

ORAL ARGUMENT - 9/6/95
94-1237
CITIES V. PUC

BOYLE: May it please the court. I am Jim Boyle, representing the Cities, who are petitioners in this proceeding. The sections that will be referred to here will be the old PURA not the PURA that was amended by the last session of the legislature. Those sections didn't change by the last session.

This appeal basically centers on one particular power plant that was never built. It was called Malakoff. It was to be two units; 645 megawatts. It was announced in 1981. Ratepayers have had the privilege, and this is a plant that has been cancelled; no spade of dirt was ever turned on it; ratepayers have had the privilege of not only paying and will pay the full \$93 million, but have had the privilege for many years of paying a return on invested capital or a return on the investment in this particular powerplant.

There is a handout, which I hope you all have, which has some demonstrative exhibits just to be used in connection with my comments this morning. The first chart there is a brief thumbnail sketch of the history of the Malakoff project. As you can see this project was rescheduled over and over and over again. And there was delay after delay, after delay. And ultimately the plant was cancelled.

By-in-large the cost that relate to the facility, that is the \$93 million were incurred, the bulk of them by 1983. By 1985 there had been a stop construction order given on this plant. Very little cost was incurred after that point. From 1981 until 1987, the plant was designated "construction work in progress." Beginning in January 1987, the designation was changed to plant held for future use.

This is an important distinction because in 1983 the legislature amended the Public Utility Regulatory Act to say that when you have construction work in progress before you can get it there is the threshold which you must meet, and that is to show that it is necessary for the financial integrity of the utility before you can get those costs.

CORNYN: What's the source of the PUC's including plant held for future use and the rate base?

BOYLE: I think the only source if you look at Rule 2321 which is also referenced in your packet is that really in this sense even though there are two accounts in the Federal Energy Regulatory Commission chart of accounts, really the plant held for future use if it's allowable is allowable as a variant or a stepchild or akin to construction work in progress.

CORNYN: It's not mentioned in PURA?

BOYLE: No, it is not. I think that this court back in 1978 said that you could get plant held for future use. And so there was some common law kind of development there. And I think that if when the legislature went back if one was going to consider you could continue to get this kind of cost it would have to be as a form of construction work in progress. And I think I cite in our application that the Commission itself has said it is akin to construction work in progress. And anytime you have construction work in progress you will have what are traditionally plant held for future use. That is by in large, and this is in Phillips Regulatory Utility book for example, which says, "that plant held for future use is traditionally nonmanmade item like land, water rights, and minerals. That is scarce kinds of things that are

nonmanmade.

HIGHTOWER: So if we wanted to go look at it, we would go look at the land?

BOYLE: As a general rule that would be the most typical use for plant held for future use. And I think in that 1978 case in this court it was \$1 million I believe. And generally it's a very small sum of money. Most typically below \$5 million. This is the first time in the 20 year history of the Commission we have ever seen anyone request this kind of money for these kinds of costs.

PHILLIPS: How did this \$93 million break down?

BOYLE: Basically the bulk of the money is for engineering and for ordering certain items for the plant itself like boilers, which had to be specially made for this particular facility. But those are the bulk of the expenses. You will see in HL&P Exhibit 75, an attachment, which details exactly these costs. And I think I have it also in our application.

CORNYN: Just as a matter of administrative law is there any other...is this an unusual event where you have a statement made by the court that there can be no blanket exclusion, and the utility itself have an internal rule without some sort of enabling statute which authorizes an expenditure like this be included in the rate base?

BOYLE: I have not researched it from that standpoint to be very candid about it. Although I know that many states permit plant held for future use as a statutory right.

CORNYN: I know there is a chart in the briefs. Are all of those by statute?

BOYLE: I am not aware of how much of it is court made as opposed to statutory. Although I am aware of many statutes that permit it. What makes Texas unique is that when we are talking about costs and expenditures of this sort we have a special provision that says the invested capital must be used and useful. And historically we have said construction work in progress is not used and useful. So an exception was made for construction work in progress, that if it met the financial integrity test and if it was prudently expended, then you could get it even though it was not used and useful. And as you know in the case of construction work in progress that's right on the _____ of the plant going in service as opposed to plant held for future use, which in this case for example and in other cases may be out 10 years. For plant held for future use to meet that designation at all you must meet what is known as the 10 year rule. You must expect to have those expenditures in use in some form or fashion within that 10 year period.

Just to go back and reemphasize in demonstrative Ex. 4 there is a reference to the rule that the Commission adopted after the 1983 session, which I think makes it pretty clear. And again these rules are very instructive too because they talk about what is invested capital. And I think pretty clearly from this rule it says, "Under ordinary circumstances the rate base shall consist only of those items which are used and useful in providing service to the public." Here they have created an exceptional circumstance if the two prongs of that test are met. And once again no mention of plant held for future use. But again I think in fairness to the company that this ought to be considered a form of construction work in progress so that they have an opportunity to recover these costs and if they meet these tests, then they should be able to get it.

We have never taken the position that it was neither appropriate that these costs were not appropriate, or that the company shouldn't be allowed to get them. It's just that they should meet this threshold test.

HECHT: A threshold test on?

BOYLE: Financial integrity?

HECHT: But as you mentioned earlier plant held for future use is ordinarily relatively smaller, so it could never meet the financial integrity test?

BOYLE: Again, it would depend I think on the utility itself. As you might recall a recent case in the CA which dealt with what is financial integrity. It was an HL&P case. And it said that if the financial indicators are below the national average...it's footnote 16...

HECHT: It seems to me that there is philosophical problem here. Why would a utility go out and incur expenses today in thinking that they are going to use it in 10 years that would threaten the financial integrity of the utility? It looks like you just 8 years, then do it at whatever cost, and put it in the rate base.

BOYLE: I think you are exactly right in the sense that that's what most utilities do. That is in terms they ask for it as CWIP; they don't ask for it for plant held for future use. That's what makes this so extraordinary.

HECHT: And so isn't it true that in every other instance except perhaps this one the financial integrity requirement doesn't make any sense in plant held for future use?

BOYLE: I think that is correct. I think in many instances utilities would have a difficult time meeting except where they've got large expenditures like this.

HECHT: For the future, which then probably in those circumstances would just put off?

BOYLE: But that is also true in the case of CWIP. Expenditures like this in almost every other utility are classified as CWIP. And in fact all of these expenditures were classified as CWIP up until 1986 or 1987. And so they have a mechanism, an incentive to go ahead and plan and to incur these expenditures. Prior to 1986, I am not aware of the land or the water resources or anything else classified as plant held for future use. So I think there is a mechanism but it may have to build up until they have had some serious expenditures.

Finally, one of the critical questions is why in 1983 did the legislature pass this extraordinary circumstance requirement or financial integrity requirement? What would the reason be? Well it seems to me you've got two basic fundamental reasons which apply: 1) a benefits and burden's test that this court is used to dealing with in utility cases; that is those people that have the burden of paying or shouldn't have that burden until they get the benefit; that is so that until it produces electricity you shouldn't have to be paying for it because you are liable to have ratepayers paying who won't be there when the electricity goes on. So it is just kind of matching of burdens and benefits. And so I think that's one reason you have this test in here: if you can meet it you get it. But if you don't because of trying to match these burdens and benefits just like I think in deferred accounting where there is this requirement of financial integrity you want to have this kind of matching of burdens and benefits.

HECHT: But it is not statutory either is it?

BOYLE: It is not statutory...yes, I think it is statutory because CWIP is required for financial integrity and I think that's the reason.

HECHT: But not adapt?

BOYLE: Not plant held for future use.

HECHT: But deferred accounting also has a statutory requirement?

BOYLE: It does not have a statutory requirement for financial integrity. That is correct. But logically obviously it is part of this burdens and benefit concept. I think the same thing that occurred in all the arguments on actual taxes. It said well if you are going to pay the expense, then you ought to get the deduction. In other words there ought to be some matching between burdens and benefits. So I think that is one of the factors.

HECHT: The harder questions is this: Dad(?) is a relatively more recent occurrence, but the legislature has known about plant held for future use since at least 1978. Why didn't they put a similar restriction on that in the statute when they were making the same exception for CWIP?

BOYLE: All I can say is that at that point in time to my knowledge and ever since I think only the one case was before this court, and I think that it had been as they said in that case a trifling or infinitesimally small. So possibly for that reason they didn't deal with it.

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RESPONDENTS

BARON: May it please the court. I would like to do two things if I may in the 10 minutes that I have. First is to be clear about the record on which this case is to be reviewed; and the second is to address what I think is the fundamental question that has been touched upon by the court in its questions, which is why there is a fundamental difference between CWIP and plant held for future use, and why that is appropriately reflected in the fact that the legislature has chosen only to single out CWIP as an exception for a financial integrity test.

This is a case as the court knows is an administrative appeal under the substantial evidence and other standards set forth in the administrative procedure act. It is neither fair nor lawful under this statute to second guess the Commission on the basis of hindsight and extra record evidence. The Commission made this decision in 1990 based on an evidentiary record that was compiled in 1988 and in the first part of 1989. The Commission did not know and could not know the facts and circumstances that led to cancellation of the Malakoff plant in 1994. On petitioner's demonstrative exhibit 1, the last four entries are outside this record and cannot be a basis for review in this court.

The record that is properly before the court your honors shows that to the point the rate case was filed Houston Lighting & Power had received a certificate of convenience and necessity to begin construction on the Malakoff plant and had begun its initial construction phase at the initial phase of construction. It had bought the land - some 3,000 acres; it had hired an engineer to do a blueprint, a design; and it had placed initial investment orders that related to the design. And that was basically it. But the record also showed that in 1988 the latest demand projections available showed a down turn an anticipated down turn in consumer demand for electricity in Houston Lighting & Power service area. And accordingly, the company decided to adjust the schedule for completion. What it did was to suspend construction, and determine that it would reactivate construction in 1991 for an anticipated need for the plant in 1997. It retained 60% essentially of the costs that it had initially invested. It had retained those as usable costs, the basic design, the blueprint, some of the key equipment orders.

The Commission found that the utility's decision was prudent, and that moreover, it related to a credible and definite plan to have the need for this plant on line in 1997.

CORNYN: Mr. Barron is it true that HL&P had not yet made a final decision to proceed with the construction of the plant at the time of the hearing in 1990 as indicated in the examiner's report on page 43?

BARRON: Well I believe that the utility I think as the evidence has showed to date in the record has to make a decision about whether to go forward at various junctions in time. And when facts and circumstances change it needs to be able to adjust accordingly.

CORNYN: Well I guess my question also relates to what sort of commitment the utility has to make at the time of the hearing in order to get the benefit of including this in the rate base? Is it that we have some plans...

BARRON: The company submitted evidence that there was going to be this need for this plant. They had previously submitted...done an entirely separate case showing that it was entitled to a certificate of convenience and necessity for this. And that's the basis. And it said we had definite plans to go ahead on the basis of projected demand. And that's the basis on which the Commission as the fact finder decided that there was a definite and credible plan to go forward.

CORNYN: But if they decide the next day after the hearing is over with it is included in the rate base and there is nothing anybody can do about it?

BARRON: There is certainly something someone can do about it. The utility has an obligation to make sure that its accounting conforms to proper accounting rules. And any party or the Commission on its own could bring a new case and investigate this matter and make appropriate adjustments if there is a need to reclassify.

HECHT: If a utility had come in and said, "well then we don't have any CWIP here but we are thinking about building this plant, and we want to spend \$93 million to think about it, and we want that in plant held for future use," that would be an odd request wouldn't it? That's an unusually large sum...

BARRON: It is a typically large amount. And that relates to the circumstances. The utility had made a decision that no one questions was imprudent. The Commission found it to be prudent, to go ahead and begin construction, the initial construction and do this blueprint. And equally so, the decision to stop was prudent. And so the issue for the Commission was while these costs have properly been placed in the CWIP account because account 107 in the accounting rules says, "costs incurred while a project is in process of construction belong in the CWIP account," they could not belong there to be placed there anymore once the prudent decision to suspend construction had been made. And so the Commission had to...it was ineligible for CWIP. And so they had to decide where it was placed. And having found that this provided a good...these usable costs that were retained represented plant held for future use under a definite and credible plan it met account 105 for plant held for future use account.

HECHT: The problem is if construction had continued those costs would have still been subject to the financial integrity rule. And because it doesn't now they are included more readily in the rate base; and why does that make sense?

BARRON: That's right. Here is I think why it makes sense. There is a fundamental difference I think that the legislature must have recognized in singling out CWIP for financial integrity treatment difference between CWIP and plant held for future use. When there is an active construction project and costs are placed in the CWIP account, a component to that account allows the utility to record a return called Allowance for Funds Used During Construction (AFUDC). So the legislature has recognized that in that instance while a plant is under active construction and there is a horizon in which the plant will go into

commercial operation and you will eventually be able to get this return on paper and converted into a cash return, the legislature has said, "since you will get it utility show us or show the commission why there is a special financial need to get the cash version of that in advance." There is no such counterpart for reporting a return in the plant held for future use account. It is not a question of when or timing when you are going to get the return. It's a question of are you going to get it now because it has usefulness, it is used and useful as an advance long term investment, or are you never ever going to get that return? Again there is no paper return.

CORNYN: Can you explain how the PUC authorized \$10 million in allowance for funds used during construction, not under CWIP but under plant held for future use because the Malakoff plant...these were not no longer funds used during construction?

BARRON: It was the portion of the allowance for funds used during construction that related to the usable costs that was placed in. All that AFUDC remained a paper reported return. It was not amortized. It was not received. It was preserved and would not be able to be converted to cash in accordance with normal CWIP accounting unless and until you went to commercial operation. But it was a very real part of the prudently incurred costs, the interest, the carrying cost associated with the initial investment and therefore it was included.

CORNYN: How would funds used during the construction process qualify, under what theory would it qualify as a plant held for future use?

BARRON: In the same way that the actual land that was purchased or the initial blueprint that was invested, the cost that was invested in making this. The carrying costs, the interest so to speak on this is parcel of how much it cost to make that investment. And while those costs were incurred during construction including the interest element, or the reasonable return element, once under the accounting rules the project was no longer in process of construction, they could not be put in the CWIP account and had to be in plant held for future use.

And that brings me to the important question that your honor asked at the outset: What is the commission's authority for doing this? And I think the answer lies in §§27 and 39a of PURA. The fundamental principal here in 39a is that a utility is entitled to a return a reasonable opportunity to earn a reasonable return on its invested capital used and useful.

OWEN: That's what I want to focus on, the definition of invested capital in the 41a. How do we fit this Malakoff plant into the original cost of property used by and useful to the PUC in providing service; how do we fit this situation into that specific definition?

BARRON: I think it is the implicit premise of opposing counsel is that that phrase "used and useful in providing service" can only include a commercial cost that is represented in the commercial operating plant. And I think that that's not the proper conception. I think that an investment, an advance investment CWIP has a used and usefulness also to rate payers.

OWEN: What cost of property do we have here that's used and useful?

BARRON: It's the investment that was made in the blueprint, the design plan, and the land and the key equipment purchase orders that were retained for usable later, that provide a current value or usefulness, the commission found in the form of advance planning to ensure that rates down the line would remain at their least reasonable cost consistent with the utility's statutory obligation to do advance planning and provide reasonable service.

HECHT: What is to keep a utility who cannot meet the financial integrity showing for CWIP from simply moving all of those costs over into plant held for future use when it wouldn't otherwise be entitled to?

BARRON: The PUC of Texas your honor we are here to evaluate whether it was a prudent decision or whether it was just accounting trickery or not.

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HEARON: May it please the court. My name is Bob Hearon for HL&P. Let me very briefly restate some basic facts here. This Malakoff plant was certificated by the Commission in 1982. They found at that time it needed to be built. HL&P began to build it. The costs were put in a construction work in progress account. HL&P decided in 1983 to delay the completion date, continue with construction but delay it. That was found to be prudent. The PUC in 1984 had a hearing about Malakoff, validated the prudence, the need, the necessity for the plant and for its continued construction, and all of those costs continued to be recorded in CWIP.

HL&P deferred construction again in 1985. But finally in 1987 it decided to stop construction. The commission found that that was a prudent decision. Every decision that HL&P made about Malakoff has been found to be prudent and reasonable.

GONZALEZ: Mr. Boyles has not contested any of those findings.

HEARON: At that point your honor I think that's correct. The question before the commission in the next rate case is what are we going to do with these Malakoff costs? Alright they divided. They said some of these costs that you have incurred in the past are not going to be usable when construction is reactivated. As to those we are going to allow recovery of them over a 10 year period, some \$61 million. The rest of them that are found to be usable and have some benefit to ratepayers in finishing and completing this plant and to be a product of proper planning and resource dedication in the past what are we going to do with them? There are two options, there are two accounts. One of them is account 107, construction work in progress. Can we put these costs in CWIP? Well the requirements for CWIP bar no 1 there has to be construction in progress. There isn't. Construction has stopped. There is no construction. So you cannot put it in CWIP. The other account is account 105, plant held for future use. One of the requirements of plant held for future use is that there is no construction going on. It is simply an investment of capital by the utility intended to be used for future resource development.

CORNYN: Is there any limit on the amount of money that can be allowed by the PUC for plant held for future use for the types of things that the utility can buy, I guess get bargain fire sale prices for the consumers' future benefit, is there any limitation at all on either of those?

HEARON: Let me answer that at two levels. First there is no limitation to _____ as Mr. Boyle argues. I think a lot of these case talk about preliminary engineering, development work, that's the kind of thing utility ought to be doing. In terms of overall monetary amount no, I don't know of any limitation, but I think there that's why the commission sits to be sure that that amount is reasonable. And that amount has been found to be reasonable by this commission.

CORNYN: How about the categories of expenses?

HEARON: The categories, there is no limitation on them. Here they included payments to Stone and Webster for architectural and engineering services: payments, deposits made with vendors, equipment suppliers for boilers, that type of thing. Deposits: HL&P's own cost in managing the project,

the land itself, a substation, and all of these things your honors have been in the CWIP account and of course that is where this AFUDC item came from. During the time it was in CWIP, AFUDC occurred.

Now with that in mind let me outline what I believe is the key to this case. If you could continue to record these costs in CWIP, then the utility would continue to earn a return in AFUDC. And that return would be accumulated as a part of the capital cost of the plant. And eventually when the plant was completed and put in service at that time, it would be recovered from ratepayers over the life of the plant.

Financial integrity comes in only if the utility says, "Well we don't want just this recorded book entry return. We want a cash return during construction in lieu of this book AFUDC." And that's where the legislature says if you are in CWIP and you want a cash return instead of simply a book entry, you have to show financial integrity.

Now Mr. Boyle confuses that by saying, "By trying to apply that concept, which is not applicable here to plant held for future use, where there is no construction, there is no provision of the plant held for future use rules that allow you to accrue this return and recover it in the future." It's either now or never.

CORNYN: How can a plant held for future use be currently used and useful if it may never be used or provide any services to consumers?

HEARON: Because it increases the flexibility of the options available to the utility. There is a bundle of testimony in this case that because of the investment that had been made in Malakoff, HL&P did not need to decide to begin construction of Malakoff again. For several years it had a head start on the completion of that plant. These are dynamic times. The population is an issue, the demand for electricity is an issue; competitive forces an issue; fuel costs are an issue; and it's a benefit to ratepayers to have a plant in suspense ready to go, which can be brought on-line in 3-5 years rather than one that would take 10 years to plan and design from the outset and complete. And that is of benefit to ratepayers.

ENOCH: Mr. Hearon if the Public Utility Regulatory Act is really designed to take what is inherently a noncompetitive business and make it react as if it was a competitive business, if that's an underlying principle on this plant held for future use issue if this was in a competitive market would not the investors in a business that had anticipated a growth in the needed business so they went out and built a new plant, but found that there was no market for the product, wouldn't those investors have to expect to take a loss on that particular investment? Can HL&P really in a competitive market have expected that when they make a decision not to build a plant, that they ought to be able to recoup the preliminary cost of the decision to build that plant?

HEARON: Two answers your honor. First 39a, as you know, entitles the utility to a return on all of its capital invested for utility purposes. That's what happened here. Secondly, if you adopt the argument that you are presenting, then what kind of signal does that send to the utility. Are you going to tell the utility that if you do advance planning, if you have a plant under construction but you stop construction, you need to recognize that we are not going to give you a return. Doesn't that just tell the utility that you better keep it under construction; you better avoid advance planning because you are not going to get paid for that; those are risks that you as investors have to take.

ENOCH: But if you applied the rule as Mr. Boyle has suggested, that financial integrity be the threshold, then you tell investors that if you make this decision you choose not to build the plant you can recover so much of this investment that the integrity of the enterprise will not be in danger.

HEARON: Your honor with all respect financial integrity is not a threshold requirement for a utility to recover its capital costs. It exists only within the confines of the CWIP account, and in the instance of deferred accounting.

ENOCH: That only to the extent the costs that would be included that you would recoup are those that have been prudently expended. The CWIP issue simply says that if your financial integrity is threatened because you are having to wait until the plant is brought on-line we will let you have a preliminary determination that you can recover some of it. But the investors are always faced with the prudence issue as to what they recover. And they would face that on this plant held for future use anyway.

HEARON: Plant held for future use as well.

ENOCH: So the only question is what amount of this money that is prudent would be included under this financial integrity issue?

HEARON: The question before this commission and before the court on review is whether these expenditures under these circumstances after construction had been stopped should or could be treated as plant held for future use, or should or could be treated as construction work in progress under the two available accounts adopted by the commission. The commission decided simply that it can't fit the construction work in progress account. None of those principles are applicable here. It does fit the plant held for future use. That's what we are going to do. That was not an arbitrary or unreasonable decision, and it's one within the statutory powers of the commission.

OWEN: You've used the ability to meet projected demand of holding the plant in suspension as a basis or touchstone for use and useful. What are the regulatory consequences to HL&P if it in fact under estimates demand and doesn't meet demand? What are the risks on that side?

HEARON: It subjects itself to the risk of a management penalty if it has refused or failed prudently to foresee these changes, to take the proper steps designed to fulfill its public service obligation. And indeed HL&P was being criticized in the early 1980s for not having sufficient plants on-line. That's why it went out and built Malakoff.

OWEN: What are the regulatory consequences...

HEARON: Well the management penalty is for one your honor. The rate of return can be reduced as a penalty under PURA for failure. Ultimately it can be penalized in any number of ways for failing to meet its service obligations to the public.

SPECTOR: The portion that was not designated to that account, now does that portion ever go into the rate base?

HEARON: No, your honor. Those nonusable costs (\$61 million) were simply recovered without a return.

SPECTOR: But they are recovered?

HEARON: Just the principal over a period of 10 years.

SPECTOR: So there is a third alternative to keeping it in the CWIP account or in the account for future use _____ can be recovered over a period of time?

HEARON: There is your honor. But it doesn't make any sense here because the distinction, the line that the commission drew was between those costs that would be usable in the future, and those that would not. Those that it would not it said go ahead recover those costs now. But the ones that are usable in the future we are going to put those in plant held for future use.

SPECTOR: With a return on it?

HEARON: With only a return. Those costs are not now being recovered. They are simply being held in suspense pending reactivation of construction of the plant.

SPECTOR: They now are out of the business?

HEARON: That is correct. If we want to talk about the events afterwards we can. And eventually this plant was cancelled. But flexibility in utility planning requires the availability of both CWIP and plant held for future use, and affirmance I submit of the commission's action in this case.

OWEN: But those costs will be amortized and ultimately over 10 years recovered from ratepayers?

HEARON: When the plant was eventually cancelled, the remaining costs were amortized without a return over 7 years to match the remaining time of the 10 year period.

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REBUTTAL

BOYLE: Your honors. I hope I will cover the points in very rapid order here. First, not permitting a CWIP except for financial integrity doesn't stop flexibility. Every other utility, dozens upon dozens of power plants were able to go forward without having to put their engineering, their boilers, all of these kind of costs. I don't think there is a single case at the commission in excess of \$20 million are request plant held for future use. This is way out of bounds about what utilities do and requests for this kind of an expenditure.

GONZALEZ: Mr. Boyles what is a standard of review for us in this case?

BOYLE: The standard of review is substantial evidence on the fact issues, and obviously errors of law you decide that.

GONZALEZ: But not to second guess the PUC?

BOYLE: That is correct. On evidentiary questions you are not to second guess them. With regards to use and useful. If one says that this kind of plant is used and useful, remember that the commission has traditionally said both about plant held for future use, and about CWIP, that it's not used and useful. It would stand it on its head if you can be 10 years and say that's used and useful in supplying electric service. But something I didn't talk about the first time out: Why CWIP? Why do they impose the financial integrity requirement? There are two requirements: matching benefits and burdens; and the second one is having plants that actually work and are producing electricity before you have to pay. And that is in plants many things can happen. What happened when Mr. Hearon spoke here? He talked about all the problems: fuel; demand; all these uncertainties that are out there. That's all the more reason why you have some minimum threshold of financial integrity before you ask ratepayers to pay for a plant that may never come on-line. The further out a plant is on this scale, the greater the danger is the plant will never become operational. The further out that it is, the people who are paying if they start 10 years out won't be the ones

receiving the benefit of the plant that is supplying the electricity.

Now one other item, and it is important to understand. The plant held for future use, the return is a cash return now. It's a full return, a full cash return on the entire amount as opposed to CWIP in which you have to prove your financial integrity. And in the prior case, and I want to talk a little about the potential for accounting gimmickry, the prior case 6762 a 32% return on CWIP. That was the cash amount that they could show at that point. They get AFUDC, but they only get it later when the plant comes on-line and is fulfilling its use to ratepayers then, and supplying electricity itself. It's actually proving and working.

Now Justice Cornyn you asked the question about whether in fact there was testimony by HL&P that the plant...there was no definite plan for the plant. And there was, and the examiner so concluded. And it was Mr. Naves testimony, and it will be found in the record, that there was no definite plans for this plant at that point in time to come on-line.

I want to go back to docket 6765. It became final on Feb. 7, 1987. Prior to that time, the plant was deactivated. It was changed from CWIP to plant held for future use. In docket 6765, the commission gave the company a certain percentage of CWIP, which included Malakoff. Before the case was final on Feb. 7, 1987, the plant had been redesignated plant held for future use. It was not longer CWIP. The commission didn't know obviously at that time, no one came forward to tell the commission. It was beyond the 10 year period in which they wouldn't have qualified for plant held for future use.

Justice Hecht you asked the questions about changing the designation where you can't qualify for financial integrity. Here we have a situation for 6 or 7 long years it was CWIP. And all of a sudden we come in here, they had gotten a small portion for financial integrity in the prior case, all of a sudden the entire amount becomes plant held for future use. Is it a coincidence when you look at that first chart that you see each time it's changed since 9 years out just within the 10 year period for plant held for future use.

PHILLIPS: You may make a fairly compelling argument, but the system may not make sense or it may be subject to abuse. But our job after all is to decide what the statute says, and what it allows.

BOYLE: And going back to the law your honor, the legislature said it must be used and useful. This plant is not. There is a finding. Finding of fact 39b says, the finding itself says, "Its potentially useful." There was no finding of fact that I could find, which indicated that they made an actual finding that it was used and useful in providing service to the public. No finding of fact to that effect. A specific finding, finding 39b which said, "It is potentially useful."

CORNYN: Do you agree with Mr. Barron that §§ 27 and 39a of PURA authorize the inclusion of plant held for future use in the rate base?

BOYLE: No, I don't, because I think there is much confusion. Section 27 is an accounting recording mechanism. It doesn't decide rate-making treatment. That is governed by the other sections of the statute beginning with 38, 39, 40, and 41. Those are the sections that decide what the rate-making treatment is. For example, you may have something in account 107, which is the CWIP account, but that determine the rate-making treatment, and that's where the legislature went in and said we need a financial integrity standard, and it must be prudent as well. So that the rate-making treatment is defined elsewhere. It is not defined by where you recorded it, which is what §27 is talking about.

HECHT: We have not asked you about the taxes you discussed below. Is there much left of that after _____?

BOYLE: There is not your honor.