

1982

Utah Department of Business Regulation, Division of Public Utilities, Committee of Consumer Services v. Public Service Commission of Utah, Brent H. Cameron, Chairman, David R. Irvine, Commissioner, James M. Byrne. Commissioner : Brief of Intervenor Utah Power & Light Company

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IN THE SUPREME COURT OF UTAH

STATE DEPARTMENT OF BUSINESS)
REGULATION, DIVISION OF PUBLIC)
UTILITIES,)

Plaintiff,)

vs.)

PUBLIC SERVICE COMMISSION OF)
UTAH, BRENT H. CAMERON,)
Chairman, DAVID R. IRVINE,)
Commissioner, JAMES M. BYRNE,)
Commissioner,)

Defendants.)

Case No. 19361

-----)
COMMITTEE OF CONSUMER SERVICES,)

Plaintiff,)

vs.)

PUBLIC SERVICE COMMISSION OF)
UTAH, BRENT H. CAMERON,)
Chairman, DAVID R. IRVINE,)
Commissioner, JAMES M. BYRNE,)
Commissioner,)

Defendants.)

Case No. 19362

BRIEF OF INTERVENOR UTAH POWER & LIGHT COMPANY

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IN THE SUPREME COURT OF UTAH

STATE DEPARTMENT OF BUSINESS)
REGULATION, DIVISION OF PUBLIC)
UTILITY,)
Plaintiff,)
vs.)

Case No. 19361

PUBLIC SERVICE COMMISSION OF)
UTAH, BERT E. CAMERON,)
Chairman, DAVID E. IRVINE,)
Commissioner, JAMES H. BYRNE,)
Commissioner,)
Defendants.)

COMMISSION OF CONSUMER SERVICES,)
Plaintiff,)
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UTAH, BERT E. CAMERON,)
Chairman, DAVID E. IRVINE,)
Commissioner, JAMES H. BYRNE,)
Commissioner,)
Defendants.)

BRIEF OF INTERVENOR UTAH POWER & LIGHT COMPANY

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STATEMENT OF THE CASE

Intervenor Utah Power & Light Company ("Utah Power" or "Company") filed an application with the Public Service Commission of Utah ("Commission") seeking to modify the accounting procedures of the Commission ordered Energy Balancing Account ("EEA") in order to satisfy the purpose of the account which is to prevent windfall benefits to either the Company or its ratepayers.

DISPOSITION BEFORE THE PUBLIC SERVICE COMMISSION

Utah Power upon application to the Commission sought and was granted an accounting procedure modification to the subject Energy Balancing Account.

RELIEF SOUGHT ON APPEAL

Intervenor Utah Power seeks a determination by this Court affirming the Commission Order issued in the subject case.

STATEMENT OF FACTS

The Commission in its Report and Order in Cases No. 78-035-21, 79-035-03, and 79-035-15 directed

and, however, upon recommendation of the Plaintiff
to implement the balancing account procedure
outlined in those orders for the purpose of eliminat-
ing "perceived inequitable results, as to both the
Company and its ratepayers, occurring from inaccurate
forecasting of non-tariff sales, surplus sales to other
utilities, purchases from other utilities and fuel
costs in rate cases." See Commission Order On Rehear-
ing, Case No. 82-035-14, July 5, 1983, page 2. The
Company subsequently established the account as
ordered. The EBA procedure requires the Company to
forecast anticipated revenues to be received from
tariff and surplus sales and anticipated expenses
to be incurred from purchased energy and fuel costs.
After setting the components of the formula an EBA
formula approved by the Commission, becomes a part of
the Company's tariff and is the basis upon which rates
are set and revenues are collected. During or at the
end of the forecast period, retroactive adjustments are
made to the EBA to bring the forecasted numbers into
compliance with actual numbers. The result of the
retroactive adjustments together with forecasted
revenues and expenses for the next period are
presented in the next EBA hearing and the process
begins anew. See Commission Order On Rehearing, Case
No. 82-035-14, July 5, 1983, pages 2-3.

In the case at bar through the period in
question, the Company experienced substantially less

the forecast of the utility customers that forecasted the result that generating capacity was idle. The cost of the idle generating capacity were borne by the Company and its shareholders without offsetting benefit. The Company in an effort to use the idle generating facilities aggressively went and found a market for the energy with non-tariff customers. The result was non-tariff sales exceeded those forecasted by \$18,000,000.00. The Company by application to the Commission then sought modification of the EBA accounting procedure to enable one third of the revenue windfall from the non-tariff sales to flow to the Company and proposed that the other two thirds flow to the benefit of the Company's customers. Under the EBA procedure, without the proposed modification, the revenue windfall would inure to the benefit of the ratepayer. The evidence showed that the proposed and authorized EBA accounting modification would not result in the Company earning even near its authorized return on equity. (Exhibits)

The Division argue that the Company's request was being considered improperly as an energy cost pass-through pursuant to §54-7-12(3)(d), Utah Code Ann. (1983 Supp.), that the accounting procedure modification was retroactive ratemaking, and that the proposed request was not an energy cost pass-through

POINT I

THE COMMISSION'S ORDER ALLOWING AN ACCOUNTING MODIFICATION IN THE SUBJECT ENERGY BALANCING ACCOUNT DOES NOT CONSTITUTE A UTILITY RATE INCREASE OR RETROACTIVE RATEMAKING

Utah Code Ann. §54-7-12(2) (1983 Supp.) specifies the procedure pursuant to which public utilities may increase rates. Said section provides:

(2) Any public utility that proposes to effect a rate increase shall file appropriate schedules with the commission setting forth the proposed rate increase. The commission shall, either upon complaint, or upon its own initiative without complaint, after reasonable notice, hold a hearing to determine whether the proposed rate increase, or some other rate increase, is just and reasonable. Except as otherwise provided in subsection (3) of this section, no proposed rate increase is effective until after completion of the hearing and issuance of a final order by the commissioner with respect to the proposed increase.

Subpart (3)(d) of §54-7-12 specifies an exception to the above described general rate case procedure for rate increases based upon increased costs of the utility for fuel or energy purchased or obtained from specified supplies. The "fuel pass-through procedure" enables rates to reflect relatively quickly to often changing cost of fuel and purchased energy.

...fuel, as the cost of fuel and purchased energy have fluctuated in both directions since the statute was enacted, the overall impact of the fuel pass-through procedure has been positive in impact to both the company and its ratepayers.

Other jurisdictions have adopted the fuel pass-through procedure and have recognized a distinction between the process necessary to secure general rate relief and the process necessary to secure rate relief for fuel and purchased energy costs. Courts have determined that the fuel pass-through procedure does not constitute retroactive ratemaking. In The City of Norfolk v. Virginia Electric & Power Company, 9 Va. 505, 90 SE2d 140 (1955), the Virginia Supreme Court of Appeals approved a fuel clause (referred to by that court as an escalator clause) for a power company under its jurisdiction, recognizing a distinction between rate fixing and approving a fuel clause. The Virginia court decided that the Virginia escalator clause did not fix rates retroactively:

[T]he escalator clause is, therefore, highly remedial; it confers no benefit on the stockholders of the company except to help the avoidance of unjustified loss, and...it likewise deprives them of the possibility of keeping an unjustified gain.

In approving the escalator clause the Commission did not fix rates retroactively, but on the contrary, it authorized and prescribed a fixed mathematical formula to be inserted in

the schedules of the Company which will be used as a "guide, direction or rule of action" for determining future rates.

Record at 146-48.

In North Carolina ex rel. Utilities Commission v. Edmiston, 30 N.C.App. 459, 227 SE2d 593 (1976), the question of whether or not a surcharge could be imposed to collect for increasing fuel costs under authority of a 1975 statute allowing fuel adjustment was discussed. The court determined that in August 1975 the State Utilities Commission's order allowing the power company to apply a temporary surcharge to collect its increased fuel charges for July and August of 1975 did not constitute retroactive rate fixing, but was a proper approval of the fuel clause designed to recover previously incurred costs. The attorney general had argued that part of the August 17, 1975 order allowing Duke Power Company ("Duke") to apply a temporary surcharge to collect its increased fuel costs for July and August of 1975 constituted retroactive rate fixing which was not authorized by the North Carolina statutes. He said that the Commission cannot fix rates retroactively so as to make them collectible for past service. 227 SE2d at 599. The court, however, concluded that there was a difference between rate fixing and approving a fuel clause designed to recover previously incurred costs. The court found the Commission's position persuasive.

The facts of Lumisten, 1976, merit close attention. The court decided that decisions made in the context of a general rate fixing case are not applicable in the case of a fuel adjustment clause. The court authorized by the North Carolina Commission to implement a fuel clause which was only a means to make a certain fuel a workable figure from the standpoint of its customers and was not meant to "fix rates." 227 SE2d at 599. The court concluded that the cost of fuel used in the generating of electricity by a utility should be treated as a factor separate from all others in the utility's rate structure. Such was the intent of the general assembly in North Carolina when it enacted the statute authorizing such an adjustment. The statute in North Carolina expressly stated that a proceeding under it should not be treated as a general rate case. 227 SE2d at 600. The statute defined the procedures for considering an application to change the cost of fuel components and required the Commission to rule on the application within ninety days after it was filed. After October 1973, Duke could not determine the actual cost of electricity kilowatt hour for a given month until two months later. Therefore the bills rendered on January 1974 included increased fuel costs for November 1973 and caused a two month lag in recovering the increased

fuel costs, necessitating the surcharge in question to be applied for July and August of 1975. The Supreme Court upheld the Commission's action in authorizing the recovery of increased fuel costs and did not deem it an attempt by the utility to use a pass-through as means of increasing future rates nor the surcharge to be retroactive ratemaking or a rate change requiring a general rate case.

The facts in Edmisten, 1976, may be compared to the subject case. Utah's fuel adjustment clause statute [Utah Code Ann. §54-7-12(3)(d) (1983 Supp.)], like North Carolina's fuel clause, was designed so that the utility could recover fuel costs. In Edmisten the recovery of fuel costs was deemed necessary and was not determined by the court to be retroactive rate fixing, or an attempt by the utility to use the pass-through to increase future rates to make up for past deficits, or subject to the procedural requirements necessary for a rate increase. The accounting modification requested by Utah Power in the subject case is not an improper use of the EBA account, should not be subject to the procedures required in a general rate hearing, and is not retroactive rate fixing.

In North Carolina ex rel. Utilities Commission v. Edmisten, 291 NC 451, 232 SE2d 184 (1977), the court appears to reverse the decision made in Edmisten, 1976, cited supra. Shepard's Citations notes that

of the W. P. Carey with Public Company tried to bring the case to the court's attention. The Commission was informed that Public Company purchased W. P. Carey and that Public Company had a reasonable belief that W. P. Carey was one of the most valuable companies in the country. Variable should have been disclosed. DeVergio's opinion was that the case was not appropriate and as such was not to be pursued. There was no action taken with respect to Public Company as a result of this investigation.

W. P. Carey, Incorporated was investigated under Order No. 80-16, and the Commission was advised that adjustment was made for the year 1971 in which such costs were incurred. W. P. Carey reported its 1971 net income of \$4.4 million, which reflected the adjustments to the net income. Adjustments were made for the year 1971, but adjustment was not made for the year 1972, and it did not require a hearing.

The Commission was advised that it implemented the provisions of the W. P. Carey case treatment, in which the Commission, through Attorney General, is required to determine whether or not a hearing should be held under the provisions of the W. P. Carey without hearings,

...and that such increases would not be illegal if the increases were limited to purchase of power or fuel. In an opinion issued June 4, 1981, the attorney general advised that the legislature had apparently acquiesced to the Commission's practice of allowing increases under an automatic adjustment clause and that modification of the fuel adjustment clause may be made without a general consideration of the entire rate schedule of the company. See Op. Wis. Attorney General No. 35-81 (June 4, 1981).

Implementing automatic fuel cost adjustments is an accepted practice. As discussed in the previous report, support, in other jurisdictions where automatic fuel adjustments have been allowed, the courts have not considered the practice to be an attempt to increase future rates. Nor have the courts determined that a collection or surcharge necessary to adjust a miscalculation is retroactive ratemaking or illegal implementation of a new rate without following the procedure necessary in a general rate case.

Plaintiff in its brief seems to advocate a similar position arguing that case law and statutes identify the standards for determining "just and reasonable" rates, that rates must be prospective in effect under Public Statute Code Ann. §54-7-12(3)(d) (1983 Supp.), that the so-called fuel pass-through statute, constitutes an exception to Public Statute Code Ann. §54-7-12 (1983 Supp.) which

to the fuel elements of the account but to the non-fuel elements, i.e., non-tariff sales. Although an adjustment in precisely this form has not been sought previously in the past it is certainly consistent with the retroactive adjustments that are typically made in the account balancing process and certainly comports with the intent of the Commission to prevent windfall profits to the Company or its ratepayers. Without the proposed adjustment an \$18,000,000.00 revenue deficiency goes to the Company's ratepayers and no revenue benefit flows to the Company even though the Company is paying the fixed costs on the generating facilities which made the non-tariff sales possible.

The accounting adjustment the Company sought from the Commission granted was retroactive in nature and all other adjustments to the account components are retroactive in nature. The proposed adjustment is no different in terms of substance or form than those previously made in the account. All are retroactive and all are made in connection with the subject components. The Plover does not assert in this case that rates charged by the Company, or that rules, regulations, contracts or contracts affecting such rates are unjust, unreasonable, discriminatory or preferential or that the rates are insufficient. The Company did not petition the Commission did not allow any adjustment in the account. The Company merely sought an adjustment in the

balances due to the unusual circumstances affecting the account in the time frame specified above. These imbalances had resulted from rates which had been charged to the account. There could, therefore, be no retroactive ratemaking. The retroactive adjustment is not equivalent to retroactive ratemaking. The Company insists that the Commission has the authority to allow the subject adjustment and by so doing does not engage in retroactive ratemaking. If the Company's proposed adjustment in this case, however, suffers the infirmity suggested by Plaintiff, the Energy Balancing Account procedure established by the Commission, at the recommendation of Plaintiff, suffers from the same infirmity and in total constitutes retroactive ratemaking and is unlawful.

Intervenor further respectfully points out that Utah Code Ann. §54-7-12(3)(d) (1983 Supp.), the so-called fuel pass-through statute, speaks only to fuel costs and purchased energy costs. There is no mention or direction that non-tariff sales revenues are to be exempted from treatment in normal rate case circumstances. Accordingly, the Commission in establishing the account and including therein non-tariff sales revenues went well beyond the legislative directive and is therefore acting without authority and the EBA in its

is not to be declared unlawful. See Basin Flying

554 P.2d 1303, 10 ENERGY Commission, 531 P.2d 1303

(1976).

In its own conclusion, the Company submits that
§ 54-7-11(6) of 54-7-12 constitutes an exception to
the general rate case procedures specified in subpart
60 of 54-6-11, that the Utah fuel pass-through
statute relates only to fuel and purchased energy
costs, that practice under the EBA has involved the
making of retroactive adjustments to the account, that
the adjustment sought in the case at bar does not
cover fuel or purchased energy costs but non-tariff
rate revenue, and that the Commission adopted EBA
procedure is considerably broader than the statute
directs in that it regulates revenues from non-tariff
revenues as well as fuel and purchased energy costs.
Based upon the foregoing intervenor submits that the
accounting modification allowed by the Commission is
consistent with past practice under the EBA procedure
and consistent with Commission policy to prevent
unusual benefits to ratepayers as well as the Company.
However, this Court is persuaded that the proposed
accounting modification constitutes retroactive rate-
making. Intervenor submits that

1. all of the retroactive adjustments typically made in the EBA procedure constitute retroactive ratemaking and are therefore unlawful and

- the EBA procedure as presently adopted by the Commission goes well beyond the statutory directive and accordingly the whole accounting procedure is contrary to law and should be declared unlawful.

POINT 11

THE COMMISSION'S ORDER ALLOWING AN ACCOUNTING ADJUSTMENT IN THE ENERGY BALANCING ACCOUNT DOES NOT VIOLATE THE RULE AGAINST RETROACTIVE RATEMAKING

Plaintiff argues in Point II of its Brief that the Commission engaged in retroactive ratemaking, directly contravening Utah Code Ann. §54-4-4(1) (1983 Supp.), when it allowed the subject EBA accounting modification in its Order issued December 30, 1982 in Case No. 82-035-14.

Intervenor Utah Power submits that the Commission Order allowing the accounting adjustment in the EBA was not retroactive ratemaking but was, rather, an adjustment clearly authorized under Utah Code Ann. §54-4-13 (1983 Supp.) and Commission Report and Order in Case Nos. 78-035-21 and 79-035-03 issued July 20, 1979. Further the accounting modification is permitted pursuant to the Commission's authority to regulate accounting practices of public utilities [See Utah Code Ann. §54-4-13 (1953)] and this authority should be distinguished from the general ratemaking provisions as previously described. See also Office of Consumer's

Public Utilities Commission of Ohio, Ohio
Case No. 1796, August 31, 1983.

The Company agrees that rate fixing, as such, is accomplished retroactively. But in order to determine what elements or facts have constituted retroactive ratemaking, one must analyze case law where the issue has appeared, and compare those facts to the instant case. The Company will show how the facts and circumstances in the instant case are different from those in which the court determined that certain utility actions did constitute retroactive ratemaking. The facts in the instant case are more analogous to the facts in cases where the action did not constitute retroactive ratemaking.

The elements of retroactive ratemaking are defined in case law. In Edmisten, (1977), cited above, the court explained that retroactive ratemaking occurs when an additional charge is made for past use of utility service:

Technically, retroactive ratemaking occurs when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rate, for such past use.

Page 194.

In Edmisten, 1977, the question arose concerning whether or not a surcharge for fuel adjustment

prohibited retroactive ratemaking. The court did not prohibit the surcharge, but not on the grounds that it was retroactive ratemaking. The court concluded that the Commission, when it issued an order allowing the surcharge for fuel, was acting in excess of its authority under the statute allowing that particular type of fuel surcharge rate increases was no longer effective. The case is cited at 196. The case serves, among other things, to describe just what "retroactive ratemaking" is.

Retroactive ratemaking was one of the main topics discussed in City of Los Angeles v. Public Utilities Commission, 102 Cal.Rptr. 313, 7 C.3d 331, 39 P.S. 285 (1972). In City of Los Angeles, a telecommunications case, the court held that the public utilities commission has the power to prescribe rates prospectively only. In City of Los Angeles, Pacific requested that the Commission fix new rates for the purpose of refunds. The court denied the request pointing out that such an action would involve retroactive ratemaking. The court stated:

To permit the commission to redetermine whether the preexisting rates were unreasonable as of the date of its order and to establish new rates for the purpose of refunds would mean that the commission is establishing rates retroactively rather than prospectively. As we have seen, the Legislature has expressly prohibited the granting of reparations on the basis of unreasonableness, where, as here, there is an

approved rates, and the legislature has
the power to do prospective ratemaking.

401 P.2d.

In Pacific Telephone & Telegraph Company v. Public Utilities Commission, 44 Cal.Pptr. 1, 62 C2d 353, 121 P.2d 353 (1965) was another telecommunications case which involved a refund order made by the Commission. The Supreme Court held that the Commission lacks power to order refunds of amounts collected by a utility pursuant to approved rates and prior to the effective date of the decision ordering general rate reduction because to do so would be retrospective and therefore unlawful. In Pacific Telephone the Commission found that the rates it fixed in 1958 should be reduced by a certain amount of money annually from the date the Commission initiated its investigation and almost two years before issuance of its decision. The court further ordered that the utility refund to its customers amounts collected during the interim in excess of the reduced rates. Pacific Telephone and independent telephone companies challenged the refund order. The court explained that the legislature directed the Commission that after a hearing it is to order rates to be enforced thereafter prospectively only. 401 P.2d at 362-363. The Supreme Court determined that the Commission's power to refund did not extend to rates previously enforced.

of the rates in the instant case are different from those in City of Lowell, North Angles, and Pacific Telephone. The instant case fits the rates previously fixed by the Public Service Commission are not at issue. The change to be put in place is a modification in the rates required, not a change in a rate "to be put in place" which is why the courts in City of Lowell, North Angles, and Pacific Telephone disallowed the rate of return order.

In New England Telephone & Telegraph Company v. Public Utilities Commission, 358 A2d 1 (R.I. 1976) was a rate of return case in which the telephone company initiated certiorari proceedings to test the reasonableness of a decision and order of the public utilities commission. Among other issues presented was the question of whether or not the commission's implementation of a rate plan would retroactively reduce the company's revenue retroactively because of an allegedly wrongful order. In New England the company asked the court to permit calculation of the rate of return on the basis of known past losses, rather than resulting from the operation of an allegedly wrongful order. That, the court determined, was not the result in previous cases found to be disallowed because of the non-retroactivity principal. 358 A2d at 11. Therefore the court did not allow the retroactive rate of return. 358 A2d at 23. The

not contend that a stay of a rate order was the Company's exclusive remedy under the circumstances.

In Mountain States Telephone & Telegraph Company v. New Mexico State Corporation Commission, 90 N.M. 315, 563 P2d 588 (1977), a telephone utility was denied a rate increase by the Corporation Commission. The telephone company argued that the Company's revenue deficiency should be remedied by the court by ordering the Commission to make the rates retroactive. Mountain State complained that it lost revenue over a period of approximately six months because the Commission had not taken into consideration the most recent figures available to determine rates. The court decided that:

rate-making is legislative in its nature...it is axiomatic that legislative action operates prospectively, not retroactively.

90 N.M. at 318.

The court continued:

retroactive remedies, which are in nature of reparations rather than rate-making, are peculiarly judicial in character, and as such as beyond the authority of the Commission to grant.

90 P2d at 604.

The court decided that the rates would not be applied retroactively and that the rates fixed by the Commission would apply prospectively only. 563 P2d at 594. The Supreme Court reversed and remanded the case with instructions holding that (1) there was enough evidence present from which the Commission could have

of reasonable rates consistent with its discretionary public policy issues with regard to apportionment. It found that the utility was suffering from a rate deficiency, and could have determined a rate of return to which the utility was entitled, (2) the fact that the Commission had six months according to the constitution to establish new rates did not make it incumbent upon the Commission to act within six months, (3) the Commission's failure to allow basic exchange rates of the utility to go into effect under bond after it was requested to do so amounted to an unconstitutional confiscation of the utility's property, (4) the utility was deprived of due process when it wasn't given adequate notice as to the extent to which cost of living increases would be applied and was not apprised of the evidence that the Commission would demand, and (5) the utility was entitled to have the Commission instructed that the most recent economic data available was to be considered.

In the present case the Company is not asking for a change in rates. The Company is requesting a rate making adjustment, not implementation of a rate schedule that would increase the Company's revenue retroactively which would be illegal under the fact situation set forth in New England and Mountain States.

The Oklahoma Supreme Court, in Southwestern Bell Service Company v. The State of Oklahoma, 637 P.2d 1111 (1982), held that since the Oklahoma

the final order did not include the power to make retroactive adjustments in the fuel adjustment clause established by final order of the Commission to be effective (in the "fuel adjustment clause" statutes), the Commission could not adjust rates retroactive to the effective date of the final order of the Commission. In Oklahoma court decided that, since there was no express statutory authority retroactive to the effective date of the final order of the Commission establishing the rate, the Commission had no such power. In Southwestern the electric power utility appealed from orders of the Corporation Commission granting in part and denying in part the utility's application for a general rate increase. The court determined that where the utility's fuel adjustment clause was established by order of the Commission, and where its payments to a wholly owned subsidiary were in conformity with that order, the Commission improperly ordered a rebate of excessive charges made by the subsidiary to the utility for fuel purchases covering a period prior to the effective date of the order determining the charges to be excessive. In the subject case, the company seeks only to have the current Energy Balancing Account limited for a period between 1981 and 1982--not retroactive to the time the Order of the Commission establishing an Energy Balancing Account was issued. Therefore the Power Company's request for adjustment

Commission's Order allowing it was not retroactive. Existing under the law set forth in South

The facts of the instant case are more similar to those cases where the courts have determined that the rate taken was not retroactive ratemaking. See Edmisten, (1976), cited supra, (Shepherd's Citations 1976). This case was reversed in Edmisten 1977, as previously discussed previously, even though the Commission had allowed a surcharge in 1977, the 1976 case (consistent with the 1977 case) the court determined the Commission order authorizing an electric utility to supply a temporary surcharge to collect for increased fuel costs of prior months did not constitute retroactive ratemaking where the utility was unable to calculate its fuel cost for a full month until two months later. The facts of Edmisten, 1976, where there was no finding of retroactive ratemaking, may be compared to those in the instant case. In the instant case the Company could not accurately project the revenues it received by the customers under the above described circumstances and the resulting surcharges resulting in the \$18,000,000.00 revenue margin. As in Edmisten, 1976, the Company should be allowed an adjustment and the adjustment does not constitute retroactive

These cases, in turn, have also revealed that courts have held that retroactive rate adjustments do not constitute retroactive ratemaking. In Electric Light & Michigan Electric Company v. Federal Power Commission, 502 F.2d 337 (D.C. Cir. 1974), the court held that the effective date of the electric company's filing be changed retroactively where the Commission exceeded its authority by suspending use of its rate schedule. The Commission had delayed the effective date of the company's rate filings prescribed by the Federal Power Act. Therefore the Federal Power Commission order delayed the effective date of the electric company's tariff and the electric company was ordered to make a retroactive rate adjustment and to collect from its customers the difference between the proposed rates and the rates actually charged for the month period in question. 502 F.2d at 339-343. The Federal Power Commission had issued an order postponing an effective date for an electric company's rate schedule and suspended the rates for five months thereafter. However, the Federal Power Commission was not allowed to do so under the Federal Power Act. The electric company filed a new tariff on June 1, 1973. The Commission designated August 13th as the effective date and then suspended its use until January 1, 1974. The court determined that the Commission exceeded its authority to delay the effective date of the

July 13, 1972 until August 13, 1972 and also lacked authority to suspend the new rates until January 13, 1973. The court ordered the Commission to give the rate filing effect as of July 14, 1972. The court decided that the electric company was entitled to the difference between the filed rates and the rates actually charged for the five month period from July 14, 1972 to January 13, 1973, but that the electric company could not collect retroactive rate increases for the five month period provided. The court concluded that a refund might be ordered after another hearing on the issue. In summary, the electric company was allowed to make prospective rate adjustments (i.e. collect the difference between its old and new rates for a certain period) which did not amount to retroactive ratemaking by the Federal Power Commission.

Another case which addresses the issue of retroactive ratemaking is State of North Carolina, ex D. C. Utilities v. City of Durham, 282 N.C. 308, 193 S.E. 2d 15 (1972). In Durham, the Supreme Court reversed a court of appeals judgment which reversed a previous Commission order permitting a distributor to increase its rates. The Supreme Court remanded the case so that the Commission order permitting the distributor to increase its rates could be implemented. The Supreme Court articulated the rule that a Utilities Commission may increase rates retroactively so as to make them

... for past service. 193 SE2d at 102. In
... however, the court allowed the Commission's
... permitting the distributor to increase its rates
... the public service sought rate increases for
... or not increasing the company's return upon
... properties but of recovering the additional costs
... was purchased from its supplier so as to avoid
... in such a return. The Commission did not
... that the return earned by the Public Service upon
... property, prior to the increases in the rates, was
... or unreasonable and therefore the court
... the court of appeals decision which would have
... a refund.

In Southwest Gas Corporation v. The Public
Service Commission of Nevada, 86 Nev. 662, 474 P2d 379
1971, a case in which the gas company was ordered by
the Public Service Commission to follow certain billing
procedures to make re-funds to customers, the Supreme
Court, among other issues, decided that the Public
Service Commission acted within permissible limits of
jurisdiction in ordering refunds to customers and
affirmed the district court's judgment. In this case
we do not hold:

It is a basic legal principal that a
rate is made to operate in the future
and cannot be made to apply retro-
actively, here, however, we find no

evidence of an attempt by the respondent to apply a rate retroactively.

Id. at 383.

In this case the court did not find retroactive rate-making because it found that the Commission's first order required prospective rule amendments to prevent the gas company from indulging in any long rate-making and by requiring it to adhere to a California altitude chart. In another part of the order the court found that the Commission imposed sanctions against the gas company for its unjustified use of long rate-making billing and for its failure to adhere to an altitude Adjustment Schedule which it had on file and the court did not find such orders to be an attempt to apply a rate retroactively. 474 P2d at 383.

Shell Oil Company v. Federal Power Commission, 476 P2d 1061 (5th Cir. 1975), was a case in which the Commission promulgated a national rate which was held down to be unjust or unreasonable and was upheld by the court of appeals. In Shell Oil Company the court held that:

replacing one incentive structure with another or providing new alternative rate system is an exercise of Federal Power Commission's discretion which does not amount to retroactive rate regulation...

Id. at 1063.

Highland Resources Inc. v. Federal Power Commission, 537 P2d 1336 (5th Cir. 1976), was a case

the instant findings were given retroactive effect to the date of filing of said applications and such action does not constitute retroactive ratemaking.

As to the cases cited and analyzed above, the Commission, the Company sought and the Commission did not constitute retroactive rate making. In the instant case, the rates were not at issue. The Company is not seeking a rate increase. No order was issued altering rates. The instant case dealt with balancing the Energy Account and with the issue of treatment of non-fossil resale revenue and how that revenue should be apportioned. The Commission's order allowing the requested adjustment was justified under the findings in the case and under current case law regarding the pass-through fuel adjustments.

POINT III

THE FACT OF FINDINGS OR CONCLUSIONS THAT THE INCREASE IN RATES IS JUST AND REASONABLE DOES NOT RENDER THE COMMISSION ORDER ARBITRARY AND CAPRICIOUS SINCE AN ACCOUNTING MODIFICATION AND NOT AN INCREASE IN RATES WAS AT ISSUE BEFORE THE COMMISSION

Plaintiff argues that Utah law requires that rates charged by utilities be just and reasonable, that the Commission has authority, after hearing, to fix

that the Commission must make findings based on substantial evidence as to each essential element of the claim. Plaintiff further argues that the Commission in the subject case did not follow the established law and, accordingly, the Commission's order is arbitrary and capricious and the "rate freeze" granted the Company is unlawful. Plaintiff contends that there are no findings or conclusions that the increase in rates is just and reasonable and that there is no competent or substantial evidence to support such a finding.

The Company agrees with the Plaintiff's general statement of the law but does not agree with the Division's suggested application thereof. This case is not a rate case. The matters considered in this case have been carved out of the traditional rate case model and have been treated separately since the special account was created.

With respect to the Division's position that there must be substantial evidence to support findings of fact in this case there are not adequate findings of fact or conclusions and an order authorizing a "rate freeze" the Company agrees. Again this is not a rate case. The Company is not seeking a rate increase. No rate issue is being altered. This is a case dealing with the issue of treatment of non-tariff imports, and with respect to that issue, the

...there is substantial evidence in this case to support the findings, conclusions and order of the Commission authorizing the accounting adjustment. The Division does not contest this. The Division contends only that the Commission has exceeded its authority in improperly granting a rate increase and that the order constitutes retroactive ratemaking.

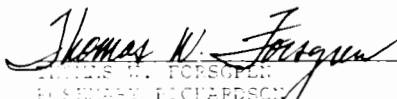
In conclusion and based upon the above, the Division respectfully submits that the case now before the Commission is not a rate case but a case dealing with accounting modification in an account which the Commission has ordered be treated separate and apart from general rate hearings. The adjustment proposed by the Company and approved by the Commission was supported by substantial evidence and based upon that evidence was found to be just and reasonable. The Company respectfully urges the Court to affirm the Commission's orders.

CONCLUSION

The Commission allowed accounting modification in the subject FEA permits a retroactive adjustment. The stated intent of the Commission to distribute windfall revenue benefits to ratepayers or the public. Without the adjustment a windfall benefit of

... to the benefit of the
... to the amount in
... by the Commission to prevent
... result for the Company respectfully
... the Commission's order herein preventing
... result should be affirmed.

... submitted this 19th day of
... 1963.


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RECEIPT OF SERVICE BY MAIL

I hereby certify that two true and correct copies of the foregoing brief of Intervenor Utah Power and Light Company were mailed or delivered this 19th day of July, 1963, to each of the following:

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