 505, 508. Mower, Stand, 9/5/90. R. at 87. Sullivant, Surrebuttal, August 31, 1990. R. at 2457-8. Sullivant, Stand. R. at 520, 531, 533-4, 538.

results in increased revenues to the Company of \$2,097,048.⁴⁰ In order to fairly compare that number to the revenue impact (shortfall) of \$1,421,758 which Mountain Fuel claims resulted from the Commission's use of an average rate base, depreciation must also be adjusted to year-end levels.⁴¹ When the \$527,000 in depreciation is added to the \$1,421,758, the resulting shortfall is \$1,948,758. Thus, when revenue impact is taken into account, the Commission's use of average rate base resulted in \$148,290 of additional revenue to Mountain Fuel.⁴² That can hardly be deemed substantial prejudice.

PART III. RATE OF RETURN PENALTY

Standard of Review on Rate of Return Penalty Issue. To Mountain Fuel's argument that the Commission lacks authority to order a rate of return adjustment, a correction-of-error standard applies. In deciding a proper rate of return, however, the Commission's findings are entitled to deference.⁴³

A. WITHIN A ZONE OF REASONABLENESS, THE COMMISSION HAS BROAD AUTHORITY TO SET A UTILITY'S RATE OF RETURN.

Mountain Fuel argues that the Commission has no inherent

⁴⁰ Exhibit DPU 6.1, rev. (Total Utah, Column E). R. at 2906.

⁴¹ The two items which must be added back into rate base to arrive at year-end levels are depreciation (\$250,000) and production-related depreciation (\$277,000). Joint Exhibit 3, pp. 23-4. These two pages, which were not designated part of the record for appeal, are attached hereto as Appendix 5.

⁴² \$2,097,048 minus \$1,948,758.

⁴³ Morton Intern., Inc. v. Auditing Div., 814 P.2d 581, 587 (Utah 1991).

authority to impose a penalty⁴⁴ to rate of return and that the Commission has limited powers to impose penalties and other punitive measures.⁴⁵ The Company, however, fails to address the fact that the Commission's 12.1% rate of return was within the range of rates established by expert testimony;⁴⁶ nor does it argue that the return resulted in unjust or unreasonable rates.

Respondent and Intervenor contend that the Commission has broad discretion to set a utility's rate of return as long as it is within a range of reasonableness. Section 54-4-4(1) of Utah's Public Utility Code provides that the Commission has the authority to determine the just, reasonable or sufficient rates of a utility. Section 54-3-1 describes what the Commission can take into account in determining a just and reasonable rate:

The scope of definition "just and reasonable" may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the state of Utah; methods of reducing wide periodic variations in demand of such products, commodities or services, and means of

⁴⁴ At pages 40 and 41 of its Opening Brief, Mountain Fuel argues that the use of the term "penalty" by the Commission in the Table of Contents of its November 21, 1990 Report and Order is somehow significant. It is clear from the Order itself, however, that even if the Commission had used the term "penalty" (rather than adjustment) throughout its Order, that term would have been intended in its generic sense of a "disadvantage, loss, or hardship" (Webster's New Collegiate Dictionary 846 (1977)), and not in the narrow sense in which it is used in Utah Code Ann. §§ 54-7-24 through -29 (1990).

⁴⁵ Petitioner's Opening Brief, page 40.

⁴⁶ Mountain Fuel did not request that any of the record testimony or evidence dealing with rate of return be designated part of the record for appeal--not even that of its own witness J. Peter Williamson. R. at 2247-8. This issue is dealt with below.

encouraging conservation of resources and energy.
(emphasis added)

Utah Code Ann. § 54-3-1 (1990). Although the term "rate of return" is nowhere specifically mentioned, the Court has recognized that the Commission may look at various factors in setting a utility's rate of return. In Utah Power and Light Co. v. Public Service Commission⁴⁷ (Utah Power), a seminal case in which the Utah Supreme Court followed two (then) recent United States Supreme Court cases dealing with rate of return,⁴⁸ this Court stated:

The Hope case stands squarely for the doctrine that it is the final impact of the rate order which is controlling insofar as Federal constitutional limitations are concerned. So long as the rate set does not confiscate the property devoted to public service, the rate order will not be held to violate substantive constitutional principles. The legislature is free to determine its own economic policy in regard to the fixing of rates. Its power to set rates is, however, still circumscribed by two constitutional limitations: (1) substantive constitutional law requires that the rates finally set shall not be confiscatory; and (2) the requirements of procedural due process must still be followed.

152 P.2d at 553. This principle, which is known as the "end result doctrine," has become a bedrock of public utility law in the United States.⁴⁹ In further defining the Commission's

⁴⁷ 152 P.2d 542 (Utah 1944).

⁴⁸ Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 62 S.Ct. 736 (1942); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281 (1944).

⁴⁹ The notion that a rate is just and reasonable if it permits the utility to "recover its costs of service and a reasonable return on the value of property devoted to public use" has been reaffirmed by this Court more recently in Utah Dep't of Business (continued...)

duties with regard to rate of return, the Court in Utah Power went on to state:

What annual rate will constitute just compensation depends upon many circumstances, and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts...The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties.

152 P.2d at 568.

What is critically absent in Mountain Fuel's appeal of the Commission's decision relating to the rate of return adjustment is any argument or evidence that the reduction in rate of return from 12.2% to 12.1% resulted in rates which were confiscatory or otherwise illegal. The Company argues that because the legislature has nowhere given the Commission specific statutory authority to adjust rate of return as a way of addressing mismanagement of affiliate relations, the Commission is limited to disallowing certain expenses.⁵⁰ The issue, however, is not whether the Commission has authority to set a rate of return. Even though "rate of return" is nowhere mentioned in the Public Utility Code, Mountain Fuel does not dispute the Commission's

⁴⁹(...continued)

Regulation v. Public Service Comm'n, 614 P.2d 1242, 1249 (Utah 1980). See also, American Salt Co. v. W.S. Hatch Co., 748 P.2d 1060, 1063 (Utah 1987).

⁵⁰ Opening Brief at 41. In Utah Power, the Court stated that the Commission could make an adjustment for Utah Power & Light's expenses of issuing and selling preferred stock by either adjusting the company's rate base or making an adjustment in rate of return. 152 P.2d at 562.

power to set a return in a rate proceeding. Mountain Fuel's argument is with the manner in which its rate of return was decided. Respondent and Intervenor contend that the only limitation on the manner in which rate of return is decided is that it result in just and reasonable rates: i.e., that due process be afforded and the "end result" not be confiscatory.⁵¹

Other jurisdictions are divided on the appropriateness of tying a rate of return award to utility efficiency or mismanagement.⁵² Two state supreme courts, North Carolina and Hawaii, have stated that a rate of return may be ordered because of utility inefficiency.⁵³ Two state supreme courts, Kentucky and New Mexico, and one intermediate state court, South Dakota, have held that a rate of return may not be lowered because of utility inefficiency.⁵⁴ Three state supreme courts, Louisiana, New Hampshire and Florida, have held that a higher return on

⁵¹ 152 P.2d at 553.

⁵² The United States Supreme Court has suggested that "the right to earn a fair return [may] be limited by the requirement that reasonable efficiency be exercised." State ex rel. Southwestern Bell Telephone Co. v. Public Service Commission, 262 U.S. 276, 312, 43 S. Ct. 544, 555 (1923).

⁵³ North Carolina ex rel. Utilities Comm'n v. General Teleph. Co. of the Southeast, 208 S.E.2d 681 (No. Carolina 1974); Application of Kauai Elec. Division, Etc., 590 P.2d 524 (Hawaii 1978).

⁵⁴ South Central Bell Teleph. Co. v. Kentucky Utilities Comm'n, 637 S.W.2d 649 (Kentucky 1982); General Teleph. Co. of the Southwest v. New Mexico State Corp. Comm'n, 652 P.2d 1200 (New Mexico 1982); Re Northwestern Bell Teleph. Co., 3 PUR4th 473 (1973).

equity may be granted for utility efficiency.⁵⁵ No state supreme court has prohibited a commission from ordering a higher return on equity because of efficiency.⁵⁶

Respondent and Intervenors believe that the best view is that a utility commission's decision on rate of return should be upheld as it is within a range of reasonableness.⁵⁷ In a recent Utah Power & Light rate case, the Utah Commission acknowledged that an increase in the rate of return may be appropriate for utility efficiency:

...we recognize that management performance is an appropriate factor for the Commission to consider in

⁵⁵ LaSalle Teleph. Co. v. Louisiana Public Service Comm'n, 157 So.2d 455 (Louisiana 1963); New England Teleph. and Telegr. Co. v. New Hampshire, 183 A.2d 237 (New Hampshire 1962); Gulf Power Co. v. Cresse, 410 So.2d 492 (Florida 1982).

⁵⁶ State utility commissions are likewise divided on adjustments to rate of return for either utility efficiency or inefficiency. The commissions of Massachusetts, New Jersey, Oklahoma, Rhode Island, Virginia, Missouri, California and Iowa have granted both higher returns for efficiency and lower returns for inefficiency. The commissions of Arkansas, Illinois, Texas, Vermont, North Carolina and Idaho have ordered lower rates of return for utility inefficiency. The commissions of New Mexico, New York, Ohio and Pennsylvania have awarded higher rates of return for utility efficiency. See PUR Digest, 3d Series, Return, § 36. The New Hampshire commission explicitly refused to order a higher rate of return for utility efficiency on the theory that the utility "should not be rewarded for what it is supposed to do anyway." Re Gas Service, Inc., 69 NH PUC 291, DR 83-345, Supplemental Order No. 17,061 dated June 4, 1984, cited at PUR Digest, 3d Series, § 36, Return, at p. 1000.

⁵⁷ The range of reasonableness determined by the Commission was from 11.6% to something less than 13%. Order on Application for Rehearing issued January 10, 1991, at 4. R. at 2164. The Commission's authorized return of 12.1% was within that range.

setting a return on equity within a reasonable range.⁵⁸

There is a compelling public policy reason for upholding the Commission in adjusting rate of return for either efficiency or mismanagement. In every major rate proceeding expert witnesses (usually economists) are hired to present testimony on rate of return. It is invariably the case that the expert used by the utility recommends a higher rate of return than the experts who testify on behalf of the Division of Public Utilities and Committee of Consumer Services. As a result, the Commission has a record justifying a fairly broad range of rate of return. If the Court prohibits the Commission from explicitly stating that it has ordered a rate of return at the lower end of the range because of utility mismanagement, there is little to deter the Commission from sub silentio doing the same thing. It would seem that both the public and the utility would be better served by the Commission being allowed to give a clear message to all parties on all of the reasons underlying its findings.

B. SINCE MOUNTAIN FUEL FAILED TO MARSHAL THE EVIDENCE ON RATE OF RETURN, THE COMMISSION'S FINDINGS ARE CONCLUSIVE.

Mountain Fuel failed to marshal any evidence on rate of return--even that of its own witness, J. Peter Williamson.⁵⁹

⁵⁸ Docket No. 89-035-10 Report and Order issued February 9, 1990. It should be noted, however, that even though the Commission expressed this policy statement, it refused to grant an upward adjustment in UP&L's rate of return for efficient management in this instance. Report and Order at 12.

⁵⁹ See Mountain Fuel's July 5, 1991 letter to Commission Secretary Stephen C. Hewlett. R. at 2247-8.

The only evidence which is before this Court on rate of return is that of Division witness Nile Eatmon and Committee witness Mattiyahu Marcus. The Division and the Committee (not the Company) requested that this evidence be certified for appeal.⁶⁰ Further, Mountain Fuel did not marshal the evidence of Division witnesses Phillip Teumim, Robert Parente or Michael Harrison, or Committee witnesses Richard Galligan, Thomas Catlin or Jerry Mierzwa, all of whom offered testimony which was used by the Commission to justify its rate of return adjustment.⁶¹ For the reasons stated in Part II.A. above, the Commission's findings on rate of return are conclusive.

**C. THE COMMISSION'S ADJUSTMENT TO RATE OF RETURN
WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Mountain Fuel's argument that the Commission had no evidentiary basis for finding that Mountain Fuel's customers were adversely affected by what it perceived as an undesirable corporate structure is inaccurate.⁶² The Commission stated in its order that it was concerned that affiliate relationships have constrained and inhibited the pursuit of a least-cost gas supply

⁶⁰ See Appendix 3.

⁶¹ The Division witnesses were consultants from Theodore Barry and Assc. and the Committee witnesses were consultants from Exeter and Assc.

⁶² In addition to the testimony cited below, three Committee witnesses from Exeter: Richard Galligan, Thomas Catlin and Jerry Mierzwa, testified on September 18, 1990 about the problems caused by Mountain Fuel's affiliate relationships. Even though the Commission relied on this evidence for some of its findings (R. at 1996-2005), none of this testimony is part of the record on appeal.

plan by Mountain Fuel.⁶³ Division witness Phillip Teumim stated in direct testimony that Mountain Fuel's control over Questar Pipeline's performance of the gas supply function was minimal and that in a number of cases, Questar Pipeline's policy decisions and actions appeared to be contrary to the best interests of the customers of Mountain Fuel. He concluded:

Due to these management deficiencies, Mountain Fuel cannot be assured that it is paying WEXPRO and Questar Pipeline only for services which are appropriately charged to the utility, that such services are efficiently performed, and that the services are performed in such a way as to minimize the costs to Mountain Fuel customers.

R at 2738. Division witness Wes Huntsman also noted affiliate problems in his direct testimony and stated that Mountain Fuel's arrangements for goods and service with its affiliates were not the result of competitive bidding and that Mountain Fuel had given preference to affiliate providers of goods and services.⁶⁴ Referring to these affiliate problems in the Order, the Commission found that evidence in the record strongly suggested "a deliberate shift of risk from Questar Corporation operations generally to the distribution utility and its core customers (R. at 1992-3) and that Mountain Fuel personnel did not possess a technical understanding of the gas supply or GCA model and its use by Questar Pipeline, and that Mountain Fuel management lacked oversight and control of Questar Pipeline. R. at 1998.

⁶³ Report and Order issued November 21, 1990 at 36. R. at 1998.

⁶⁴ R. at 2549.

The Commission further found that while Questar Pipeline's rates and rate structure can adversely affect Mountain Fuel and its core customers, Mountain Fuel never intervened to represent its customers' interests at the Federal Energy Regulatory Commission (FERC) where such rates are determined. R at 1993. Mountain Fuel testified that it did not appear in FERC proceedings because it did not want to be at odds with its sister affiliate Questar Pipeline and because that "doesn't carry out the fiduciary responsibility to the shareholders" of Questar Corporation. R at 1173.

The Commission also revalued portions of a real estate transaction between Mountain Fuel and its affiliate, Interstate Land. The Commission found that this transaction placed ratepayers at a disadvantage that could not be entirely controlled or offset. R. at 1979-80. This concern about the lack of arms length negotiating between Mountain Fuel and its affiliates was at the heart of the Commission's decision to reduce Petitioner's rate of return.⁶⁵ Mountain Fuel seems displeased that the Commission is determined to examine the general corporate structure of Questar Corporation.⁶⁶ General regulatory principles however, require that a Commission strictly

⁶⁵ See Report and Order issued November 21, 1990 at 17-20, 34-43. R. at 1979-1982, 1996-2005.

⁶⁶ See Petitioner's Opening Brief, page 43, footnote 32.

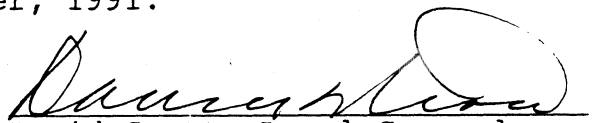
scrutinize affiliate transactions and relationships.⁶⁷

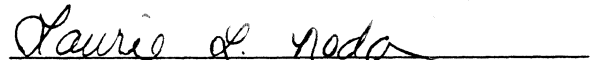
CONCLUSION

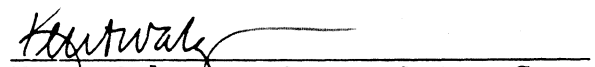
Careful review and analysis of Appellant's arguments and authorities reveals that they do not support Appellant's claims that the Commission erred on test year, rate base, or rate of return. Mountain Fuel has failed to marshal the evidence supporting the Commission's findings and those findings are supported by substantial evidence. The conclusions are supported by the weight of Utah and federal authority.

Therefore, Respondent and Intervenor respectfully submit that the Commission's order should be affirmed.

DATED this 16th day of December, 1991.


David Stott, Legal Counsel
Utah Public Service Commission


Laurie Noda, Asst. Atty. Gen.
Division of Public Utilities


Kent Walgren, Asst. Atty. Gen.
Committee of Consumer Services

⁶⁷ See Priest, Principles of Public Utility Regulation, Vol. 1. p. 80. See also, Committee of Consumer Services v. Public Serv. Comm'n, 595 P.2d 871 (Utah 1979); Town of New Shoreham v. Rhode Island Public Util. Comm'n, 464 A.2d 730 (Rhode Island 1983).

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above
JOINT BRIEF OF RESPONDENT AND INTERVENORS was mailed, postage
pre-paid on this 16th day of December, 1991 to the following:

GARY G. SACKETT, ESQ.
Questar Corporation
180 East First South Street
P.O. Box 11150
Salt Lake City, UT 84147

by Laurie Roda

APPENDIX I

54-3-1. Charges must be just; service adequate; rules reasonable.

All charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient, just and reasonable. All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable. The scope of definition "just and reasonable" may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the state of Utah; methods of reducing wide periodic variations in demand of such products, commodities or services, and means of encouraging conservation of resources and energy.

54-4-4. Classification and fixing of rates after hearing.

(1) Whenever the commission shall find after a hearing that the rates, fares, tolls, rentals, charges or classifications, or any of them demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provisions of law, or that such rates, fares, tolls, rentals, charges or classifications are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

(2) The commission shall have power to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts and practices, or any number thereof, of any public utility, and to establish, after hearing, new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or schedule or schedules in lieu thereof.

(3) The commission, in its determination of just and reasonable rates, may consider recent changes in the utility's financial condition or changes reasonably expected, but not speculative, in the utility's revenues, expenses or investments and may adopt an appropriate future test period, not exceeding twelve months from the date of filing, including projections or projections together with a period of actual operations in determining the utility's test year for rate-making purposes.

54-4-21. Valuation of public utilities.

The commission shall have power to ascertain the value of the property of every public utility in this state and every fact which in its judgment may or does have any bearing on such value. The commission shall have power to make revaluations from time to time and to ascertain the value of new construction, extensions, and additions to the property of every public utility; provided, that the valuation of the property of all public utilities doing business within this state located in Utah as recorded in accordance with Section 54-4-22 of this chapter shall be considered the actual value of the properties of said public utilities in Utah unless otherwise changed after hearings by order of the commission. In case the commission changes the valuation of the properties of any public utility said new valuations found by the commission shall be the valuations of said public utility for all purposes provided in this chapter.

54-7-19. Valuation of utilities — Procedure — Findings conclusive evidence.

- (1) (a) In determining the value, or revaluing the property of a public utility as required by Section 54-4-21, the commission may hold hearings.
(b) The commission may make a preliminary examination or investigation into the matters designated in this section and in Section 54-4-21 and may inquire into those matters in any other investigation or hearing.
(c) The commission may seek any available sources of information.
(d) (i) The evidence introduced at the hearing shall be reduced to writing and certified under the seal of the commission.
(ii) The findings of the commission, when properly certified under the seal of the commission, are admissible in evidence in any action, proceeding, or hearing before the commission, and before any court as conclusive evidence of the facts as stated.
(e) The commission's findings of facts can be controverted in a subsequent proceeding only by showing a subsequent change in conditions bearing upon the facts.
- (2) (a) The commission may hold further hearings and investigations to make revaluations or to determine the value of any betterments, improvements, additions, or extensions made by any public utility.
(b) The commission may examine all matters that may change, modify, or affect any finding of fact previously made, and may make additional findings of fact to supplement findings of fact previously made.

APPENDIX 2



Norman H. Bangerter
Governor

State of Utah

PUBLIC SERVICE COMMISSION OF UTAH

Heber M. Wells Building
160 East 300 South 4th Floor
P.O. Box 45585
Salt Lake City Utah 84145
(801) 530-6716

Commissioners
Brian T. (Ted) Stewart
Chairman
James M. Byrne
Stephen F. Mecham
Douglas C. W. Kirk
Executive Staff Director
Stephen C. Hewlett
Commission Secretary

MEMORANDUM

TO: Parties, Docket No. 89-057-15

FROM: Public Service Commission

DATE: August 27, 1990

SUBJECT: TEST-YEAR RATE BASE; PREPARATION OF COMPREHENSIVE EXHIBIT

In this docket, parties differ on whether year-end or average rate base is appropriate for test period purposes. We intend to resolve the dispute early in the proceeding.

As the first matter to be taken up when the hearing begins, each party will be expected to present, through its attorney or a designated witness, a concise statement of the reasons for its choice. Among other things, each statement must address, first, our use in recent US West and Utah Power & Light cases of average rate base in conjunction with historic test years, and second, the problem this choice creates for matching test year revenues, expenses, and rate base. So that necessary information will be on hand, the Company is directed to supply an exhibit establishing test-year rate base using average rate base as soon as possible.

On another subject, we direct the parties to prepare a comprehensive joint exhibit setting forth the issues under consideration in the docket, matched with descriptions of each party's position on each issue. Parties should plan to present the exhibit to the Commission prior to or as early in the hearing as possible.

001000

APPENDIX 3



Gary G. Sackett
Associate General Counsel

July 5, 1991

Office 180 East First South St
Salt Lake City, Utah 84111
Phone (801) 534-5563
Mail P.O. Box 11150
Salt Lake City, Utah 84147
Fax (801) 534-5131

Stephen C. Hewlett, Secretary
Public Service Commission of Utah
Heber M. Wells Building
160 East 300 South Street
Salt Lake City, UT 84110

Dear Steve:

*Re: Mountain Fuel Supply Co. v. Public Service Commission,
Utah Supreme Court Case No. 910051*

As a follow-up to my conversations with Dave Stott and Utah Supreme Court clerk, Geoffrey J. Butler, Mountain Fuel Supply Company would like to designate the following additional portions of the record compiled in PSC Docket No. 89-057-15 for transmittal to the Court in connection with the captioned appeal. If there are other portions of the record that the Commission or the two intervenors (the Utah Division of Public Utilities and the Committee of Consumer Services) wish to designate, please call me so that we can arrive at a stipulated portion of the record pursuant to Utah Rule of Appellate Procedure 16.

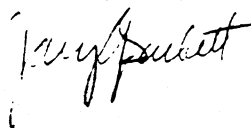
Document	Date	PSC Exhibit No.
Transcript of Proceedings	11-07-89	
Glenn H. Robinson Direct Testimony	03-30-90	MFS-1
Glenn H. Robinson Rebuttal Testimony	08-17-90	MFS-1R
Glenn H. Robinson Exhibits		MFS-1.1 - 1.8
Alan K. Allred Direct Testimony	03-30-90	MFS-5
Alan K. Allred Rebuttal Testimony	08-17-90	MFS-5R
Alan K. Allred Exhibits		MFS-5.1, revised MFS- 5.2 - 5.8, MFS-5.9, MFS- 5.10, revised MFS-5.11, MFS-5.12 - 5.19
James L. Balthaser Surrebuttal Testimony	09-05-90	MFS-6SR
James L. Balthaser Exhibits		MFS-6.1, 6.18, 6.19
Chester G. Sullivant Direct Testimony	07-06-90	DPU-1

Document	Date	PSC Exhibit No.
Chester G. Sullivant Surrebuttal Testimony	08-31-91	DPU-1SR
Chester G. Sullivant Exhibits		DPU-1.1 - 1.12
Wesley D. Huntsman Direct Testimony	07-06-90	DPU-2
Wesley D. Huntsman Surrebuttal Testimony	08-31-90	DPU-2SR
Wesley D. Huntsman Exhibits		DPU-2.2 - 2.11
Carl L. Mower Surrebuttal Testimony	08-31-90	DPU-10
Carl L. Mower Exhibit		DPU-10.1

Also, I note that the PSC pagination of the record duplicates pages 1-205, with a re-start of pagination for the September 5, 1990, transcript. To avoid confusion in citing to the record in the briefs, it would be helpful if you would contact Mr. Butler to discuss a solution. Also, Mountain Fuel reserves the right to specify additional documents under Rule 16 at a later time.

If you have questions concerning this listing, please contact me so that we can work out the appropriate details as quickly as possible.

Yours very truly,



GGS:ls1

cc: Utah Supreme Court
Geoffrey J. Butler, Clerk
Public Service Commission of Utah
David L. Stott, Esq.
Committee of Consumer Services
Kent Walgren, Assistant Attorney General
Division of Public Utilities
Laurie L. Noda, Assistant Attorney General



State of Utah
DEPARTMENT OF COMMERCE
Division of Public Utilities

Norman H. Bangerter
Governor

David L. Buhler
Executive Director

Frank Johnson
Division Director

Heber M. Wells Building
160 East 300 South/P.O. Box 45802
Salt Lake City, Utah 84145-0802
(801) 530-6651

July 10, 1991

Stephen C. Hewlett, Secretary
Public Service Commission of Utah
Heber Wells Building 4th Floor
160 East 300 So.
Salt Lake City, UT 84110

Re: Mountain Fuel Supply Co. v. Public Service Commission
Utah Supreme Court Case No. 91-000-51

Dear Steve,

Pursuant to the letter I received from Gary Sackett on July 5, 1991, the Division would like to have designated the following documents in connection with the captioned appeal.

Document	Date	PSC Exhibit No.
Mary Cleveland Direct Testimony	7-6-90	DPU-6
Mary Cleveland Surrebuttal Testimony	8-31-90	DPU-6SR
Mary Cleveland Exhibits		DPU-6.1-6.5
Nile W. Eatmon Direct Testimony	7-6-90	DPU-5
Nile W. Eatmon Surrebuttal Testimony	8-31-90	DPU-5SR
Nile W. Eatmon Exhibits		DPU-5.1-5.6 DPU-5.1SR- 5.4SR

Phillip S. Teumim
Direct Testimony

7-16-90

DPU-8GS

Phillip S. Teumim
Surrebuttal Testimony

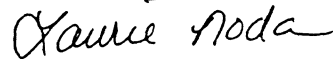
9-12-90

DPU-8SRGS

The Division reserves the right to specify additional documents under Rule 16 at a later time.

If you have any questions or problems, please let me know.

Sincerely,

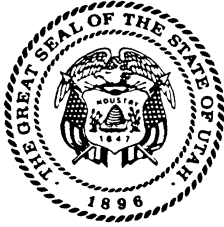


Laurie L. Noda
Assistant Attorney General
Division of Public Utilities

cc: Mountain Fuel Supply Co.
Gary Sackett

Committee of Consumer Services
Kent Walgren

OFFICE OF
THE ATTORNEY GENERAL



STATE OF UTAH

R. PAUL VAN DAM - ATTORNEY GENERAL

36 SOUTH STATE STREET, ELEVENTH FLOOR • SALT LAKE CITY, UTAH 84111 • TELEPHONE 801 533 3200 • FAX 801 533 3216

JOSEPH E. TESCH
CHIEF DEPUTY ATTORNEY GENERAL

July 9, 1991

Stephen C. Hewlett, Secretary
Public Service Commission of Utah
Heber M. Wells Building
160 East 300 South Street
Salt Lake City, UT 84110

Re: Certification of Record in Mountain Fuel Supply
Co. v. Public Service Commission, Utah Supreme
Court Case No. 910051

Dear Steve:

In response to Mr. Sackett's letter of July 5, 1991, following are the additional parts of the record from PSC Docket No. 89-057-15 which the Committee of Consumer Services would like designated as part of the record. In the event further portions of the record are needed after Mountain Fuel files its Briefs with the Court, Mr. Sackett has stated that he will not object to additional documents being made available to the Court pursuant to Rule 16 of the Utah Rules of Appellate Procedure.

Document	PSC Exhibit No.
Michael Arndt Direct Testimony	CCS-1
Michael Arndt Surrebuttal Testimony	CCS-1SR
Matty Marcus Direct Testimony	CCS-2
Matty Marcus Surrebuttal Testimony	CCS-2SR
Williamson Testimony re Green Mtn. Power Central Vermont Public Service, Public Service of New Hampshire and Narragansit Transit	CCS Cross 1
Information regarding Brewery Property	CCS Cross 2

We are presuming that the Brief filed by the Committee on September 28, 1990 and the Committee's response to Mountain Fuel's Application for rehearing have already been certified. If

not, please consider this a formal request that they be included with the above.

If you have any questions, please contact me.

Sincerely,



Kent Walgren
Assistant Attorney General
Committee of Consumer Services

cc: Utah Supreme Court
Geoffrey J. Butler, Clerk
Public Service Commission of Utah
David L. Stott, Esq.
Mountain Fuel Supply Co.
Gary Sackett, Esq
Division of Public Utilities
Laurie L. Noda, Asst. Attorney General

APPENDIX 4

APPENDIX 4

Mountain Fuel Supply Company
Docket No. 89-057-15
James L. Balthaser
Exhibit No. 6.20

Type of Test Year and Rate Base
Used in Determining Gas Rates 1/

Type of Test Year Allowed	Agency	Type of Rate Base
1 FORECAST	MISSISSIPPI PSC	AVERAGE
2 FORECAST	NORTH DAKOTA PSC	AVERAGE
3 FORECAST	CALIFORNIA PUC	AVERAGE
4 FORECAST	WISCONSIN PSC	AVERAGE
5 FORECAST	HAWAII PUC	AVERAGE
6 FORECAST	MINNESOTA PUC	AVERAGE
7 FORECAST	NEW YORK PSC	AVERAGE
8 FORECAST	NEW MEXICO PSC	BOTH
9 FORECAST	MICHIGAN PSC	BOTH
10 FORECAST	PENNSYLVANIA PUC	YEAR END
11 PARTIAL	IDAHO PUC	AVERAGE
12 PARTIAL	MARYLAND PSC	AVERAGE
13 PARTIAL	GEORGIA PSC	AVERAGE
14 PARTIAL	ALASKA PUC	AVERAGE
15 PARTIAL	DELAWARE PSC	AVERAGE
16 PARTIAL	RHODE ISLAND PUC	AVERAGE
17 PARTIAL	WEST VIRGINIA PSC	AVERAGE
18 PARTIAL	DC PSC	AVERAGE
19 PARTIAL	COLORADO PUC	BOTH
20 PARTIAL	FLORIDA PSC	BOTH
21 PARTIAL	NEW JERSEY BPU	YEAR END
22 PARTIAL	NEVADA PSC	YEAR END
23 PARTIAL	OHIO PUC	YEAR END
24 HISTORIC	WASHINGTON UTC	AVERAGE
25 HISTORIC	MONTANA PSC	AVERAGE
26 HISTORIC	LOUISIANA PSC	AVERAGE
27 HISTORIC	TENNESSEE PSC	AVERAGE
28 HISTORIC	MAINE PUC	AVERAGE
29 HISTORIC	SOUTH DAKOTA PUC	AVERAGE
30 HISTORIC	IOWA SUB	AVERAGE
31 HISTORIC	NEW HAMPSHIRE PUC	AVERAGE
32 HISTORIC	SOUTH CAROLINA PSC	YEAR END
33 HISTORIC	TEXAS RC	YEAR END
34 HISTORIC	CONNECTICUT DPUC	YEAR END
35 HISTORIC	MASSACHUSETTS DPU	YEAR END
36 HISTORIC	VERMONT PSB	YEAR END
37 HISTORIC	OKLAHOMA CC	YEAR END
38 HISTORIC	VIRGINIA SCC	YEAR END
39 HISTORIC	KENTUCKY PSC	YEAR END
40 HISTORIC	ARIZONA CC	YEAR END
41 HISTORIC	INDIANA URC	YEAR END
42 HISTORIC	WYOMING PSC	YEAR END
43 HISTORIC	NORTH CAROLINA UC	YEAR END
44 HISTORIC	KANSAS SCC	YEAR END
45 HISTORIC	MISSOURI PSC	YEAR END
46 HISTORIC	OREGON PUC	YEAR END
47 NOT REGULATED	NEBRASKA PSC	
48 NOT SPECIFIED	ILLINOIS CC	BOTH
49 NOT SPECIFIED	ALABAMA PSC	YEAR END
50 NOT SPECIFIED	ARKANSAS PSC	YEAR END

1/ KARUC Annual Report on Utility and Carrier Regulation 1988, Tables 13 and 23

APPENDIX 5

Expenses

*Issue: Joint Exhibit 2, page 5 of 11, line 13 - Year-end Depreciation

<u>MFS</u>	<u>DPU</u>	<u>CCS</u>
250	250	- 0 -

Explanation: Annualization of 1989 depreciation to reflect year-end rate base.

MFS Position: This annualization is a known and measurable change which is necessary to match depreciation expense with year-end rate base. Both year-end rate base and this depreciation expense annualization should be allowed in order to reflect most accurately the conditions during the period in which the rates will be in effect.

DPU Position: The Division recommends the annualization of 1989 depreciation to reflect year-end rate base. The reason is that annualization changes within the test year are allowed under the Commission's annualization policy.

CCS Position: The Committee's position is that this adjustment is neither necessary nor proper for ratemaking purposes. The average test year approach produces the desired matching of investment, revenues and expenses. Year-end annualizations are complex, speculative and contrary to the Commission's intent to simplify the ratemaking process.

Expenses

*Issue: Joint Exhibit 2, page 5 of 11, line 14 - Production-related Depreciation

<u>MFS</u>	<u>DPU</u>	<u>CCS</u>
277	277	- 0 -

Explanation: Post-test year adjustment to reflect 1990 production of Company owned gas and the lower 1990 unit depreciation rate.

MFS Position: This adjustment is known and measurable, as it is based on the depreciation rate per unit for 1990 and planned 1990 Company-owned gas production levels reflected in Docket Nos. 90-057-02 and 90-057-07. The adjustment is necessary to reflect most accurately the conditions during the test year in which the rates will be in effect.

DPU Position: The Division adjusted depreciation at December 31, 1989 year ending levels to reflect the use of year end rate base. The Division did not use average rate base. The Division used year end rate base because it felt that it more accurately reflect the conditions that would exist at the time rates go into effect.

CCS Position: The Committee's position is that this adjustment is neither necessary nor proper for ratemaking purposes. The average test year approach produces the desired matching of investment, revenues and expenses. Year-end annualizations are complex, speculative and contrary to the Commission's intent to simplify the ratemaking process.