

# KEEPING THE LIGHTS ON—AT ALL COSTS? IMPLORING CONSISTENT PRUDENCE REVIEW AND A PRUDENCE STANDARD THAT INCLUDES DEMAND RESPONSE AND RESPONSIBLE PORTFOLIO MANAGEMENT

Motel 6 burnt itself into the nation's aural memory with Tom Bodett's parting words after every commercial, "We'll leave the light on for ya." While Motel 6 might deserve credit for *leaving* the light on, for the majority of Americans, the nation's investor owned utilities shoulder responsibility for *keeping* the lights on.<sup>1</sup>

## INTRODUCTION

Electric utilities have an obligation to keep the lights on, but prudently. A "public"<sup>2</sup> utility holds exclusive retail franchises, the terms and conditions of which oblige both service to all customers within a franchise area and sensible management of the utility's energy portfolio.<sup>3</sup> If utilities fail to secure an ample supply of electricity in advance, the prudence of their management is called into question. Ratepayers have no obligation to compensate utility management and shareholders for imprudent decisions and behavior.<sup>4</sup> When establishing rates, state Public Utilities Commissions<sup>5</sup> (PUCs) review utilities' decisions and behavior, and one standard they can use to measure is a prudence standard of review. How do utilities plan for the future, however, when different PUCs apply such divergent interpretations of the prudence standard that diametrically

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1. See Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992—A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447, 451 n.14 ("Private, profit-making electric companies serve approximately 75% of the nation's electric consumers."). "The electric utility industry is one of the nation's largest industries. The gross stock of fixed private capital in the investor-owned electric utility industry (excluding cooperatives and publicly-owned systems) was \$931.2 billion in 1991." See *id.* at 449 n.2 (citing BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS (Aug. 1992)).

2. Investor-owned utilities are commonly referred to as "public" utilities, but they are privately owned.

3. Joel B. Kleinman & Lisa M.R. Miller, *Who's in Charge Here? Federal Versus State Regulation in the New Era of "Deregulated" Energy: Lessons From California*, 2003 A.B.A. SEC. ENV'T, ENERGY, & RES.105, 107.

4. Green Mountain Power Corp., 184 Pub. Util. Rep. (PUR) 4th 1, 3 & n.5 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535 (citing Cent. Vt. Pub. Serv. Corp., 83 Pub. Util. Rep. (PUR) 4th 532 (Vt. Pub. Serv. Bd. May 15, 1987), 1987 WL 257812; Vt. Elec. Co-op, Inc., 148 Pub. Util. Rep. (PUR) 4th 460 (Vt. Pub. Serv. Bd. Dec. 30, 1993), 1993 WL 595683; and Vt. Elec. Co-op, Inc., Nos. 5810, 5811, 5812 (Vt. Pub. Serv. Bd. Feb. 8, 1996), 1996 WL 131186, to show that all disallow imprudent costs).

5. Also called state Public Service Commissions (PSCs) or Public Service Boards (PSBs)—depending on the state, PUC refers to "[a] commission created by a legislature to regulate public utilities or public-service corporations." BLACK'S LAW DICTIONARY 286 (8th ed. 2004).

opposite results obtain? Perhaps “[t]he art of rate making is an art of wise compromise,”<sup>6</sup> but both PUCs and utilities ought to be able to count on and play by certain basic ground rules. Creating regulatory certainty for customers and the electric power industry should be one goal of regulating bodies.<sup>7</sup> Because many utilities’ service areas span more than one state, it makes sense for PUCs to cross state lines to coordinate at least minimum standards.

This Note provides a brief historical background of electric utility regulation in Part I. Part II examines inconsistent applications of the prudence standard. Finally, Part III proposes a measure of regulatory certainty in the prudence standard for state PUCs and utilities. While differences from state to state are inevitable, a minimum prudence standard should be established that all PUCs can apply consistently. Such a minimum prudence standard should require utilities to implement initiatives that reduce electricity demand and increase efficiency (demand response), as well as to maintain responsible, diversified means of meeting electricity demand (portfolio management).

## I. BACKGROUND

### A. *Natural Monopolies and the Obligation to Serve*

In a market economy, supply and demand, together with competition among suppliers, typically, over time, put a check on the number and size of companies that provide a product or service. In the case of providing electricity, economic barriers, such as extremely high costs to enter the market and economies of scale with respect to power lines and large generation facilities, tend to discourage the existence of more than one provider.<sup>8</sup> The resulting single provider holds a natural monopoly, meaning

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6. JAMES C. BONBRIGHT, *PRINCIPLES OF PUBLIC UTILITY RATES* 38 (1961) (imploping consideration of unintended costly or harmful side effects when determining the reasonableness of any rates or rate policy).

7. See FED. ENERGY REG. COMM’N, *WHITE PAPER: WHOLESALE POWER MARKET PLATFORM 1* (2003), available at [http://www.ferc.gov/industries/electric/indus-act/smd/white\\_paper.pdf](http://www.ferc.gov/industries/electric/indus-act/smd/white_paper.pdf) (stating that one of the Federal Energy Regulatory Commission’s goals continues to be “stability and regulatory certainty for customers, the electric power industry, and investors”).

8. Compare RICHARD J. PIERCE, JR. & ERNEST GELLHORN, *REGULATED INDUSTRIES IN A NUTSHELL* 48–54 (4th ed. 1999) (explaining the simple concept of natural monopolies), with BONBRIGHT, *supra* note 6, at 10 (challenging whether natural monopolies are as inevitable as generally accepted). But see SALLY HUNT, *MAKING COMPETITION WORK IN ELECTRICITY* 4 (2002) (“We now know from experience elsewhere and in parts of the United States that competition in electricity production is feasible. We know that many of the reasons the industry was organized as regulated

that “some businesses require such high capital investment in infrastructure that monopolies are more efficient because they avoid duplication of expensive infrastructure and can take advantage of necessary economies of scale.”<sup>9</sup> If the natural monopoly eliminates competition, then a company must be kept in check somehow. Traditionally, governments monitor natural monopolies through regulation. Fundamental to the concept of regulation of a natural utility monopoly is that, in exchange for a protected market franchise (service territory), a utility accepts the obligation to provide electricity on demand, reasonably and satisfactorily, to all customers in its market area.<sup>10</sup>

State and federal mandates also require public utilities to maintain uninterrupted service despite cost fluctuations, energy crises, or other unforeseen events. Throughout their market areas, utilities must provide power, regardless, and in return, they have historically been guaranteed the opportunity to make a regulated rate of return—an arrangement utilities often refer to as the “regulatory compact” between the PUC and the utility, though no actual regulatory compact exists in law.<sup>11</sup>

There must be some restraint with respect to the costs utilities can pass on to consumers, though. PUCs do not automatically pass costs through to ratepayers merely because utilities keep the lights on. PUCs subject utilities’ decisions and behavior to prudence reviews and sometimes even disallow costs.<sup>12</sup>

Utilities’ costs, expenses, decisions, and resulting behaviors have changed in many ways due to industry restructuring. Utilities have traditionally been vertically integrated, incorporating the three components required to deliver electricity: production (generation), transmission, and

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monopolies for so long no longer apply.”).

9. SHARON BEDER, *POWER PLAY: THE FIGHT TO CONTROL THE WORLD’S ELECTRICITY* 26 (2003); *see also* JAMES C. BONBRIGHT ET AL., *PRINCIPLES OF PUBLIC UTILITY RATES* 23 (2d ed. 1988) (defining natural monopoly as a “subadditivity of costs, which exists when all the industry output (or array of outputs) demanded can be produced most efficiently only by a single firm”); *BLACK’S LAW DICTIONARY* 1028 (8th ed. 2004) (defining natural monopoly as “[a] monopoly resulting from a circumstance over which the monopolist has no power, as when the market for a product is so limited that only one plant is needed to meet demand”).

10. BONBRIGHT, *supra* note 6, at vii.

11. There is nothing in law that explicitly states that a compact exists. If a “regulatory compact” exists at all, it is between the polity (the state, not the PUC) and the utility. The notion of such a formal contract existing has been put forward chiefly by the utilities, particularly during the debates on restructuring and stranded costs, often to justify what PUCs considered outrageous demands in protection of their assets and revenues. E-mail from Rick Weston, Director, The Regulatory Assistance Project, to Heather Jarvis (Jan. 12, 2004) (on file with author).

12. As this Note will set forth, however, PUCs do not, but should, use prudence reviews consistently.

distribution.<sup>13</sup> In recent years, some states have restructured from the vertical integration, and the ensuing partial unbundling of the three components has resulted in many large utilities actually divesting themselves of their generation, which has altered their perspective on the market. In states that have restructured, the intention was that generation would be subject to competitive discipline, and that the components that remained natural monopolies (transmission and distribution) would remain regulated. Many utilities, whether restructured or not, now augment their overall capacity by purchasing electricity on the wholesale market, while others have begun selling power on the wholesale market.

As utilities have gained broader decision-making freedom, state PUCs grapple with questions of whether utilities can pass all costs to consumers to recover their incurred costs. PUCs must weigh utilities' guaranteed opportunity for recapture of costs with consumer interests in reliable, low-cost power. Ideally, PUCs establish rates as low as they can fairly go. In some cases, perhaps PUCs' focus on consumers' interests over utilities' interests retards utilities' incentives to take risks for fear of not being able to recapture expenditures. On the other hand, if utilities manage risks prudently, and if utilities' costs are prudent, PUCs will generally include the prudently incurred costs in rates.

In this tumultuous energy-intensive era, riddled with unforeseen crises, what balance between consumer and utility interests is appropriate? As the turbulent energy landscape expands, as utilities meet ever-increasing energy use by purchasing power in a fluctuating wholesale market, and as PUCs sometimes address questions of fairness by claiming that their decisions do "not result in unremunerative or confiscatory rates,"<sup>14</sup> some predictable decision-making standard must apply.

### *B. Wholesale Markets*

The Federal Power and Public Utility Holding Company Acts of 1935 (FPA and PUHCA, respectively) established a balance between federal and state regulation of monopoly utility franchises, which for electric utilities includes regulation of the three operations: generation, transmission, and distribution.<sup>15</sup> The FPA gave jurisdiction over wholesale transactions to the

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13. *E.g.*, LEONARD S. HYMAN, *AMERICA'S ELECTRIC UTILITIES: PAST, PRESENT AND FUTURE* 117 (2d ed. 1985).

14. *PacifiCorp*, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm'n Mar. 6, 2003), 2003 WL 1900923, ¶¶ 320, 321, 326 (repeating, without much explanation, conclusory statements that the results of their rates were neither unremunerative nor confiscatory).

15. Federal Power Act of 1935, 16 U.S.C. § 824 (2000); Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 (2000).

Federal Power Commission (now the Federal Energy Regulatory Commission (FERC)), with states retaining jurisdiction over retail transactions.<sup>16</sup> The Public Utility Regulatory Policies Act of 1978 (PURPA) introduced some degree of competition into the generation of electricity, requiring utilities, under specified circumstances, to purchase power that they did not generate through their own facilities.<sup>17</sup> Then in 1992, the Energy Policy Act created the opportunity for electric utility restructuring and expanded the wholesale market in electricity generation by requiring owners of transmission lines to carry electricity generated by other companies.<sup>18</sup> Interaction of the expanded wholesale transmission market with a regulated distribution monopoly has complicated regulatory challenges and blurred lines between FERC jurisdiction and state PUC jurisdiction. According to one commentator, they “have taken the industry apart and have put nothing comprehensive in its place.”<sup>19</sup>

Expanded wholesale electricity generation markets have added significant complexity to business-as-usual utility regulation. Utilities often feel the brunt of regulatory uncertainty:

Utilities increasingly perceived a breakdown in the “regulatory compact” under which utilities had come to believe they were entitled to recover fully all of their utility investments plus a return on equity. No longer was it a “foregone conclusion that a franchise utility, with an obligation to serve, would build its own new generating capacity.” Buying power (from other utilities or non-utility generators) rather than building generating capacity—and thereby shifting rather than shouldering construction and operating risk—became an option considered favorably by an increasing number of utilities.<sup>20</sup>

In other words, faced with regulatory uncertainty and given another option, utilities often seized opportunities to reduce their perceived risk by reducing or eliminating production responsibilities.

Though restructuring is not directly relevant to prudence, restructuring was at least a partial attempt to eliminate prudence questions regarding generation. Restructuring was intended to provide a more equitable sharing of risks and benefits between companies (shareholders) and consumers by

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16. BEDER, *supra* note 9, at 66; *see also* 42 U.S.C. §§ 7151(b), 7171(a), 7172(a), 7291, 7293 (2000) (establishing and granting powers to the Federal Power Commission).

17. Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2621(d)(10) (2000).

18. Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2915 (1992).

19. HUNT, *supra* note 8, at 12.

20. Watkiss & Smith, *supra* note 1, at 452 (footnote omitted).

subjecting companies to competitive discipline and possible losses of value rather than to regulatory discipline. However, as the next Part shows, regulation and regulatory uncertainty still abound.

## II. DARK SITUATIONS

### A. *Prudent Power Providers—One Standard*

The historical standard for prudence is what a reasonable, professional utility manager would have done in the situation under scrutiny.<sup>21</sup> A thorough prudence review examines every aspect of information available to a utility at the time it made a particular decision and then assesses how the utility performed based on that information—whether the utility’s decisions *and* actions reflect prudent care.<sup>22</sup> While loosely analogous to the classic legal “reasonable person” standard, cases nevertheless tend to turn on sophisticated understandings of what utility managers “should” have done, according to what they knew or should have known at the time they made the decision under review.<sup>23</sup> Although PUCs often give substantial deference to the judgment of utility management, PUCs do “not merely presume that management operated properly, and [a PUC evaluating prudence] holds the company responsible for making all reasonable efforts to gather relevant information and to respond appropriately.”<sup>24</sup> Because state PUCs apply a prudence standard in retrospect, according to what a decision-maker knew or should have known at the time the decision was made, “[t]he further the review is from the utility decision, the more difficult it is. [The prudence review] should not be influenced by new information arising subsequent to the time such management decisions were made, since to do so results in an inequitable ‘20-20 hindsight’ analysis.”<sup>25</sup>

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21. See *Green Mountain Power Corp.*, 184 Pub. Util. Rep. (PUR) 4th 1, 4 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535 (concluding that Green Mountain Power’s rate determinations were “just and reasonable”). Prudence is not confined to power supply. For example, a utility in Vermont, the Central Vermont Public Service Corporation, was found imprudent twenty years ago in the design and construction of the Seabrook Nuclear Power Station. *Cent. Vt. Pub. Serv. Corp.*, 83 Pub. Util. Rep. (PUR) 4th 532 (Vt. Pub. Serv. Bd. May 15, 1987), 1987 WL 257812, at \*1.

22. For an example of meticulous prudence review done by the Vermont Public Service Board, see *Green Mountain Power Corp.*, 184 Pub. Util. Rep. (PUR) 4th 1, 193–207 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535.

23. Telephone Interview with Richard Cowart, Director, The Regulatory Assistance Project, Montpelier, Vermont, and former Chair of the Vermont Public Service Board (Oct. 1, 2003).

24. *Green Mountain Power Corp.*, 184 Pub. Util. Rep. (PUR) 4th 1, 217 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535.

25. William A. Badger, *Prudence Reviews: New Approaches Are Needed*, 130 No. 2 PUB. UTIL. FORT., July 15, 1992, at 22, 24.

The absence of a prudence requirement would mean that so long as utilities kept the lights on, they could change whatever they wanted at whatever costs they would incur without concern for whether PUCs would pass costs through to ratepayers. Such an imbalance of utilities' interests over individual consumers' interests is precisely what PUCs are charged to guard against.<sup>26</sup> Nevertheless, using a prudence standard of review is not mandatory, nor do state PUCs apply a prudence standard categorically to all utility decisions and actions.

According to *Federal Power Commission v. Hope Natural Gas Co.*, PUCs enjoy flexibility in their rate-making and are not bound to "the use of any single formula or combination of formulae in determining rates."<sup>27</sup> The flexibility provided by *Hope* invites PUCs to combine standards as they see fit, focusing on, for example, financial harm, end results, prudence, or a balancing of interests. *Hope* is tremendously outcome-focused as it declares that "[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling,"<sup>28</sup> and "[i]t is not theory but the *impact* of the rate order which counts."<sup>29</sup>

Irrespective of the flexibility granted in *Hope*, skewed impact and erratic results reached under the current free application of standards implores tighter adherence to a more uniform prudence standard. The wide latitude *Hope* granted to PUCs to achieve reasonable rates should be narrowed in the face of a changed and changing electricity industry. Utilities have many masters—PUCs, FERC, shareholders, and the market—with each master asserting its own interest. If PUCs let down on the regulatory process by inconsistently applying a widely variable standard, they introduce additional uncertainty into utilities' decision-making processes. By failing to assert consistently the interests of ratepayers through an ecumenical prudence standard, PUCs create a void into which those asserting other interests, such as industry organizations, can creep.<sup>30</sup> The goal of advocating a more uniform, broadly applicable standard is not

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26. See BONBRIGHT, *supra* note 6, at 39 (arguing that a PUC is justified in considering the interests of consumers its sole responsibility). However, Bonbright states an important caveat, "the legitimate interests of investors may be regarded as amply protected by the allowance of rates sufficiently high to maintain corporate credit and hence to assure the maintenance of adequate service." *Id.*

27. Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

28. *Id.*

29. *Id.* (emphasis added). "If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important." *Id.*

30. Notwithstanding the fact that industry organizations do represent industry ratepayers, individual electricity consumers do not enjoy the support of an organized group outside the PUC to advocate for their interests.

to “unnecessarily foreclose alternatives,” as feared by *Hope* progeny *Duquesne Light Co. v. Barasch*; rather, a more uniform, consistently applied standard would aim to create a standard upon which utilities and PUCs can rely in such an otherwise tumultuous energy environment.<sup>31</sup>

### B. One Standard—Myriad Applications

Since the partial unbundling of the components required to deliver electricity (production, transmission, and distribution), many large electric utilities have met their demand by purchasing power on the wholesale market as part of building their portfolio for providing power. In the Western Power Crisis of 2000–2001<sup>32</sup> that hurled thousands into darkness, while entire regions were blacked out because of power rationing, wholesale power prices soared to “unforeseen, unprecedented levels.”<sup>33</sup> The Federal Energy Regulatory Commission (FERC) corroborated the extreme situation:

The [FERC] found that the electric market structure and market rules for wholesale sales of electric energy in California were seriously flawed and that these structures and rules, in conjunction with an imbalance of supply and demand in California, have caused, and continued to have the potential to cause, unjust and unreasonable rates for short-term energy (Day-Ahead, Day-of, Ancillary Services and real-time energy sales) under certain conditions. The Commission identified a number of rules and regulatory policies as flawed . . . .<sup>34</sup>

While the usual recourse would be for utilities to appeal to the PUCs in their provider states for permission to increase rates, in many cases PUCs denied utilities throughout the Western states permission to raise consumer rates to recapture significant costs due to wholesale power price spikes. A perplexing case is the tale of multi-state provider, PacifiCorp, which sought to recapture its monstrous costs. Getting the lights back on cost the

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31. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 316 (1989) (reaffirming *Hope* and stating that adoption of the prudent investment rule as the single constitutional standard of valuation would be “inconsistent with the view of the Constitution this Court has taken since *Hope Natural Gas*,” and “would unnecessarily foreclose alternatives which could benefit both consumers and investors”).

32. *PacifiCorp*, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm’n Mar. 6, 2003), 2003 WL 1900923, ¶ 60.

33. Bill Lockett, *PacifiCorp Wants Expedited Rate Hike: Prices Could Increase Aug. 21*, CASPER STAR-TRIB. (Wyo.), Aug. 18, 2001, at A1 (on file with author).

34. *PacifiCorp v. Reliant Energy Servs., Inc.*, 105 Fed. Energy Reg. Comm’n Rep. (CCH) 61,184 (2003), 2003 WL 22628176, ¶ 5.

company a great deal. Overall, “[i]f PacifiCorp is able to recover all of these costs by passing them through to its customers, the rate increase would amount to 1.5 percent, 1.8 percent, and 2.7 percent for PacifiCorp’s residential, commercial and industrial customers.”<sup>35</sup> Passing the costs through to its customers, however, has not necessarily proven reliable. The Wyoming Public Service Commission refused to grant any of the ninety-one million dollar rate increase for which PacifiCorp applied to recapture Wyoming’s share of its costs.<sup>36</sup> Conversely, to recapture Oregon’s share of costs for the very same circumstances, the Oregon Public Utility Commission granted eighty-five percent of the amount requested—one hundred percent of the entire amount agreed upon in stipulations between PacifiCorp and other interested parties.<sup>37</sup> Prudence guided both decisions—explicitly or implicitly—as to whether PacifiCorp’s actions leading up to the power crises proved sensible and cautious.

PacifiCorp is an investor-owned utility that provides electric service in six states: Oregon, Washington, California, Utah, Idaho, and Wyoming.<sup>38</sup> PacifiCorp is based in Portland, Oregon, is owned by Glasgow-based Scottish Power, and operates most of its service territory under the name “Pacific Power.”<sup>39</sup> Pacific Power serves approximately seventy percent of Wyoming and thirty-one percent of Oregon’s electricity needs.<sup>40</sup> The company typically generates ninety to ninety-five percent of its own electricity and purchases additional power as needed from the wholesale market.<sup>41</sup> PacifiCorp also sells power on the wholesale market, thus being both a customer and market contributor.<sup>42</sup>

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35. *Id.* ¶ 67.

36. PacifiCorp, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm’n Mar. 6, 2003), 2003 WL 1900923, ¶¶ 1–2, 320–21.

37. *See Indus. Customers of Northwest Utils. v. PacifiCorp*, 218 Pub. Util. Rep. (PUR) 4th 465 (Or. Pub. Util. Comm’n Jul. 18, 2002), 2002 Ore. PUC LEXIS 277, at \*8 (stipulating to a disallowance of fifteen percent, the result of a formula agreed upon by all parties, used to figure prudently incurred excess net power costs).

38. PacifiCorp, PacifiCorp Facts, at <http://www.pacificcorp.com/Navigation/Navigation3877.html> (last visited July 28, 2005).

39. Bill Lockett, *Report Blames PacifiCorp for Power Plant Failure*, CASPER STAR-TRIB. (Wyo.), Dec. 12, 2002, at A1, available at <http://www.casperstartribune.net/articles/2002/12/12/news/f6fc47751ec726fa4820da5822084e25.txt> [hereinafter *Report Blames PacifiCorp*]. Note that the *Casper Star Tribune* article refers to the former company name in Wyoming, “Pacific Power and Light,” but the operating name in Oregon, Washington, Wyoming, and California is “Pacific Power.” *See* PacifiCorp Homepage, <http://www.pacificcorp.com> (last visited July 28, 2005); PacifiCorp, *supra* note 38.

40. *Report Blames PacifiCorp*, *supra* note 39; Oregon Dep’t of Energy, Electricity Supply and Oregon, at <http://egov.oregon.gov/ENERGY/supply.shtml> (last visited July 28, 2005).

41. Bill Lockett, *AARP Opposes PacifiCorp Hike*, CASPER STAR-TRIB. (Wyo.), Oct. 16, 2001, at B1.

42. *PacifiCorp v. Reliant Energy Servs., Inc.*, 105 Fed. Energy Reg. Comm’n Rep. (CCH) 61,184 (2003), 2003 WL 22628176, ¶ 10.

Prices on the wholesale market spiked to unprecedented levels when the FERC abdicated its responsibility to assure “just and reasonable” wholesale prices; the FERC also failed for months to prevent generators from abusing the deregulated California wholesale market by withholding units and forcing price increases as a result.<sup>43</sup> A series of four significant, concurrent events—coupled with indecisive federal action—caused PacifiCorp to pay tremendously high prices to do business in 2000 and 2001.<sup>44</sup> Beginning in May of 2000, PacifiCorp paid up to \$500 per megawatt-hour (MWh) for wholesale electricity that had previously cost it twenty-five to thirty dollars per MWh.<sup>45</sup> “[D]uring the enormous price spikes, a 430-Megawatt coal-fired power plant in Utah [Hunter Number One] had a ‘complete meltdown’” that lasted five months, which forced PacifiCorp to purchase even more of the costly wholesale electricity.<sup>46</sup> To further compound the financial impact and require PacifiCorp to purchase even more expensive wholesale power, the sale of their Centralia generating plant that was begun in April 1999<sup>47</sup> came to fruition May 4, 2000, taking the power Centralia would otherwise have generated out of PacifiCorp’s portfolio.<sup>48</sup> Additionally, hydroelectric power production was down due to the drought that began in 2000.<sup>49</sup>

Unfortunate timing of subsequent federal price caps on the erratic wholesale market exacerbated PacifiCorp’s situation as it tried to recoup its costs by selling short-term electricity contracts to offset the cost of the expensive wholesale power it had purchased. PacifiCorp had been netting costs by purchasing contracts in a “dollar averaging” strategy, and, worried

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43. *Proposed Changes in Electricity Trading Markets: Congressional Testimony Before the Senate Energy and Natural Resources Comm’n*, 107th Cong. (2002), available at 2002 WL 100237279 (statement of Ms. Marilyn Showalter, Chairwoman, Washington State Utils. and Transp. Comm’n); see also *The Smoking Gun; Memos Show Enron Gamed California Market*, SAN DIEGO UNION-TRIB., May 8, 2002, at B8, available at 2002 WLNR 11163479 (stating that FERC failed to protect California consumers while Enron manipulated the market).

44. Bill Luckett, *PacifiCorp Loses Rate Hike Appeal*, CASPER STAR-TRIB. (Wyo.), Dec. 14, 2004 [hereinafter *PacifiCorp Loses Rate Hike Appeal*], at A1, available at <http://www.casperstartribune.net/articles/2004/12/14/news/wyoming/d31b31986fc522bd87256f6a000d91a3.txt>; Bill Luckett, *PacifiCorp Files for Rate Hike: Increases Would Vary in West, East*, CASPER STAR-TRIB. (Wyo.) May 8, 2002, at A1.

45. Mark Brady, *Pacific Power Makes Plea for Rate Hike*, CASPER STAR-TRIB. (Wyo.), Oct. 23, 2002, at A3, available at <http://www.casperstartribune.net/articles/2002/10/23/news/casper/96a925cac8d0d95387256c5b00058b4d.txt>.

46. *Id.* (quoting Bob Tarantola, Pacific Power’s Wyoming Vice President).

47. *Indus. Customers of Northwest Utils. v. PacifiCorp*, 218 Pub. Util. Rep. (PUR) 4th 465 (Or. Pub. Util. Comm’n Jul. 18, 2002), 2002 Ore. PUC LEXIS 277, at \*22.

48. *PacifiCorp*, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm’n Mar. 6, 2003), 2003 WL 1900923, ¶ 181.

49. Brady, *supra* note 45.

that the company would come up “‘short’ sufficient energy to serve its peak summer load, PacifiCorp purchased more energy than it actually needed to serve its loads; the electricity supplied during the ‘shoulder hours’ was surplus. PacifiCorp typically sold the surplus on the futures market in an effort to recoup some of its expenditures.”<sup>50</sup>

These four independent situations—exorbitant wholesale prices, the Hunter Number One generator breakdown, the Centralia sale timing, and the drought affecting hydroelectric production—created quite a calamity for PacifiCorp. To recover its costs, PacifiCorp filed with the PUCs in its service states for permission to increase both base rates and interim rates to electricity consumers.<sup>51</sup> PacifiCorp faced a separate PUC rate case in each service state to review PacifiCorp’s decisions and actions:

The obligation for utilities to operate in a prudent manner applies not solely to investments in specific projects, but to the full range of utility actions, including the negotiation and management of purchased power contracts. In the case of purchased power contracts, utilities have responsibilities paralleling those applicable to investments. Initially, the Company must consider the value of the contract, recognizing the full range of risks (price, availability, and environmental, among others), and the availability of alternative power sources, including demand-side management options.<sup>52</sup>

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50. *PacifiCorp v. Reliant Energy Servs., Inc.*, 105 Fed. Energy Reg. Comm’n Rep. (CCH) 61,184 (2003), 2003 WL 22628176, ¶ 10.

51. Relevant to this Note are the Oregon and Wyoming Public Utility Commission and Public Service Commission, respectively: *Indus. Customers of Northwest Utils. v. PacifiCorp*, 218 Pub. Util. Rep. (PUR) 4th 465 (Or. Pub. Util. Comm’n Jul. 18, 2002), 2002 Ore. PUC LEXIS 277; and *PacifiCorp*, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm’n Mar. 6, 2003), 2003 WL 1900923.

The company also filed complaints with the Federal Energy Regulatory Commission (FERC) against five wholesale power suppliers for dealing in bad faith and gouging their customers. Bill Luckett, *Company Asks Feds to Review Contracts: FERC Hesitation on Price Caps Hurt Firm*, CASPER STAR-TRIBUNE (Wyo.), May 4, 2002, at A1. The FERC failed to grant PacifiCorp any recovery, finding that under their “public interest” standard of review, “it was not enough to show that forward prices became unjust and unreasonable,” that the company must show that the rates, terms, and conditions of the contracts were “contrary to the public interest.” *PacifiCorp v. Reliant Energy Servs., Inc.*, 105 Fed. Energy Reg. Comm’n Rep. (CCH) 61,184 (2003), 2003 WL 22628176, ¶ 19. The FERC went on to explain that “if rates subsequently become unjust and unreasonable and the contract at issue is subject to a [public interest] standard of review, the Commission under court precedent may not change a contract simply because it is no longer just and reasonable.” *Id.* ¶ 31.

52. *Green Mountain Power Corp.*, 184 Pub. Util. Rep. (PUR) 4th 1, 218 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535 (footnote omitted).

The widely divergent evaluations of PacifiCorp's prudence in two of PacifiCorp's service states, Wyoming and Oregon,<sup>53</sup> reveal that state discretion as granted under the FPA and preserved in *Hope* and *Duquesne* is so broad as to fall short of providing regulatory certainty for utilities or of ensuring a minimally consistent standard of prudence.

## 1. Wyoming Public Service Commission Decision

### a. Hunter Number One

The Hunter Number One (Hunter No. 1) generator unit was out of commission for more than five months, November 2000 until May 2001, because of a rare "stator core failure."<sup>54</sup> Though the 430-Megawatt unit failure occurred in the midst of the Western Power Crisis of 2000–2001, PacifiCorp "continued to provide service throughout its service area, in part by purchasing power to replace the lost generation capacity associated with the failure to the generator."<sup>55</sup> Because of the exorbitant wholesale prices, the cost of this purchased power exceeded the cost the company would have incurred, had Hunter No. 1 been operating as usual.<sup>56</sup>

PacifiCorp and its experts testified to the prudent handling of the Hunter No. 1 failure.<sup>57</sup> Parties opposed to rate increases in Wyoming argued against PacifiCorp's prudence, alleging that PacifiCorp was not entitled to recapture costs for its Hunter No. 1 plant failure, because PacifiCorp could have prevented the plant failure by establishing and implementing a better maintenance schedule.<sup>58</sup> The PSC commented that they at the PSC were "left with two respectable and generally credible bodies of expert analysis which reach widely divergent conclusions on responsibility for the failure."<sup>59</sup> Faced with conflicting testimony, the PSC exercised the flexibility granted in *Hope* and *Duquesne* and jettisoned use of an official prudence standard.<sup>60</sup> Instead, the PSC denied all cost recovery for the Hunter No. 1 failure largely based on historical non-recovery of extraordinary, one-time costs,<sup>61</sup> and the fact that PacifiCorp did

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53. See *infra* Part II.B.1–2.

54. PacifiCorp, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm'n Mar. 6, 2003), 2003 WL 1900923, ¶ 59.

55. *Id.* ¶ 60.

56. *Id.*

57. *Id.* ¶¶ 66–89.

58. *Report Blames PacifiCorp*, *supra* note 39.

59. PacifiCorp, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm'n Mar. 6, 2003), 2003 WL 1900923, ¶ 121.

60. *Id.* ¶ 122.

61. *Id.* ¶¶ 123–125.

not show that it was doomed to suffer “impending financial crisis.”<sup>62</sup> However, the PSC subtly betrayed its bias about what constitutes prudent behavior when it admonished PacifiCorp for not having taken advantage of one of the PSC’s favored mechanisms for passing on to rate payers wholesale cost changes as described below, but instead being content to recover costs of purchased power from regular base rates.<sup>63</sup>

#### b. Wholesale Market

The subtle nudging according to the PSC’s implicit notions of prudence evaporated as they blatantly denied any of the \$60.3 million for which PacifiCorp applied to recover for astronomical wholesale power costs.<sup>64</sup> They reasoned that PacifiCorp had “elected not to avail itself of the protection of [Wyoming PSC] Rules 249 and 250” for utilities to pass on or create a balancing account for the cost of purchasing power,<sup>65</sup> which it did “voluntarily, evidencing a willingness to absorb the burdens and benefits which can come from not adjusting purchased power costs in rates except in general rate cases.”<sup>66</sup> It seems that by its admonishment about what would have constituted prudent actions and decisions, the PSC agreed with Wyoming Industrial Energy Consumers (WIEC), whose members comprise more than fifty percent of PacifiCorp’s electricity sales in Wyoming, in their opposition to the interim rate increase, and that regarding PacifiCorp’s prudent business practices, most of PacifiCorp’s debts arise from “‘questionable PacifiCorp power transactions’ and ‘risky’ strategies.”<sup>67</sup> The PSC balanced interests, noting that PacifiCorp (the entire company overall, not just the Wyoming operations) suffered no appreciable financial harm and reiterated that “the extraordinary nature of an event does not, in itself, give rise to any entitlement to recovery.”<sup>68</sup>

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62. *Id.* ¶ 127.

63. *Id.* ¶ 126.

64. *Id.* ¶¶ 196, 203, 320.

65. *Id.* ¶ 203. For Rules 249 and 250, entitled “Electric, Gas and Water Wholesale Utility Commodity Purchase Pass on Procedure” and “Electric, Gas and Water Wholesale Utility Commodity Balancing Account as the Basis for Periodic Pass on Filings,” respectively, see Wyo. Rules and Regulations Public Service Commission: Utility Accommodations ch. 2 §§ 249–250 (Jul. 31, 1992), available at <http://soswy.state.wy.us/RULES/1201.pdf>.

66. PacifiCorp, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm’n Mar. 6, 2003), 2003 WL 1900923, ¶ 203.

67. Bill Lockett, *Groups Oppose PacifiCorp Hike*, CASPER STAR-TRIB. (Wyo.), Nov. 23, 2002, at A1, available at <http://www.casperstartribune.net/articles/2002/11/23/news/5d296459836bd22d87256c7a0011f585.prt>.

68. PacifiCorp, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm’n Mar. 6, 2003), 2003 WL 1900923, ¶ 316.

c. Centralia Plant and Low Hydroelectric Output

At the onset, per the recommendation of WIEC and the consumer advocate staff, the PSC simply adjusted away as “excess” the costs from the Centralia sale and the low hydroelectric production. The PSC adopted the WIEC’s argument, reasoning that PacifiCorp had been imprudent by

fail[ing] to replace 300 MW of lost Centralia power immediately upon closing the sale of the plant to TransAlta on May 4, 2000, which provided only a 300 MW base-load purchase by PacifiCorp from TransAlta during the summers of 2000 and 2001, which represented only a partial replacement of the more than 600 MW Centralia resource. PacifiCorp argued various uncertainties surrounding the transaction . . . but the evidence shows that, due to PacifiCorp’s significant increase in wholesale market activity, its load/resource balance was worsening; and it was also facing increased forced outage rates at its generation plants and poor hydro conditions. This adjustment decreases excess deferred power costs by approximately \$2.51 million.<sup>69</sup>

With the issues thus summarily dismissed, the PSC did not address them with more specificity or further examine their prudence.

2. Wyoming Public Service Commission Dissent

a. Hunter Number One

One Wyoming Public Service Commissioner reached significantly different conclusions to the questions raised in the PacifiCorp rate case.<sup>70</sup> As to the Hunter No. 1 situation, reasoning that “[t]he Hunter No. 1 Unit was operated within a reasonable tolerance of industry standards” the commissioner could not reach a “justifiable conclusion that PacifiCorp was imprudent or negligent in its operation.”<sup>71</sup> The dissent further exculpates PacifiCorp by implicating both the “extreme dysfunction of the wholesale electric power market” at the time of the Hunter No. 1 failure and the FERC’s indecisive action to defuse the “runaway costs.”<sup>72</sup> Finally, rather than scrutinizing PacifiCorp’s involvement in the wholesale market skeptically, the dissent asserted that PacifiCorp “honored its responsibility

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69. *Id.* ¶ 192.j.

70. *Id.* Dissent ¶ 1 (Furtney, Comm’r, dissenting).

71. *Id.* Dissent ¶ 5.

72. *Id.* Dissent ¶ 6.

to serve its customers by buying power in the midst of a dysfunctional market,” calling it “the very essence of [meeting] its duty to serve . . . to explore other replacement power supply options and then to decide to purchase replacement power in the wholesale market.”<sup>73</sup> Because Western wholesale power markets far exceeded even extreme risk expectations, the dissent would have granted PacifiCorp approximately thirty-one percent of the amount it requested.<sup>74</sup>

#### b. Wholesale Market

Building on its support for PacifiCorp’s wholesale market strategies, the dissent questions “whether or not it was reasonable for this Commission to expect [PacifiCorp] to have built such extreme market conditions and volatility into their contingency plans.”<sup>75</sup> Instead of alluding to imprudence because PacifiCorp had not employed a commodity pass-on or balancing account approach per the Utility Accommodations in the Wyoming Public Service Commission Rules and Regulations, sections 249 and 250, the dissent favorably distinguishes PacifiCorp’s actions from those of other state utilities. First, the dissent points out that by voluntarily taking on some of the commodity price risk (by opting out of the requirements under sections 249 and 250), PacifiCorp “demonstrates a willingness to share commodity price risk between customers and shareholders.”<sup>76</sup> Such action is very different from that of other state utilities, which, by availing themselves of the PSC’s procedures, drop the “commodity price risk 100% on the backs of the customers.”<sup>77</sup> For the decision not to use a commodity pass-on or balancing-account approach, the dissent argues, PacifiCorp should not be disallowed the opportunity to request cost recovery as one avenue for recouping costs as was decided in the majority opinion.<sup>78</sup>

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73. *Id.* Dissent ¶ 7.

74. *Id.* Dissent ¶ 10. The amount equals \$9.6 million of the Hunter replacement power costs. *Id.* Dissent ¶¶ 10, 11.

75. *Id.* Dissent ¶ 13.

76. *Id.* Dissent ¶ 15.

77. *Id.* Dissent ¶ 15. Wyoming PSC Administrator Dave Mosier pointed out as he described his disagreement with part of the PSC’s decision that “a ‘commodity cost balancing’ account that [PacifiCorp has elected not to use] would automatically pass on unforeseen wholesale costs to consumers as well as refund lower unforeseen costs.” Bill Lockett, *Consumers Get Break from PSC: Regulators Refuse Rate Hike for Power Plant Failure*, CASPER STAR-TRIB. (Wyo.), Feb. 2, 2003, at A1 (on file with author).

78. PacifiCorp, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm’n Mar. 6, 2003), 2003 WL 1900923, Dissent ¶ 16 (Furtney, Comm’r, dissenting).

### c. Centralia Plant and Low Hydroelectric Output

Finally, regarding the Centralia sale and low hydroelectric year, the dissent disagrees with the majority's decision to adjust away the costs so summarily.<sup>79</sup> As to the Centralia plant, the dissent disagrees "with the adjustment to identify costs related to the replacement of lost Centralia generation sooner and before wholesale prices began to increase rapidly in the summer of 2000."<sup>80</sup> Pointing out the fault of exceeding the scope of what was known at the time, the dissent observes:

[The industry group opposed to the rate hike (WIEC)] argues that PacifiCorp failed to replace the balance (300 MW) of lost Centralia power immediately upon closing the sale with TransAlta on May 4, 2000, which also included a 300 MW base-load purchase from TransAlta during the summers of 2000 and 2001. PacifiCorp argues that the complexities of the Centralia sale included regulatory uncertainties, uncertainty as to whether the sale would close or not, no long-term planning window for the replacement of power and the imprudence of paying a "contingent option premium" for replacing Centralia power on a sale contingent basis. This is an adjustment based upon hindsight, which is not practical or supportable.<sup>81</sup>

With respect to the low hydro year, the dissent is only willing to adjust away the drought effects on the assumption that PacifiCorp is allowed an appropriate rate by the PSC to reflect its chosen resource planning method of purchase and sale "netting" on the wholesale market.<sup>82</sup>

## 3. Oregon Public Utility Commission Decision

### a. Hunter Number One

Similar to the situation in Wyoming, opposing sides paraded their experts before the PUC to opine on the root cause of the failure and the efficacy of PacifiCorp's operating and maintenance procedures.<sup>83</sup> However, in this case, neither confusion nor stalemate resulted. The PUC

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79. *Id.* Dissent ¶¶ 20–22, 29–32.

80. *Id.* Dissent ¶ 29.

81. *Id.* Dissent.

82. *Id.* Dissent ¶ 21.

83. *See Indus. Customers of Northwest Utils. v. PacifiCorp*, 218 Pub. Util. Rep. (PUR) 4th 465 (Or. Pub. Util. Comm'n Jul. 18, 2002), 2002 Ore. PUC LEXIS 277, at \*92–174 (methodically listing each issue, the parties' arguments, and their experts' testimony).

expressly found PacifiCorp's actions reasonable and prudent with respect to each of the technical aspects of the Hunter No. 1 failure.<sup>84</sup> The PUC also rejected opponents' theories of non-recovery due to negligence or strict liability.<sup>85</sup>

#### b. Wholesale Market

PacifiCorp delineated its reasons for its wholesale activities as 1) "to optimize its resource system," 2) to "minimize the need for rate increases," 3) to "stabilize costs to retail customers," and 4) to "achieve a reasonable rate of return for shareholders."<sup>86</sup> The PUC endorses PacifiCorp's power supply and overall wholesale strategies as prudent, because they constituted reasonable steps to "keep its cost of replacement power low in purchasing power to meet its shortfall" as well as responding to market opportunities.<sup>87</sup>

#### c. Centralia Plant

Because the PUC had determined that ratepayers would not be harmed by the Centralia sale and because the PUC had assessed the risks and benefits of the sale when PacifiCorp sought preapproval, the PUC in this case found no imprudence.<sup>88</sup> At the time of the preapproval, the PUC also stated that PacifiCorp's replacement power costs could be recoverable in rates.<sup>89</sup> Their conclusion that PacifiCorp acted reasonably in light of what it knew at the time, and not from the perspective of later events, is consistent with their earlier orders.<sup>90</sup>

#### d. Hydroelectric Output

Regarding the low hydroelectric production year, the PUC simply agreed that PacifiCorp had provided enough evidence in the record to support a finding of prudent conduct.<sup>91</sup> PacifiCorp took appropriate steps, according to the PUC, to replace generation lost to the drought in the midst of the other concurrent difficulties.<sup>92</sup>

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84. *See id.* at \*116, 124, 135, 144, 151, 157, 173 (resolving each sub-issue in favor of PacifiCorp).

85. *Id.* at \*182.

86. *Id.* at \*53.

87. *Id.* at \*70, 73.

88. *Id.* at \*25.

89. *Id.*

90. *Id.* at \*25–26.

91. *Id.* at \*84–85.

92. *Id.*

#### 4. Oregon Public Utility Commission Concurrence

Throughout the decision, the Oregon PUC reiterates that it measures its prudence standard objectively, from the point in time of the decision at issue, imputing actual or supposed knowledge available at the time, and without the benefit of hindsight.<sup>93</sup> The concurrence suggests acceptance of strategies that diverge from traditional resource planning for utilities to meet their obligations, such as involvement with the wholesale market, but at the same time, the concurrence admonishes its regulated bodies to enter into any strategy cautiously and in an informed manner.<sup>94</sup> Even in PacifiCorp's instant situation before the PUC, the concurrence points out that warning signs were on the horizon that should have triggered a response from PacifiCorp.<sup>95</sup> Nevertheless, the concurrence illustrates that the standard is prudence, not clairvoyance, when it concludes that "[t]he extraordinary escalation of power prices in the wholesale market in the year 2000 was unprecedented" and "beyond prudent prediction."<sup>96</sup>

#### 5. Summary of the PacifiCorp Decisions

In summary, the Wyoming Public Service Commission denied PacifiCorp's requests to recover unexpected costs resulting from the Western Power Crisis of 2000–2001, and the Oregon Public Utility Commission granted the requests. Because none of the public service commissions in PacifiCorp's five service states other than Wyoming delivered such a harsh ruling for imprudent actions as did the Wyoming PSC, PacifiCorp appealed to the Wyoming Supreme Court and to federal district court.<sup>97</sup> The outcome of the appeals may settle PacifiCorp's present request, but finality in this one case is unlikely to effect change in the other states in which PacifiCorp does business. With no widespread tangible changes, PacifiCorp is destined to face the same uncertainty next time it enters into service-area-wide rate cases. More specifically, PacifiCorp is sure to face similar uncertainty as it makes any company-wide future resource planning. It is not a wild stretch of the imagination to suppose that

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93. *Id.* at \*193–95 (Hemmingway, Chairman, concurring). *See generally id.* at \*1–197 (Hemmingway, Chairman, concurring) (emphasizing throughout that the PUC measures the prudence standard according to what was known or should have been known at the time of making the decision, not at the time of the rate hearing).

94. *Id.* at \*194–96 (Hemmingway, Chairman, concurring).

95. *Id.* at \*195 (Hemmingway, Chairman, concurring).

96. *Id.* at \*195–96 (Hemmingway, Chairman, concurring).

97. *PacifiCorp v. Pub. Serv. Comm'n*, 103 P.3d 862 (Wyo. 2004) (affirming the Wyoming PSC decision). The federal appeal is still pending. *PacifiCorp Loses Rate Hike Appeal*, *supra* note 44.

other utilities face similar uncertainty. An unpredictable regulatory environment is perpetuated with the combination of uncertainty of the highly subjective prudence standard itself with the uncertainty from inconsistent application of a prudence standard.

### C. *One Standard—Inconsistent Application*

The PacifiCorp cases demonstrate the inconsistent application of the prudence standard. At least one repercussion of such inconsistency is the increased difficulty for utilities to plan future decisions with the certainty that they will be rewarded with the opportunity to recoup costs through rate increases. Another consequence could be the deterioration of an open, cooperative working relationship between the PUC and the utility. Where PUCs want open, frequent communication with their regulated utilities, instead they could be met with confusion and suspicion. If PUCs do not regularly and explicitly apply a prudence standard, it is difficult for utilities to ascertain when they will be held to such a standard or when they will avoid it.

A situation in Vermont elucidates this uncertainty and potential for deterioration. The Green Mountain Power Corporation (GMP) locked in a long-term contract with Hydro-Quebec (HQ) to provide power to GMP's customers.<sup>98</sup> The Vermont Public Service Board (PSB) had previously approved the decision to enter into the contract.<sup>99</sup> The PSB had granted earlier rate increase requests resulting from the locked-in contract.<sup>100</sup> The PSB had even given a prudence review to another state utility about locking in the same HQ contract (and found the utility in that situation imprudent), while still not subjecting GMP to prudence review.<sup>101</sup> However, irrespective of GMP's earlier successful legal proceedings with the PSB, the eventual prudence review found GMP imprudent, because at the time of the final lock-in, "northeastern power markets and GMP's own power needs were changing dramatically" from conditions at the time the PSB first approved the contract.<sup>102</sup> The PSB's approval, in 1990, of GMP's decision

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98. Green Mountain Power Corp., 184 Pub. Util. Rep. (PUR) 4th 1, 1 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535.

99. *Id.* at n.2.

100. *Id.*

101. Cent. Vermont Pub. Serv. Corp., No. 5701, 5724, 1994 WL 713817, at \*65 ¶ 244 (Vt. Pub. Serv. Bd. Oct. 31, 1994); *see* Green Mountain Power Corp., 184 Pub. Util. Rep. (PUR) 4th 1, 1 n.2 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535 ("The Contract was entered into by HQ and the Vermont Joint Owners ("VJO") on behalf of Vermont's electric distribution utilities.")

102. Green Mountain Power Corp., 184 Pub. Util. Rep. (PUR) 4th 1, 2 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535.

to enter into the HQ contract did not give them automatic approval in 1991 to lock the contract in.<sup>103</sup> GMP's accelerated lock-in "did not conform to the high standards of competent and vigilant utility management to which [the PSB] hold[s] utility managers in Vermont."<sup>104</sup>

Though not criticizing the outcome of the final prudence review case, it is easy to imagine that GMP must have been both relieved and confused because each of its earlier post-lock-in decisions eschewed a prudence investigation. Indeed, Green Mountain Power claimed *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) in the 5983 Docket (the subsequent prudence review case), attempting to preclude the prudence review since the PSB had not brought it up in earlier cases.<sup>105</sup> The Vermont PSB disagreed with the claims, largely because of settled case law applying *res judicata* only to administrative decisions that "entail[] the essential elements of adjudication"<sup>106</sup> and because "the prudence of the Contract nor of the lock-in were raised by parties as an explicit issue" to have been fully litigated as required for collateral estoppel.<sup>107</sup> The PSB also worried that "[s]uch a principle would also seem to require the Department [i.e., the Public Service Department, the public advocate] to litigate every potential cost item in every rate case, an outcome inimical to the administrative process, and likely impossible to comply with within the statutory period allowed for utility rate cases."<sup>108</sup> Essentially, the PSB asserted that a finding that a company's rates are reasonable does not imply a finding that every cost element used to create those rates is prudent. Though these rationales have legal backing, they do not address the problem exposed in this paper: that utilities ought to be held to a prudence standard regularly.

Currently, prudence reviews are sporadic and unpredictable. PUCs must implement changes to apply a more certain standard within and among states. In previous GMP hearings, none of the parties raised the issue of prudence, and the PSB did not raise the issue itself. In the PacifiCorp Wyoming hearing, the parties raised the prudence issue, but the PSC majority declined to apply it overtly.<sup>109</sup> The Oregon PacifiCorp case saw prudence raised by all parties and applied by the PUC.<sup>110</sup> To ensure that a

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103. *Id.*

104. *Id.*

105. *Id.* at 7.

106. *Id.* at 9 & n.21.

107. *Id.* at 18.

108. *Id.* at 19.

109. *See generally* PacifiCorp, 224 Pub. Util. Rep. (PUR) 4th 1 (Wyo. Pub. Serv. Comm'n Mar. 6, 2003), 2003 WL 1900923 (declining to refer expressly to prudence).

110. *See generally* Indus. Customers of Northwest Utils. v. PacifiCorp, 218 Pub. Util. Rep. (PUR) 4th 465 (Or. Pub. Util. Comm'n Jul. 18, 2002), 2002 Ore. PUC LEXIS 277 (reaching prudence

prudence standard is applied consistently, PUCs should regularly raise the question on their own and complete a thorough review, irrespective of whether parties to the proceedings have raised the issue. Further, instead of waiting for the occasion of a rate case, it might even be wise for PUCs proactively to adopt a periodic prudence review, which is “not the same thing as preapproval or ‘guaranteed’ cost recovery,” but a procedure that “would provide opportunities for the utility and state commissions to identify potential problems early so that they could be addressed and managed more effectively.”<sup>111</sup>

### III. ENLIGHTENED SOLUTIONS

By what standards can utilities operate to guarantee prudence according to the terms and conditions of their franchises? Two indispensable tools utilities have at their disposal to help make prudent decisions are portfolio management and demand response. Utilities have an obligation to mitigate risks in a prudent way.<sup>112</sup> Less flexibility should be afforded PUCs as to *whether* to apply a prudence standard. Still, the PacifiCorp situation illustrates that the question of which actions are prudent can have widely varying answers when the standard *is* applied.<sup>113</sup>

The nature of regulation will change in an increasingly complex world where a regulated utility coexists with competition. Under circumstances where this coexistence continues to charge the electric utility with an obligation to serve, it is absolutely necessary that regulation consider new approaches

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expressly in each of its resolutions).

111. Badger, *supra* note 25, at 24. A model recommended by an informal task force initiated by the National Association of Regulatory Utility Commissioners (NARUC) is

“based on rolling or ongoing prudence review procedures. This model reflected four basic principles:

- \* Establish prudence review and cost recovery procedures prior to initiating a project.
- \* Conduct the prudence review process through collaborative discussions, if possible, between the commission, the utility, the consumer advocate, and other interested parties.
- \* Separate the determination of need for the project from the review of construction management and expenditures.
- \* Continue the periodic reviews for each major construction project and the need for power and project selection through completion.

*Id.*

112. *See, e.g.,* BEDER, *supra* note 9, at 27 (indicating that as a balance to a natural monopoly in which to make business decisions, regulation ensures that “the public [gets] a fair deal”).

113. *See supra* Part II.B.

to prudence reviews that provide more certainty to the decision-making process.<sup>114</sup>

In its independent, but related, endeavors to establish a standard market design for transmission, the FERC recognizes that regulatory certainty to allow for innovation, investment, and efficient use of the nation's resources is "not likely to develop without strong Commission action."<sup>115</sup> With respect to state and local jurisdictions, PUCs should take strong action by collaborating among states to insist that a prudence standard is used and that it include both demand-side management and responsible portfolio management.

#### A. Demand-Response Initiatives

Utilities ought to engage a plethora of demand-response resources that manage the system's exposure to price spikes, the cost of compliance with environmental laws, and system outages, among other risks, by encouraging energy efficiency and load management to decrease the overall capacity required. Moderating demand creates more value and awareness of amounts and times of energy use. Moderating demand makes customers and utilities less vulnerable to market forces, because they can make changes in their own use patterns, equipment, or incentives to suit their own needs. Without utilities' affirmative attention to demand response—as required back in 1978 by the PURPA,<sup>116</sup> beginning with communicating to customers the cost variation of electricity at different times—there is "[n]o incentive, or signal for consumers to modify [their] usage patterns."<sup>117</sup>

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114. Badger, *supra* note 25, at 26.

115. FED. ENERGY REG. COMM'N, *supra* note 7, at 1.

116. FRED BOSSELMAN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 680 (2000).

PURPA outlined six fundamental policies for retail electric power rates and services: (i) rates should reflect the actual cost of electric power generation and distribution; (ii) rates should not decline with increases in electric power use unless the cost of providing the power decreases as consumption increases; (iii) rates should reflect the daily variations in the actual cost of electric power generation; (iv) rates should reflect the seasonal variations in the actual cost of electric power generation; (v) rates should offer a special "interruptible" electric power service rate for commercial and industrial customers; and (vi) each electric utility must offer load management techniques to their electric consumers that will be practicable, cost effective and reliable, as determined by the state public utility commission.

*Id.*

117. Michael O'Sheasy, *Demand Response—A Vital Element to Connect Retail and Wholesale Markets*, 2003 A.B.A. SEC. ENV'T, ENERGY, & RES., 11TH SEC. FALL MEETING 874.

Some demand-response mechanisms include: entering into contracts with large customers to become interruptible customers, such as by agreeing to operate during off-peak hours, to send employees home, or otherwise sharply to curtail use during high-demand times.<sup>118</sup> When utilities work with industrial customers to establish interruptibility, they achieve demand response at an industrial and commercial customer scale.<sup>119</sup> Situations in which companies choose to cycle air conditioners during price spike (high-demand) times lower the utility's overall system exposure to wholesale price spikes by comprising a significant load reduction.<sup>120</sup>

Energy efficiency and system-thinking measures can play a big role in reducing demand, such as with heat recovery projects, or installing energy efficient equipment in industry operations,<sup>121</sup> or even looking at specific regions to develop comprehensive energy projects.<sup>122</sup> Working with developers via incentives or state laws<sup>123</sup> to establish and use energy efficient design criteria and to include energy efficient lighting fixtures and appliances merges sustainable growth planning with demand-side management. Demand response can be very simple for commercial, industrial, and even residential customers with “[h]ourly metering for most of the consumption . . . and pricing plans that expose customers to the spot price for some of their consumption.”<sup>124</sup> Customers can then choose to use electricity when it is most economical for them—in off-peak times as established by their utility.

An additional, and complementary, approach is to implement consumer energy conservation plans whereby consumers reduce their overall demand

118. See Guerry Waters, *Payable on Demand*, 142 NO. 2 PUB. UTIL. FORT. 55 (Feb. 1, 2004), available at 2004 WL 71331730 (describing how utilities use demand-response mechanisms such as time-of-use metering and responding to large customer needs).

119. Demand response has come to include more than just the utility-controlled power cuts to a few “interruptible rate” customers. *Id.*

Demand response . . . permits customers to define their level of participation each time the utility requests a reduction. They can weigh the energy cost against the value of their production, maintaining full supply, during, for instance, critical manufacturing processes, while reducing it if the only results will be a few complaints from warmer-than-usual office workers.

*Id.*

120. See *Rates & Regulation: Utilities Struggle with Sending Wholesale Price Signals to Retail Customers, Officials Say*, ELEC. UTIL. WEEK, May 19, 2003, at 23, available at 2003 WL 11143981 (“Demand-response plans, time-of-use rates or real-time pricing are all ways for retail customers to see what the wholesale market is doing and respond on their own to either limit their exposure to high prices or take advantage of wholesale market conditions.”).

121. Green Mountain Power Corp., 184 Pub. Util. Rep. (PUR) 4th 1, 127, 130 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535.

122. See *id.* at 139–144 (describing the Mad River Valley Energy Project).

123. *Id.* at 122.

124. HUNT, *supra* note 8, at 8.

and are rewarded with discounts—rewards for shared savings.<sup>125</sup> PacifiCorp and many other utilities have implemented programs like the “20/20” shared savings program, where customers are rewarded for conservation.<sup>126</sup> “Under the program, a customer who cuts energy use by 20 percent or more relative to the amount they used in the same month last year will receive a 20 percent reduction on the remaining portion of the monthly bill.”<sup>127</sup> Customers who meet the challenge see immediate savings.<sup>128</sup> Also, by helping cut demand, PacifiCorp’s need to generate more power or buy wholesale decreases, which “reduces both the need and the magnitude of future rate increases.”<sup>129</sup> Large commercial or industrial customers, as well as individual residential customers, can benefit from shared savings programs.<sup>130</sup> Likewise, many programs described above can be scaled down for residential customers, such as assisting with energy efficient appliances and fixtures.

Demand-response programs can produce various benefits to ratepayers and utilities alike, from lowering delivery costs, to “decreas[ing] costs of service, lower[ing] customer bills, reduc[ing] environmental impacts, and [achieving] local economic benefits.”<sup>131</sup> A presentation by ISO (Independent System Operator) New England to the Northeast Energy and Commerce Association summarizes the need for demand response.<sup>132</sup> First, “[d]emand response may be the only resource available” to curtail load when reliability is threatened, and “to meet short-run planning and operational reserves.”<sup>133</sup> Even if demand response is not the only resource available, it nevertheless “diversifies the system ‘insurance policy’ to help ‘keep the lights on.’”<sup>134</sup> Secondly, market operators want to involve customers in managing their own on-site power use during high price times.<sup>135</sup> Empowering customers to respond to markets promotes more

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125. See WESTERN GOVERNORS’ ASS’N, WGA POLICY RESOLUTION 03-19: WESTERN STATES’ ENERGY POLICY ROADMAP 3 (Sept. 15, 2003) (referring to such programs as “demand-exchange tariffs”), available at <http://www.westgov.org/wga/policy/03/roadmap3-19.pdf>.

126. Bill Luckett, *20/20 Vision: Conservation Could Cut Costs: PacifiCorp Offers Reward for 20% Reduction*, CASPER STAR-TRIB. (Wyo.), May 22, 2001, at B1.

127. *Id.*

128. *Id.*

129. *Id.*

130. See *supra* notes 117–120 and accompanying text.

131. Green Mountain Power Corp., 184 Pub. Util. Rep. (PUR) 4th 1, 123 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535.

132. Henry Yoshimura, ISO New England, Making Demand Response Work in New England, Presentation Before the Northeast Energy and Commerce Association 5 (Jan. 9, 2003), available at [http://www.ksg.harvard.edu/hepg/Papers/Yoshimura\\_NE.Demand.Response\\_01-09-2003.pdf](http://www.ksg.harvard.edu/hepg/Papers/Yoshimura_NE.Demand.Response_01-09-2003.pdf).

133. *Id.*

134. *Id.*

135. *Id.*

energy efficiency, “mitigate[s] ‘price spikes’ (price volatility) . . . and allows consumers to take back some of the surplus value in the market.”<sup>136</sup>

The FERC also advocates for demand response for its consumer empowerment, because demand response can “limit supplier market power.”<sup>137</sup> The FERC notes as well that demand response can “enhance reliability and resource adequacy, and limit price volatility.”<sup>138</sup> Uncertainties in policy can pose barriers to demand response initiatives.<sup>139</sup>

Recognizing that energy and resource issues are vastly different between the Eastern and Western United States, and among states generally, it is nevertheless helpful to examine the structure of Vermont Public Service Board (PSB) rate cases for their treatment of demand-side management. The PSB’s cases illustrate the importance of demand-side management by the prominent placement of the subject as a primary consideration, illustrated by both the structure of the final order document, and in the course of the review process, as shown in the text of the reviews.<sup>140</sup> In its order of February 27, 1998 in Docket 5983, the PSB begins the Demand-Side Management section by reminding the reader that “[e]lectric and gas utilities in the state of Vermont are required by law to design and implement a comprehensive set of demand-side management (“DSM”) programs, to reduce customers’ energy consumption with efficiency and conservation measures that cost less than the energy they replace.”<sup>141</sup> The PSB then evaluates the prudence of a utility’s DSM measures in the course of the PSB’s overall prudence review.<sup>142</sup> Such unambiguous, prominent treatment throughout the prudence review process

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136. *Id.*

137. FED. ENERGY REG. COMM’N, *supra* note 7, at 9 n.9.

138. *Id.*

139. Yoshimura, *supra* note 132, at 6.

140. *See, e.g.*, Green Mountain Power Corp., 184 Pub. Util. Rep. (PUR) 4th 1, v (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535 (listing “DEMAND-SIDE MANAGEMENT” as a first-level heading in the table of contents); Cent. Vermont Pub. Serv. Corp., No. 5701, 5724, 1994 WL 713817, at \*2 (Vt. Pub. Serv. Bd. Oct. 31, 1994); Cent. Vt. Pub. Serv. Corp., 83 P.U.R. 4th (PUR) 532 (Vt. Pub. Serv. Bd. May 15, 1987), 1987 WL 257812, at \*5.

141. Green Mountain Power Corp., 184 Pub. Util. Rep. (PUR) 4th 1, 122–123 (Vt. Pub. Serv. Bd. Feb. 27, 1998), 1998 WL 216535 (citing 30 VT. STAT. ANN. § 218c; Least Cost Investments, Energy Efficiency, Conservation, and Mgmt. of Demand for Energy, 111 Pub. Util. Rep. (PUR) 4th 427 (Vt. Pub. Serv. Bd. Apr. 16, 1990), 1990 WL 488684).

142. Interestingly, the utility in *Green Mountain Power Corp.* sought to recover its costs incurred from implementing DSM measures. Green Mountain Power Corp., 184 Pub. Util. Rep. (PUR) 4th at 122–124. Such a dynamic is likely brought about by the fact that Vermont law mandates DSM programs. The distinction between a mandate and what this author proposes—DSM as an actual component of prudence—is that in the latter, a utility could not be found prudent without having accomplished some measure of demand response. Whereas in the former, a utility’s DSM programs are themselves subject to prudence review to evaluate cost recovery.

illustrates to those who are regulated that demand response efforts are valued and required.

From East to West, governing and advisory bodies support demand response. The Western Governors' Association (WGA), in their Energy Policy Roadmap, supports encouraging utilities to send accurate price information to their customers, thereby empowering customers to make their own decisions and investments to reduce their total use and cost.<sup>143</sup> The WGA asserts that enabling customers to make their own demand choices "means developing and deploying technologies that allow building owners and other consumers to receive more accurate price signals that encourage them to reduce or shift consumption to off-peak times."<sup>144</sup> The WGA policy recommends that utility distribution companies, state and tribal energy agencies, PUCs, state legislatures, and tribal councils adopt policies, technical assistance, incentives, and regulations that allow for funding of demand response and energy efficiency measures so that changes are actually feasible for both utilities and customers.<sup>145</sup>

### *B. Portfolio Management*

A well-managed electric energy portfolio contains a sound mix of contractual resources to build a solid, dependable portfolio for providing power and to reduce the risks inherent in wholesale markets. Utilities ought to assemble a stable portfolio so that in tough times—in peak hours—they are not caught short of power. The WGA recommends that retail power suppliers and power generators reduce their dependence on the volatile wholesale market and hedge their power purchase planning against future price spikes by entering into a mix of short-term and long-term contracts.<sup>146</sup> A mix of short- and long-term contracts will not only reduce susceptibility to the wholesale market, but also will "stabilize prices to consumers."<sup>147</sup>

Brought to life in the example PacifiCorp cases, according to the FERC:

PacifiCorp failed to hedge for the possible risk that spot market prices might fall, and it did not pursue a mix of products to reduce risk associated with market volatility through portfolio diversification. PacifiCorp could have purchased option contracts instead of the must take products it bought, it could

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143. WESTERN GOVERNORS' ASS'N, *supra* note 125, at 2.

144. *Id.*

145. *Id.* at 3.

146. *Id.* at 2.

147. *Id.*

have purchased energy under monthly contracts, and it could have purchased index contracts or longer-term contracts.<sup>148</sup>

PacifiCorp retorts that the FERC “inappropriately focused on the company’s buying practices” and that the company actually did not have any “better alternatives” to purchasing the wholesale power according to the contract terms that it had to accept at the time.<sup>149</sup> Beyond simply playing on the wholesale market, utilities are more frequently using the wholesale market as a tool to balance and rebalance their portfolios and to balance their entire resource system. The concurring opinion in the Oregon PUC case appreciates the expansion of traditional resource planning in its statement that, “[a]s utilities have moved to buy and sell more power in the wholesale market, what constitutes ‘prudent’ utility resource planning has become cloudy.”<sup>150</sup>

Utilities have a multitude of alternatives for portfolio management to result in least cost planning, and no single winning mix exists. For example, opinions vary as to whether a prudent portfolio should include a “commodity cost adjustment and balancing” account as supported by the Wyoming PSC, a sort of true-up mechanism that automatically passes on to consumers higher unforeseen wholesale costs and refunds lower unforeseen costs.<sup>151</sup> However, as described in the Wyoming PSC dissent:

PacifiCorp has been heavily criticized for not having a purchased power cost adjustment mechanism in place if they want to minimize commodity price volatility risk and yet at least some of the intervening parties have opposed prior efforts of PacifiCorp to establish such a mechanism. Furthermore, some parties also seem to question whether or not PacifiCorp should be allowed to recover dollar-for dollar [sic] commodity costs as most other Wyoming electric utilities do. Based on the evidence in this proceeding it seems likely that PacifiCorp may face strong opposition to an application to establish such a mechanism.<sup>152</sup>

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148. *PacifiCorp v. Reliant Energy Servs., Inc.*, 105 Fed. Energy Reg. Comm’n Rep. (CCH) 61,184 (2003), 2003 WL 22628176, ¶ 60 (citing a previous order).

149. *Id.* ¶ 61 (citing PacifiCorp’s Request for Rehearing at 46).

150. *Indus. Customers of Northwest Utils. v. PacifiCorp*, 218 Pub. Util. Rep. (PUR) 4th 465 (Or. Pub. Util. Comm’n Jul. 18, 2002), 2002 Ore. PUC LEXIS 277, at \*193–94 (Hemmingway, Chairman, concurring).

151. *PacifiCorp*, 224 Pub. Util. Rep. (PUR) 4th 1, ¶ 197 (Wyo. Pub. Serv. Comm’n Mar. 6, 2003), 2003 WL 1900923.

152. *Id.*, Dissent ¶ 38 (Furtney, Comm’r, dissenting).

Another example of an alternative for prudent portfolio management is to include renewable energy and distributed generation. Including distributed generation means allowing for installation and grid connection of “small turbines, high efficiency co-generation, fuels [sic] cells, etc., that are typically installed on the consumer’s property.”<sup>153</sup> Encouraging distributed generation may help reliability and add to system diversity.<sup>154</sup> Including renewable energy in utilities’ portfolios helps “protect against volatile natural gas prices; meet growing customer demand for power; improve/maintain air quality; tap domestic resources & add to fuel diversity.”<sup>155</sup> In other words, including renewable energy and distributed generation helps utilities realize additional benefits other than merely achieving a diverse portfolio.

Using distributed generation and renewable energy is not without its opposing arguments, however. “Both renewable energy and distributed generation present long and short term trade-offs. These choices can be more costly than the traditional model, in the short term. Many argue that in the long term they are cheaper.”<sup>156</sup> Regardless of the portfolio mix and mechanisms chosen, “a diverse energy portfolio . . . will include conventional and alternative energy resource development, energy efficiency and conservation.”<sup>157</sup>

A comprehensive examination of all available resources from which to choose a sound portfolio mix is beyond the scope of this article, but a diverse mix should nonetheless be required as part of considering a utility’s decisions and actions prudent. By aiming to insulate themselves from market risk through diverse financial decisions, utilities will also mitigate damage from unforeseen events and emergencies like the Western Power Crisis of 2000–2001. Utilities should employ integrated resource planning, as described herein and beyond, as part of a prudent portfolio strategy.

#### CONCLUSION

The energy world is in such flux currently that it is imperative for utilities to be able to depend on at least a minimally consistent prudence standard. Likewise, PUCs must be able to protect the interests of rate payers by demanding prudent action. Currently, the prudence standard is

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153. WESTERN GOVERNORS’ ASS’N, *supra* note 125, at 3.

154. Matthew Brown, *Renewable Energy and Distributed Generation: An Introduction to Policy Options*, 2003 A.B.A. SEC. ENV’T, ENERGY, & RES., 11TH SEC. FALL MEETING 801.

155. *Id.*

156. *Id.* at 802.

157. WESTERN GOVERNORS’ ASS’N, *supra* note 125, at 4.

inconsistently and unpredictably applied. As players are changing shape and services, a consistent, predictable prudence standard will help maintain trust on both sides of the regulatory pact. The flexibility allowed under the *Federal Power Commission v. Hope Natural Gas Co.*, while allowing PUCs independence and power to set their own rate-making methods, is detrimental in the current fluctuating, chameleon energy environment.<sup>158</sup> More certainty is needed. Perhaps the prudent investment theory has become more imperative with the growth of wholesale markets. As Justice Jackson wrote in his extensive dissenting opinion in *Hope*, “[t]he prudent investment theory has relative merits in fixing rates for a utility which creates its service merely by its investment.”<sup>159</sup>

A more consistent prudence standard for utility decisions must, at the very minimum, require responsible portfolio management and demand response measures. What implications would requiring a more consistent prudence standard have for promoting or inhibiting utilities’ assumption of new risks, such as involving themselves in the wholesale markets as buyer and seller, adopting environmental measures, or building renewable energy? To reduce their exposure to whims of wholesale markets, perhaps utilities will indeed increase their distributed generation using micro-turbines, fuel cells, photovoltaic systems, or wind turbines. However, utilities are unlikely to take such risks without at least some semblance of predictability. PUCs can guide utilities’ actions by demanding prudent action—that includes demand response and portfolio management—and implementing prudence reviews consistently among states.

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158. *Fed. Power Comm’n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

159. *Id.* at 649 (Jackson, J., dissenting).