

1991

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

Utah Supreme Court

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Recommended Citation

Reply Brief, *Mountain Fuel Supply Company v. Public Service Commission of Utah*, No. 910051.00 (Utah Supreme Court, 1991).
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THE COURT
BRIEF
DOCKET NO. 910051 IN THE SUPREME COURT OF THE STATE OF UTAH

MOUNTAIN FUEL SUPPLY)
COMPANY,)
Petitioner,)

v.)

PUBLIC SERVICE COMMISSION)
OF UTAH,)
Respondent.)

Case No. 910051

(Priority Category 10)

**REPLY BRIEF OF PETITIONER
MOUNTAIN FUEL SUPPLY COMPANY**

**ON PETITION FOR REVIEW FROM THE
PUBLIC SERVICE COMMISSION OF UTAH**

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FILED

JAN 30 1992

January 30, 1992

CLERK SUPREME COURT
UTAH

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MOUNTAIN FUEL SUPPLY)	
COMPANY,)	
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OF UTAH,)	
)	
Respondent.)	

**REPLY BRIEF OF PETITIONER
MOUNTAIN FUEL SUPPLY COMPANY**

On December 16, 1991, Respondent Public Service Commission of Utah (the PSC or the Commission) and Intervenors, the Utah Division of Public Utilities (the Division) and the Utah Committee of Consumer Services (the Committee) filed a joint brief in this proceeding.¹ Mountain Fuel Supply Company (Mountain Fuel) respectfully submits its reply brief to respond to issues and arguments raised in the joint brief.

I. TEST-YEAR ISSUES

Respondents have briefly raised several issues relative to the Commission's

¹Because the respondent PSC and the two intervenor agencies have filed a single joint brief, this Reply Brief will refer to the three agencies collectively as "Respondents" and to their responsive brief as "Respondents' Brief."

decision to employ an unadjusted 1989 test year to determine Mountain Fuel's 1991 rates (Respondents' Brief 7-12), but none of the discussion addresses the fundamental issue: Did the Commission's actions imposing an unadjusted 1989 test year "allow for reasonably anticipated changes in revenues, expenses, or other conditions in order that the test-period results of operations will be as nearly representative of future conditions as possible"? *Department of Business Regulations v. PSC*, 614 P.2d 1242. 1248 (Utah 1980). Respondents have concentrated on whether Mountain Fuel made a "proffer" of evidence, whether the issue is moot, and whether the rate of inflation justified the PSC actions.

A. *The "Proffer Argument"*

The Respondents' first defense is that Mountain Fuel did not make a "proffer of the potential difference in rates" that a choice of test year would make. (Respondents' Brief at 7-8.) At best, this argument is of the form-over-substance variety; more fundamentally, it mischaracterizes the preliminary proceedings and imposes on a utility seeking rate relief an impossible standard of evidentiary prescience that has no basis in law.

Mountain Fuel made a direct proffer of the type of evidence and presentation that it wished to submit to the Commission. At the November 21, 1989, prehearing (and prefiling) conference that the Commission had scheduled for oral argument on the subject of the test year, Mountain Fuel outlined in detail the information that it wished to present and the reasons for so doing. (R. 7-9, Vol. I.) Although Mountain Fuel stated its belief that a future-looking test period

would better model the “rate-effective period,” it offered to submit a full range of information on both historical and future periods.

It is important to review briefly the sequence of events that led to this proposal. As outlined in its Initial Brief (at pages 4-7), Mountain Fuel was summoned by the PSC to make a rate filing. At the first prehearing/prefiling conference held by the PSC, the Commission declared that it intended to determine rates for the future period beginning late 1990 and extending into 1991 on the basis of a historic test year—the year 1989. Although the Company argued that it should be allowed to present such evidence as it thought would carry its PSC-imposed burden to establish rates for the future period—namely, information about a future test year—the Company offered to file both sets of data and information in order to accommodate both the Commission’s mandate for historical test-year information and to present the Company’s own case. (R. 6-9, Vol. I.)

The Commission’s response was flatly to refuse this proffer. (R. 37, Vol. I.) It now comes before the Court to claim that this case should be dismissed because Mountain Fuel did not lay out the precise difference in the rates that the two different underlying approaches would produce. But this information that would have shown these differences is exactly the dual filing Mountain Fuel was prepared to make. The Commission can’t really believe that the absence of a showing that it prohibited in the first instance constitutes a reasonable justification for denying Mountain Fuel its day in court on this fundamental issue.

The PSC did not hesitate in denying Mountain Fuel the right to make the

future-test-year presentation that the Company believed was appropriate to establish just and reasonable rates. The Commission now comes to this Court and bases its defense on the theory that Mountain Fuel—in the face of the Commission’s unequivocal proscription of submitting future test-year data—should have nonetheless been prepared at the prefiling conference to state the effects of two full-scale rate-case presentations for the sole purpose of making a “proffer.”

The evidence rule cited in Respondents’ Brief reads, in relevant part:

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one of excluding evidence, the *substance of the evidence* was made known to the court by the offer or was apparent from the context within which questions were asked.

Utah R. Evid. 103(a)(2) (emphasis added). Mountain Fuel is at a loss to understand how its unequivocally stated position and detailed description of the filing it proposed to make would not pass this test. Mountain Fuel outlined plainly the “substance of the evidence” for the Commission. Rule 103(a)(2) does not require more.

In addition, Respondents’ reliance on the technical application of a rule of questionable relevance is all the more puzzling in view of the Commission’s own rules: “The Commission is not bound by the technical rules of evidence and may receive any oral or documentary evidence” Utah Admin. Code § R750-100-9(A)(6)(a) (1991).² Apart from the fact that Mountain Fuel’s proffer is in

²In addition, the Utah Administrative Procedures Act, Utah Code Ann. (continued...)

full compliance with Rule 103(a)(2), the Commission's selective invocation of the Rules of Evidence is not consistent with its own rules, the Utah Administrative Procedures Act, nor the character of rate-making as a legislative function.³

Respondents' "proffer argument" has no merit. It would impose a prefiling performance standard on the utility that has no legal or equitable foundation. Respondents' defense attempts to sidestep and obscure the real issue: Did the Commission carry out its responsibility to receive and evaluate such evidence as would allow it to determine just and reasonable rates for a period beginning in December 1990 and continuing into 1991? A straightforward review of the record shows it did not.

B. The Mootness Issue

In its second argument, Respondents (at pages 8-9) claim that the Company hasn't asked for the application of a specific test year and that, therefore, the issue is moot. This argument would parlay the somewhat peculiar mechanics of utility ratemaking into an administrative maze from which the utility could never escape.

Mountain Fuel's restraint in limiting its request for relief to something less than a full remand and reconstruction of a 1990 rate proceeding does not render

²(...continued)

§§ 63-46b-1 through -22 (1989 & Supp. 1991) appears not to contemplate automatic imposition of the Utah Rules of Evidence on administrative agencies. *See, e.g.,* § 63-46b-8, which explicitly cites incorporation of one of the Rules of Evidence (on judicial notice) and implicitly rejects another (on hearsay testimony).

³*See, e.g., Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 389 (1932); *Department of Business Regulations v. PSC*, 614 P.2d 1242, 1250 (Utah 1980).

the issue before the Court as moot. The Commission's prohibition of the parties' submitting relevant evidence and its failure to correlate the data for the 1989 test year with the rate-effective period (beginning December 1990) are unlawful acts, and Mountain Fuel should be afforded relief from these actions.

Although Mountain Fuel might have chosen to seek a full remand of the case from the Court to the PSC with instructions to redetermine rates based on a recreation of the evidence that would have been presented in 1990, the Company instead chose the far more practical course of seeking to file new information that would set prospective rates under the auspices of this Court's disposition of the issues raised in this case. This recognizes the reality that life must go on for both the utility company and its customers, as well as the difficulty of obtaining a stay of a Commission rate order while matters are under review before this Court.⁴

Respondents characterize this as seeking no remedy. Although Mountain Fuel has not sought the remedy that the Respondents might have expected, there is nonetheless a real grievance that requires a remedy: To avoid the very problem that the Respondents use as a foundation for their argument—that “[t]he forecasted test period Mountain Fuel wanted . . . no longer exists”—the Company has sought the remedy of refiling a new case with explicit instructions from this Court that such a case is to be evaluated on the basis of determining as accurately as

⁴This is apparently a very high hurdle, as perhaps illustrated by this Court's recent denial of a request for a rate-order stay by US West. *US West Communication, Inc. v. PSC*, No. 910408 (Utah, Nov. 8, 1991).

possible the conditions that will exist while the rates will be effective. Mountain Fuel's choice not to seek a complete remand to reconstruct a 1990 rate proceeding with a proper evaluation of the test period does not render the issue moot.

But, even if the issue were technically moot, this is precisely the type of situation that is entitled to judicial review because it is likely to recur and will otherwise escape judicial review. As Respondents have correctly pointed out, this Court has addressed the issue in *Wickham v. Fisher*, 629 P.2d 896 (Utah 1989). The criteria cited there are satisfied in Mountain Fuel's case. The test-year issue "is of wide concern, affects the public interest, is likely to recur in a similar manner, and . . . would otherwise likely escape judicial review." *Id.* at 899.

A Commission declaration on page 7 of the November 21, 1990, order nearly guarantees that there will be a recurrence of the problems raised in this case, with the same difficulty in bringing the matter to this court in a timely fashion:

In future proceedings, the Commission will decide 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.

(R. 1969.) Apparently, the Commission feels very strongly that it should continue to make factual determinations without the benefit of taking evidence on these matters ("prior to the onset of hearings"). This proclamation directly establishes the likely-to-recur criterion of *Wickham*.

Surely, it is not sensible public policy to permit the Commission to avoid

judicial scrutiny of an unlawful act simply because of the inherent nature of the utility ratemaking process.

Also, Respondents' suggestion that the Company should have taken an interlocutory appeal (at pages 9-10 n.10) overlooks the likelihood that there was, at that time, no justiciable issue. An interlocutory appeal in November 1989, when the Commission denied the parties the right to submit future-test-year evidence, would likely have been rejected for lack of a demonstrable, irreparable injury. At the time of the Commission's action, there was still the possibility that it would permit such modifications, changes and post-test-year adjustments to the historical 1989 test year that the resultant rates could have passed the minimal legal tests for being just and reasonable for the 1991 period. With appropriate adjustments, Mountain Fuel might well not have been aggrieved, notwithstanding the rejection of a full future test year. Such a determination wasn't possible until a final order was issued on November 21, 1990. Apart from the nearly impossible timing problems created by taking an interlocutory appeal,⁵ it also seems probable that the Commission itself would have opposed such a procedure.

In a short, the test-year issue was not ripe on November 21, 1989. *See,*

⁵In order to get to this Court, Mountain Fuel would have first had to file a request for rehearing with the Commission; the Commission would have had to deny the rehearing; and the parties would presumably file briefs and argue the issue before this honorable Court while the business of determining rates would be "on hold." Would the Commission, who initiated the rate proceedings, have supported such a judicial interlude?

e.g., *Redwood Gym v. County Commission*, 624 P.2d 1138, 1148 (Utah 1981).⁶

It only became justiciable when the Commission issued its final order on November 21, 1990, declaring that it would reject all post-test-year adjustments and failing to make any finding that the unadjusted 1989 test year was reasonably related to the period when rates would be effective.

C. The “Inflation Defense”

At pages 10-11 of their brief, Respondents attempt to justify the use of unadjusted 1989 data by claiming that “the Commission took into account economic circumstances.” Apparently as a predicate to this claim, Respondents argue (page 10) that the imposition of a historical test year was in some way justified because *the Commission* initiated the proceeding by summoning the Company and requiring it to undertake the burden of proof in establishing its rates. (R. 2221, 2238.) The claim that the Commission “wanted to learn . . . whether or not a rate reduction might be justified” is not only irrelevant to the statutory responsibilities of the Commission under Utah Code Ann. §§ 54-3-1 and 54-4-4 (1990), but it is an after-the-fact construct that was not a part of the Commission’s final order in the case.

Even if it were relevant to the issue of a proper test year, the Respondents’ citation to pages 3-7 of the Commission’s final order (at page 10) is inaccurate.

⁶*See also, e.g., Papago Tribal Utility Authority v. FERC*, 628 F.2d 235 (D.C. Cir. 1980), and cases cited in that opinion discussing the ripeness doctrine for agency actions, as developed in the federal courts.

There is *no* discussion in that order of the Commission's focus on "whether or not a rate reduction might be justified." In any event, none of this is relevant to the way in which this case went forward and the Commission's responsibilities to determine lawful rates. The Commission "invited" the Company to submit a filing for the determination of future rates; it imposed the burden of proof on the Company to establish the rates; the Company sought to present evidence it thought would model the period when rates would be effective; the Commission refused to entertain such a presentation (and ultimately denied other proposed adjustments to the 1989 historic period); pursuant to the Commission's evidentiary limitations, the Company sought a rate increase under Utah Code Ann. § 54-4-4.

The Commission was not thereby relieved of its obligation to determine rates in accordance with the law—applicable statutes, constitutional principles and the prior decisions of this Court.

The Respondents' Brief goes on to argue (page 11) that the state of inflation in the U. S. economy justified the exclusion of post-1989 evidence. As pointed out in Mountain Fuel's Initial Brief (pages 30-31), there wasn't *any* evidence to justify this conclusion. The *only* support cited in Respondents' Brief for this assertion and conclusion is that "the Commission took administrative notice of the fact that the rate of inflation had been consistently low for quite some time." (Respondents' Brief at 11.)

First, neither the Commission nor any party identified any document or any data or other information of which "administrative notice" was to be taken.

Counsel for the Committee asked the Commission to take “official notice of the inflation rate during the last five years,” without specifying or identifying what he was talking about or referring to. (R. 39.) Commissioner Stewart indicated “the Commission will do so,” but there was never any identification of what information was under discussion. This can hardly be considered an evidentiary foundation for Commission action that is required to pass UAPA muster.

Beyond this evidentiary problem, Commission has repeatedly relied on the following logic, restated in its brief (pages 11-12): (a) If general levels of inflation in the United States are lower than they were in the 1970s and early 1980s, there is no need to use a forward-looking or adjusted test year. (b) Current inflation rates are lower than those of the 1970s and early 1980s. (c) Therefore, the Commission needn’t consider evidence of conditions that will exist during the rate-effective period.

This reasoning is so defective that any reliance on it surely breaches the arbitrary-and-capricious standard of the Utah Administrative Procedures Act, Utah Code Ann. § 63-46b-16(4)(h)(iv) (1989). At best, the Commission confuses *necessary* with *sufficient* conditions for examining a question of this kind. High inflation rates, standing alone, may well be a *sufficient* condition for considering forward-looking evidence; but they are surely not a *necessary* condition. That is, there are a host of elements that enter the ratemaking exercise that can change materially over time, such that the failure to account for them will not produce rates that, as accurately as possible, model the period when rates will be effec-

tive.⁷ Inflation is only one such factor.

Even if inflation were the one critical element, the Commission's reasoning doesn't pass rudimentary muster. No one in this proceeding, including the Commission, has postulated a zero-inflation period. The only real record evidence is that of Mr. Robinson (R. 2279), which shows that there has been a significant level of inflation that may have a material effect on business operations.

If these levels in some way negated or nullified the necessity to determine conditions *during the rate-effective period*, the Commission never articulated why this was so. As discussed in Mountain Fuel's Initial Brief, there was *no* evidence to link—one way or the other—the existing inflation rates with the stability of costs, revenues, rates or any other ratemaking element.⁸

Finally, the very existence of *any* inflation suggests the possibility of dynamic relationships among the elements that go into the ratemaking equation. Any reasonable attempt to comport with the *Department of Business Regulations* guide-

⁷For example, the size of the company's plant investment, its customer base, the average usage level of the customers, the addition or loss of major industrial users, the capital structure of the company, the cost of materials and supplies.

⁸It is difficult to take seriously the claim in Respondents' Brief (at page 11): "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." There is no basis for it; no witness ever addressed the subject; the Commission's order did not address this point. Respondents offer no clue about what would be the magic level of "economic volatility" that would automatically trigger the use of forward-looking information, nor—more importantly—why a condition of economic volatility is necessary before the Commission is required to consider evidence of the utility's operations during the rate-effective period.

lines (“as nearly representative of future operations as possible”) must look past a historic year that is nearly two years removed from the rate-effective period.

D. Utah Code Ann. § 54-4-4(3)

Two Respondents argue (at pages 11-12) that Utah Code Ann. § 54-4-4(3) (1990) permits the Commission to reject evidence about the Company’s operations during the period of time when rates will be in effect.⁹ The statute states:

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 the filing, including projections or projections together with a period of actual operations in determining the utility’s test year for ratemaking purposes.

Respondents rely on the phrase “may adopt” to give the Commission license to sweep away the basic requirements of due process, reasoned decision-making and the fundamental goal of utility ratemaking—namely, to set rates for a future period. This is not a rational interpretation of the statute in light of the other requirements that Commission actions must satisfy.

Respondents’ Brief has attempted to paint Mountain Fuel’s position on this issue as requiring the use of a specific future test year. As the Company made perfectly clear in oral argument before the Commission (R. 7-9, Vol. I) and in its Initial Brief (at page 10 n.5), it recognizes there may be more than one way to

⁹The Committee of Consumer Services declined to support this statutory argument. (Respondents’ Brief at 11 n.14.)

arrive at lawful results. But, in all events, there must be some logical connection between the chosen 1989 test year and the period when rates were to be effective. In this case, the Commission never made such a connection. It has accordingly not carried out the legal responsibility that the Commission itself identified as the fundamental goal: “to provide . . . information that reasonably approximates circumstances expected during the period rates will be in effect.” (R. 1968.)

Contrary to the implication in Respondents’ Brief, § 54-4-4(3) does not override the otherwise applicable standards to which the Commission must adhere: the general guideline stated in *Department of Business Regulations*, the UAPA’s proscription of arbitrary and capricious action, and the necessity to provide proper findings to support ultimate conclusions, as required by this Court. *See, e.g., Milne Truck Lines, Inc. v. PSC*, 720 P.2d 1373, 1378 (Utah 1986).¹⁰

Finally, Mountain Fuel is reluctant to get involved in a contest of unsupported claims about the motives of the Utah Legislature in enacting the future-test-year language in § 54-4-4(3), but it must take issue with the characterization in footnote 15 of Respondents’ Brief. That the statute allows the utilities and Commission to deal with periods of high inflation does not imply anything about low or medium inflation or any other conditions that might exist.¹¹ Indeed,

¹⁰Although this is a pre-UAPA case, the principles of agency accountability that are discussed are at least as strongly applicable under the UAPA as under former agency-review standards. *See Vali Convalescent and Care Institutions v. Division of Health Care Financing*, 797 P.2d 438, 443 n.6 (Utah App. 1990).

¹¹Even in a *declining* price environment, a future test year would better match rates with the rate-effective period and provide lower rates, in general.

Mountain Fuel's recollection of the reason for the future-test-year language was to eliminate any uncertainty about the Commission's authority to consider a future test year.

E. The Rate-base Issue

The Respondents dedicate the plurality of their argument (pages 13-23) to the secondary issue of a proper rate base for Mountain Fuel—year-end versus average-year rate base. But they have attacked and apparently defeated a “straw man.” Had Mountain Fuel argued that year-end rate base is—either as a matter of law or uniform application of fundamental ratemaking principles—*always* the proper measure of the utility investment, Respondents' arguments might be relevant.

However, as indicated in its Initial Brief (at 32-38), Mountain Fuel has sought the Court's review of the rate-base issue in the context of the Commission's failure to satisfy the lawful requirement of deriving and approving rates that properly reflect conditions during the rate-effective period. This is only one of six connected arguments discussing the absence of evidence establishing the Commission's unadjusted 1989 test year complete with mid-year rate base, as the best representative of the period during which rates were to be effective.

Contrary to Respondents' attempt to characterize this as an independent issue to be viewed in the context of isolated evidence about rate base, Mountain Fuel has already conceded that there may be instances where the use of an average-year rate base might be perfectly proper (Initial Brief at 35 n.25).

In addition, the Respondents make a major issue out of Mountain Fuel's failure to discuss certain parts of the record that involve the rate base. This argument misunderstands or misstates the gravamen of Mountain Fuel's argument: *There is a total absence of evidence to show that average rate base, vis-à-vis year-end rate base, more closely approximates conditions that will exist during the rate-effective period.*

Respondents' claims about Mountain Fuel's failure to "marshall the evidence" (pages 14-19) contort the holding in *First National Bank of Boston v. County Board of Equalization*, 799 P.2d 1163, 1165 (Utah 1990). This case does not stand for the proposition that appellant must marshall evidence that is not relevant to the fundamental issue before the Court. If Respondents wish to bring it to the Court's attention to establish a different point, they may, of course, do so. But, Mountain Fuel's failure to make Respondents' arguments for them is not a deviation from *Bank of Boston*.¹²

Further, the Initial Brief's arguments are aimed directly at the discussion of the rate-base issue in the Commission's final order. (R. 1969-71.¹³) Notwithstanding Respondents' multiple after-the-fact citations to the evidentiary record,

¹²Nor is it a violation of the Utah Rules of Appellate Procedure 11(e)(2), as Respondents claim (page 14). See the discussion in § F, *infra*.

¹³Respondents' Brief cites pages 3-10 of the Commission's November 21, 1990, order (miscited as "R. 1956-72") as the place where "the Commission gave the . . . reasons for its decision to use the average rather than the year-end rate base." The *only* discussion of the rate-base issue is contained in just over a page of discussion running from page 7 to page 9.

Mountain Fuel understood the foundation for the PSC's choice of rate base to be recited at pages 7-9 of its final order where the Commission gave three reasons to justify its use of the average-year rate base.¹⁴

Mountain Fuel's Initial Brief (pages 34-38) discussed each and showed why they singly and collectively do not satisfy the criteria for establishing just and reasonable rates.

The Company and this Court must assume that the reasoning and the evidence cited in the PSC's orders form the foundation for its conclusions. If this is not the case, then—almost by definition—the Commission has acted arbitrarily and capriciously and, at the very least, has not satisfied the requirements of *Milne* and *D and H Real Estate Co. v. PSC*, 784 P.2d 158, 159 (Utah 1989).

In this regard, the first “reason” cited in the Respondents' Brief to support its rate-base conclusion—that inflation rates were low and Mountain Fuel's rates had been stable—does not even appear in the November 21, 1990, order on rate base. Rather, this point is a part of the order's discussion on choice of test year and is unconnected with the rate-base rationale.

But, the fundamental point is not over the technical aspects of the coordination of rate base with test-year revenues and expenses, which is the focus of the Respondents' Brief. It is whether there is any evidence to show that this choice is

¹⁴It is also notable that the Commission did not address the rate-base issue in its order on rehearing. (R. 2161-65.) This reaffirmed that the limited discussion of the issue on pages 7-9 of the November 21, 1990, order constituted the Commission's full rationale and consideration of the evidence on the issue.

more likely to represent the level of Mountain Fuel's utility investment on which it is entitled to earn a fair rate of return than a method that pushes the measurement *back in time* some six months. On this point, the only evidence is that the Company's rate base is increasing (R. 2425) and that, under the circumstances of this case, *a year-end rate base would more accurately reflect actual conditions*. (See discussion and citations in Initial Brief at 36-37.) Under conditions where an unadjusted 1989 test year has been imposed, failure to advance the time for the "rate-base snapshot" will short-change the utility. It will be denied a reasonable opportunity to earn a return on a portion of the property dedicated to providing utility service.

F. *Inapplicability of Rule 11(e)(2)*

At page 14, Respondents raise an issue about Mountain Fuel's augmentation of the portion of the record that was originally transmitted by the PSC, citing Utah Rules of Appellate Procedure 11(e)(2).¹⁵ Respondents' claims that Mountain Fuel did not comply with this rule are puzzling. First, Rule 11(e)(2) appears under Title II of the Rules, "Appeals from Judgments and Orders of Trial Courts" and appears not to have been designed for agency cases.

Second, Rules 15 and 16 are the directly applicable rules under Title III, "Review and Enforcement of Orders of Administrative Agencies, Commissions and Committees." Rule 16 requires the PSC to file "the entire record or such

¹⁵Respondents' Brief miscites this as Rule 11(3)(e)(2).

parts as the parties may designate by stipulation” When Mountain Fuel discovered that the Commission unilaterally filed only a portion of the record with the Court, it sought to augment the transmitted material and to alert the other parties to the problem, as reported in Appendix 3 of Respondents’ Brief. This is the procedure contemplated by Rule 15(b). There is no provision in Title III of the rules that imposes Rule 11-type requirements. Presumably, the primary responsibility for the agency to transmit the entire record removes any problems of the type addressed by Rule 11.

G. *Summary*

Respondents’ Brief does not provide any credible argument to support the PSC exclusion of future-period data. The brief focuses on procedural matters (the “proffer issue,” the question of mootness, and the “evidence marshalling” argument) and on the legally and factually unsupported claim that inflation levels justify its actions.

At no point in their brief do the Respondents claim that there is evidence (1) to justify the prohibition on future-test-year information, or (2) to show that the unadjusted 1989 test year satisfies the requirements of *Department of Business Regulations* or otherwise to address the substantive issue of determining conditions during the rate-effective period.

II. REDUCTION OF EQUITY RATE OF RETURN

A. *Lack of Authority to Support a Penalty*

On the relevant evidence before it, the Commission stated, “[W]e find the

cost of equity to be 12.2%.” (R. 1991.) It then proceeded to reduce this to 12.1%. In Respondents’ Brief, the focus on this issue is that, once the Commission has specified some kind of “zone of reasonableness” for the return on equity, it has open-season license to choose any number within the range.

Respondents’ Brief (page 24) relies on its perception that “the Commission has broad discretion to set a utility’s rate of return as long as it is within a range to reasonableness.” The brief goes on to cite Utah Code Ann. § 54-3-1:

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 customers, and on the well being of the State of Utah; methods of reducing wide periodic variations in demand of such products, commodities of services, and means of encouraging conservation of resources and energy.

Mountain Fuel does not see that this provision grants the Commission the freedom of action it claims. In particular, it doesn’t even hint at the authority to penalize a utility because the Commission “take[s] issue with the management of the company’s parent.” (R. 1992.)

As this Court made perfectly clear in *Kearns-Tribune Corp. v. PSC*, 682 P.2d 858, 859 (Utah 1984), the Commission has no inherent regulatory powers. Thus, even if there had been substantial evidence to support a claim of utility mismanagement or inefficiency, the Commission is not permitted to penalize the utility through the lowering of its otherwise properly determined return on equity.

Here, however, the case is even stronger, because the Commission has

made no findings of Company inefficiency or mismanagement.¹⁶ Respondents nevertheless argue (pages 27-29) that “[t]here is a compelling public policy reason for upholding the Commission in adjusting rate of return for either efficiency or mismanagement.” This is simply irrelevant in the case before the Court. Likewise, the several cases cited in the Respondents’ Brief at pages 27-28 deal with rate-of-return reductions where inefficiency or mismanagement had been found. These cases are therefore not applicable to Mountain Fuel’s situation. Further, even if there had been such evidence, there is no foundation—either statutory or evidentiary—that would support a reduction of the otherwise lawful rate of return determined by the Commission. (See Initial Brief at 42-45.)

Respondents have cited the “end result” doctrine of such cases as *Utah Power and Light Co. v. PSC*, 152 P.2d 542 (Utah 1944). This is still the law in Utah with respect to confiscation arguments, but it does not stand for the proposition that no component of the chain of events leading to the end result can be subject to judicial scrutiny. In particular, Commission action must be viewed not only in connection with the *Utah Power* case, but in the context of the Utah Administrative Procedures Act, subsequent decisions of this Court, such as *Department of Business Regulations and Milne*, and the fundamentals of utility rate-making that govern the procedures and substance of the determination of just and reasonable rates, as required by Utah Code Ann. § 54-4-4 and § 54-3-1.

¹⁶There were indications to the contrary, in fact. (R. 1965, 1992.)

The Commission does not have license to cloak otherwise unauthorized penalties in the mantle of the *Utah Power* case.

B. *Marshalling of Evidence*

On pages 29-30, Respondents rely on their perception of the “marshalling of evidence” language stated in *Bank of Boston*, 799 P.2d at 1165. Mountain Fuel does not dispute this requirement, but the Respondents miss the mark when they ascribe significance to the fact that Mountain Fuel did not designate various rate-of-return and other evidence from the record in support of its arguments on the Commission’s .1% penalty reduction.¹⁷

The threshold question is, of course, what evidence is relevant to the issue the Company has raised. As indicated in its Initial Brief (page 39), Mountain Fuel has not taken legal issue with the establishment of 12.2% as the just and reasonable rate of return. Thus, all the evidence presented (a considerable volume) on the establishment of this equity return level is irrelevant to the issue before the Court—including Mountain Fuel’s own rate-of-return evidence.

Rather, the Company has raised the substantial-evidence issue in two forms: (1) There is *no* evidence that linked any action or failure of action of Mountain Fuel to a reduction in the equity rate of return to be permitted the Company; (2) similarly, there is *no* evidence that would quantify any such reduction. Respon-

¹⁷Much of the evidence passingly referred to in page 30 of Respondents’ Brief was also not designated by any of the Respondents. See Appendix 3 of Respondents’ Brief.

dents' Brief (page 29) needles Mountain Fuel for not designating its own witness's rate of return testimony as the part of the record to be considered. But it is perfectly obvious why: Professor Williamson—as with the other rate-of-return witnesses—did not address the question of rate of return with respect to Company performance, mismanagement, efficiency or affiliate relations. Why the Company should burden this Court with irrelevant rate-of-return evidence is unclear.

Further, Respondents' claims that Mountain Fuel did not marshal the evidence of various witnesses of the Division and Committee concerning the rate-of-return penalty is particularly puzzling. In the first place, under Rule 15(b) the Respondents were free to designate such evidence as they saw fit if it supported their position concerning substantial evidence. That they chose not to do so does not undercut Mountain Fuel's position that these witnesses' testimony was not relevant to the issue raised by the Company. Second, no rate-of-return witness addressed the subject in the context of a penalty or adjustment for affiliate transactions or relations.

Mountain Fuel and the Court can only evaluate the lawfulness of the PSC's final order by taking the Commission's words at face value. On this issue, the Commission's order summarizes its reasoning thus:

The record suggests, though without benefit of systematic examination, that Company management has performed very well in most respects. In two areas, however affiliate relationships and gas supply planning, *we take issue with the management of the Company's parent, Questar Corporation.*

(R. 1992, emphasis added.)

This is the foundation for the Commission's reduction of the rate of return, and Mountain Fuel believes that it is unlawful for the reasons given in its Initial Brief. By referring the Court to several places in the record, Respondents' Brief attempts to establish that there is a sufficient quantum of evidence to satisfy the substantial-evidence test of the UAPA. Mountain Fuel does not dispute that there were witnesses who speculated and expressed "concern" about the management of the corporate parent. But this speculation was never translated into any tangible effect on Mountain Fuel's utility service or rates.

Even if the Commission had the authority to impose a rate-of-return penalty, the test is whether the legitimate, lawful relationship between Mountain Fuel and its affiliates has a detrimental effect on the customers of Mountain Fuel. There are two levels of evidence that are required to justify any cost disallowance or rate reduction: There must be substantial evidence of (1) a tangible, identifiable connection between a professed "concern" and the quality of service or the rates charged for the service, and (2) the measure of the connection between the disapproved behavior and the rate reduction (the penalty).

None of the evidence cited in Respondents' Brief establishes these connections. Was there testimony that one or more witnesses disapproved of the corporate structure under which Mountain Fuel operates? Yes. Was there *speculation* that this *might* have an effect Mountain Fuel's operations? Yes. Does this speculation demonstrate in any way that the utility services rendered by Mountain Fuel and the rates it charges were detrimentally affected? No. Was there *any* evidence

to measure the alleged adverse effect implied by the Commission? No.


A careful reading of the record shows that any general dissatisfaction with the operating structure of Mountain Fuel and its parent was not translated into any tangible measure of customer detriment. There is, therefore, no reason—no substantial evidence—to justify a reduction in the Company's rates by lowering its rate of return.

Plainly and simply, the Commission's adjustment to the Company's rate of return was a penalty that is unsupported by the evidence and unsupported by any grant of authority from the Utah Legislature.

III. CONCLUSION

For the reasons stated above and in its Initial Brief, Mountain Fuel Supply Company reasserts its request for relief from this Court, as set forth in its Initial Brief.

Respectfully submitted,
MOUNTAIN FUEL SUPPLY COMPANY


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January 30, 1992

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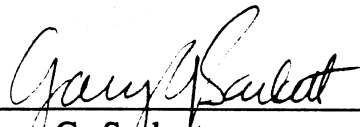
CERTIFICATE OF SERVICE

I, certify that on January 30, 1992, I served four copies of the "Reply Brief of Petitioner, Mountain Fuel Supply Company" by first class mail upon counsel for respondent and intervenors in this matter to the following addresses:

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