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Deseret Livestock Company, a corporation, and Anschutz Land and Livestock Company, Inc., a corporation v. Utah Power and Light Company : Brief of Respondents

Utah Supreme Court

David A. Robinson; Richard L. Bird, Jr.; Attorneys for Plaintiffs-Appellants.
S. G. Baucom; Robert Gordon; Attorneys for Defendant--Respondent.

IN THE SUPREME COURT

OF THE STATE OF UTAH

DESERET LIVESTOCK COMPANY, a corporation, and ANSCHUTZ LAND & LIVESTOCK COMPANY, INC., a corporation,

Plaintiffs-Appellants,

vs.

UTAH POWER & LIGHT COMPANY, a corporation,

Defendant-Respondent.

Case No. 14008

BRIEF OF RESPONDENTS

APPEAL FROM THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY
HONORABLE STEWART M. HANSON, PRESIDING

S. G. BAUCOM, ESQ.
ROBERT GORDON, ESQ.
P. O. Box 899
Salt Lake City, Utah 84110

Attorneys for Defendant-Respondent

DAVID A. ROBINSON, ESQ.
531 South State Street
Salt Lake City, Utah 84111

RICHARD L. BIRD, JR., ESQ.
333 East 400 South
Salt Lake City, Utah 84111

Attorneys for Plaintiffs-Appellants

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DAVID A. ROBINSON, ESQ.
531 South State Street
Salt Lake City, Utah 84111

RICHARD L. BIRD, JR., ESQ.
333 East 400 South
Salt Lake City, Utah 84111

Attorneys for Plaintiffs-Appellants

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BRIEF OF RESPONDENTS

NATURE OF THE CASE

This is an action against an electric utility brought by two of its customers claiming damages to irrigation pumps and loss of crops and forage allegedly resulting from negligence of the utility and for breach of contract to supply electric power and for breach of implied warranty of fitness of electrical power supplied to said customers.

DISPOSITION OF CASE IN LOWER COURT

The case was tried in the District Court of Salt Lake County, Utah, before Honorable Stewart M. Hanson, sitting without a jury. At the close of plaintiff's case defendant moved for dismissal. The Court reserved a ruling

on the motion and defendant proceeded with its case. Upon conclusion of the trial, the Court granted defendant's Motion to Dismiss.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek to have the judgment of the trial court reversed and remanded for trial or, alternatively, for judgment for plaintiffs and remand for determination of damages.

STATEMENT OF MATERIAL FACTS

Defendant does not agree with the statement of facts as set forth in plaintiffs' brief in that such statement omits certain material facts relative to damages, to the time of occurrence of the incident giving rise to this action, to the number of customers supplied on the same electric distribution line which supplied service to plaintiffs, to the physical electric distribution system on plaintiffs' properties and in other respects. Defendant therefore submits its own Statement of Material Facts.

For purposes of brevity, plaintiffs Deseret Livestock Company and Anschutz Land and Livestock Company, Inc., will be referred to as Deseret and Anschutz; defendant Utah Power & Light Company will be referred to as Utah Power.

Deseret and Anschutz are both corporations and both owned certain ranching and livestock property in Skull Valley,

Tooele County, Utah. Subsequent to the commencement of the action, Deseret sold all of its properties to Skull Valley Company, a Utah limited partnership (R. 2). Deseret and Anschutz are both customers of Utah Power and receive electric power for various purposes, including the operation of electric motors and pumps used for irrigation pumping. Plaintiffs are both served from what is known as the Skull Valley No. 1 Circuit (Ex. 6-P, R. 49-50). Approximately sixty-five customers, including seventeen irrigation pumping customers, are supplied with service from this same line (R. 50).

Electric power is delivered to both plaintiffs at a specified point of delivery, beyond which point they each use such power for their respective electric requirements. Deseret owns, operates and maintains its own electric distibution lines with associated transformers, fuses and other devices, which lines run from the point of delivery to various points of use on Deseret's property.

Mr. Beck, Manager of the Deseret ranch, testified that the various distribution lines owned by Deseret are (1) one-half mile long, (2) one hundred yards long, (3) one hundred yards long, and (4) one-quarter mile long (R. 14).

Deseret and Utah Power entered into an electric service agreement (Ex. 2-P). Said agreement refers to and incorporates Utah Power's Electric Service Regulations as filed with the Public Service Commission of Utah. Mr. A. R.

Dunn, Manager of Rates for Utah Power, testified (R. 70) that such regulations set forth the conditions, definitions and characteristics under which electric service is supplied to a customer. Said regulations provide in part that Utah Power does not guarantee its service against irregularities and interruptions and further that the customer assumes all responsibility on its side from the point of delivery for the service supplied and the electrical installation used therewith (R. 72).

Mr. Beck, Manager of Deseret, testified (R. 13) that around the 18th or 20th of June of 1970, in the morning, he discovered that the irrigation pumps were not operating. He immediately called Mr. Al Nytch of Utah Electric Motor to repair same (R. 8). He called Mr. Nytch in the morning and he came out the same day (R. 13). Mr. Nytch, in his deposition, received in evidence, stated that he was informed the pumps went out the prior evening and he was called but not reached at that time. Mr. Beck did not notify Utah Power relative to any problem with the irrigation pumps (R. 18). Three pumps were operating on the Deseret ranch at the time (R. 17) and one pump was damaged (Dep. 8). The damaged pump was out of service for sixty to seventy days (R. 9). It was used for pumping water for irrigating five hundred acres used for growing hay and forage (R. 9). Mr. Beck testified that because of the unavailability of water on this tract, one thousand tons of hay were not produced and two or three

months of forage for one thousand cattle was lost (R. 10). Mr. Daniel Freed, Vice President of Deseret, testified (R. 20) that the hay was worth $30 to $35 per ton and would have cost $7 to $8 per ton to harvest. He further testified (R. 21) that the forage was valued at $.15 per day per head of cattle. He stated that it was not necessary for Deseret to purchase any feed to replace that which was claimed lost because of the lack of water (R. 23).

Mr. Nytch stated that the damage to the pump was caused by a sustained outage followed by a phase reversal which occurs when one electric line is switched with another (Dep. 11) and that such occurrence must be man made and can only be man corrected (Dep. 25-26). The cost of repairs to the Deseret pumps attributable to the phase reversal was $7,837.11 (Ex. 3-P, 4-P and R. 22).

Mr. Max Arneson, Manager of Anschutz's ranch, testified that he was in Wasatch County when he received a call from Mr. George Slaugh, foreman of the Anschutz Skull Valley ranch, informing him that one of the irrigation pumps was not working (R. 30). Mr. Arneson was unable to recall the date of the call other than that it was sometime in June, 1970 (R. 31). He testified the pump was out for sixty to seventy days but that repairs were all complete by August 4, 1970 (R. 32). He stated the repair invoice was paid in September, was dated August 4, 1970, and that repairs were completed by that date (R. 32). There were two pumps on the

Anschutz ranch but only one was damaged (R. 27, 38). Anschutz did not purchase any feed to replace that not produced because of the lack of water (R. 32). Mr. Arneson stated that there are one or two ranches having wells and pumps located between the Deseret and Anschutz ranches (R. 33). He testified the value of the lost forage at $4.50 per head of cattle per month, that the irrigated property served by the damaged pump would serve three hundred head of cattle, that the forage was lost for a three-month period (R. 29-30) and that the repair bill for pump repairs was $1,679.84 (R. 29-30). Mr. George Slaugh, Anschutz's foreman, testified that when he discovered the pump was not working, he called Mr. Arneson who instructed him to call Mr. Nytch to make the repairs (R. 37). He stated the problem occurred around the 18th or 20th of June (R. 38). Mr. Nytch stated that Mr. Slaugh called him approximately five days or so after the incident occurred (Dep. 4).

Mr. Nytch stated (Dep. 19) that the damage to the Anschutz pump was caused by phase reversal and that the Deseret and Anschutz pumps now have devices to protect against such phase reversal but neither had such devices at the time of the pump failure (Dep. 9).

Arthur J. Nielson, Jr., witness for plaintiffs, and Dale Brown, witness for defendant, both testified (R. 100 and R. 61) that a phase reversal occurs from a switching or reversing of conductors from their proper order on a three

phase circuit. Mr. Brown testified that a phase reversal would effect all users on the same circuit (R. 69), that it could not be accomplished without an outage, that it could not be done with hot live lines (R. 91) and that it would take ten to fifteen minutes to physically accomplish the reversal (R. 92).

Plaintiffs' witness Nielson testified (R. 105-106) that a phase reversal need not occur on a pole-mounted electric line but can occur on the ground at the terminal box of the motor or could occur at the substation or generating plant or at any place in between (R. 107). He also stated (R. 107) that a phase reversal to cause damage to both the Deseret and Anschutz properties would have to result from action taking place above the Anschutz ranch and toward the substation or generating plant.

Mr. David Robinson, attorney for plaintiffs and Vice President, Secretary and Treasurer of Deseret, stated (R. 45) that a demand letter written by him on February 11, 1971, was, to his knowledge, the first notification given to Utah Power relative to the subject occurrence.

Mr. Gail A. Parker, District Representative of Utah Power's Tooele office stated (R. 50) that approximately sixty-five customers are served from the same line that supplies service to plaintiffs. He also testified that no trouble calls or outage reports were received from either Deseret or Anschutz or any other customer served from the

subject electrical line during the period around June 18, 1970, or for several days prior to and after that date and that no work was being done during this period at the Skull Valley Substation (R. 51-52, 54).

At the conclusion of plaintiffs' case, defendant made a Motion to Dismiss (R. 43) for lack of proof in establishing any negligence or liability on the part of defendant. The motion was taken under advisement (R. 44) and defendant, without waiving same, proceeded to put on its case. Upon the close of all evidence, the matter was argued and taken under advisement. The Court subsequently issued a memorandum decision granting defendant's Motion to Dismiss. Thereafter, an Order of Dismissal was entered and an objection to same was filed because said Order did not contain Findings and Conclusions. Findings of Fact and Conclusions of Law, together with an Order or Dismissal were then made and entered and plaintiffs filed their objections thereto. After a denial of such objections, this appeal was taken.

ARGUMENT

POINT I

THE JUDGMENT AND PROCEEDINGS IN THE TRIAL COURT ARE PRESUMED TO BE CORRECT AND THE FINDINGS OF THE TRIAL COURT SHOULD BE REVIEWED IN SUCH A MANNER AS WILL SUPPORT THE JUDGMENT.

There are numerous cases supporting the general proposition of law that the judgment and proceedings in the

trial court are presumed to be correct and the trial court's findings should be reviewed in such a manner as will support the judgment. Leithead v. Adair, 10 Utah 2d 282, 351 P.2d 956. It is well established that the duty of the appellate court is to review the evidence in a light most favorable to the findings. Parrish v. Tahtaras, 7 Utah 2d 87, 318 P.2d 642; Petrie v. General Contracting Company, 17 Utah 2d 408, 413 P.2d 600. This Court succinctly stated the rule in Lawrence v. Bamberger Railroad Company, 3 Utah 2d 247, 282 P.2d 335, and it was there stated as follows:

> When the Court has made findings and entered judgment thereon as was done here, it is then our duty to review the evidence in the light most favorable to the findings, and they must be allowed to stand if reasonable minds could agree with them. Likewise every reasonable intendment ought to be indulged in favor of the validity and correctness of the judgment under review, and it will not be disturbed unless the appellant meets his burden of affirmatively showing error.

POINT II

THE TRIAL COURT PROPERLY CONSIDERED ALL OF THE EVIDENCE PRESENTED BY BOTH PARTIES IN MAKING ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW AND SAME ARE CONSISTENT WITH THE EVIDENCE PRESENTED

At the conclusion of plaintiff's case, defendant moved to dismiss the complaint for lack of proof of any negligence or liability on the part of defendant (R. 43). The motion was taken under advisement and defendant proceeded

to put on evidence without waiving the motion. The motion was, therefore, continuing and was recognized by the Court and by all parties as being a continuing motion.

Rule 41(b) of Utah Rules of Civil Procedure specifically provides that if a motion to dismiss is made at the conclusion of plaintiffs' case, the Court, as trier of the facts, may then determine them or may decline to render any judgment until the close of all the evidence. The trial court took the matter under advisement and at the close of all evidence then granted the continuing motion to dismiss.

The trial court's reservation of a ruling on the motion at the time it was made was nothing more than a determination that judgment should not be entered at that time but should be reserved until the close of all the evidence in accordance with the provisions of Rule 41(b). Although the Court's ruling was here made at the conclusion of the case and pursuant to a continuing motion to dismiss, the situation is analogous to that where such a motion is denied at the conclusion of plaintiffs' case and then granted after all the evidence is presented. In such situation the apparent reversal by the court of its own previous ruling is a circumstance fully contemplated by the language of Rule 41(b) which specifically permits the court to render judgment at the close of plaintiffs' case or ". . . he may decline to render any judgment until the close of all the evidence." In that regard, 5 Moore's Federal Practice, at page 1159, states:

> As previously noted, he may conclude that it is inadvisable to sustain defendant's motion midway in the trial and that the trial should be completed, even though technically he may sustain defendant's motion. The denial amounts to nothing more than a refusal to enter judgment at that time; constitutes only a tentative ruling; and does not preclude the trial judge from making at the close of the case findings and determinations at variance with his prior tentative ruling.

In the instant case, where the court determined to hear all of the evidence before rendering its decision on defendant's Motion to Dismiss, it would be clearly unreasonable and improper for the court to base such decision on only a part of the evidence.

The trial court made fourteen Findings of Fact, all of which were fully supported by the evidence and which are substantially included, in narrative form, in the Statement of Material Facts herein, with references to record pages.

Plaintiffs principally take issue with Findings of Fact No. 4 and Conclusion of Law No. 1. Such Finding, in substance, is that Utah Power at or near the time plaintiffs claim the irrigation pumps were damaged did not (1) experience any electrical outage or disturbance on its Skull Valley line, (2) did not receive any complaint or trouble call from any of the sixty-five customers served by said line, and (3) did not perform any maintenance or repair work on said line.

Evidence to support such finding clearly appears from the testimony offered by Mr. Parker, the employee in

charge of Utah Power's Tooele office (R. 51-52, 54). Plaintiffs offered no evidence to the contrary. Exhibit 6-P illustrates the total Skull Valley circuit showing all the customers served from this line. Defendant's witness Brown testified (R. 91-92) that a phase reversal could not be accomplished without an outage and that it would take a minimum of ten to fifteen minutes to physically reverse the conductors and create a phase reversal. Plaintiffs' witness Nytch agreed that an outage was necessary to cause a phase reversal and testified that the outage would ". . . have to have been sustained for a while." (Dep. 11).

The lack of any communication to Utah Power at the time in question from any of the sixty-five customers supplied with service by the same line as that serving plaintiffs, who would have experienced an electrical outage for ten to fifteen minutes, combined with the fact that no repairs were being performed or were required on such line at the time in question, leads to the inescapable conclusion that the damage sustained by plaintiffs were isolated instances occurring only on their properties and affecting only their facilities.

In view of the evidence presented on this issue by defendant and the lack of any contrary evidence presented by plaintiffs, the trial court's Finding of Fact No. 14 was fully supported by the evidence and based, in part, on such findings, the Court properly concluded that defendant was

not negligent in the operation or maintenance of its electrical lines in supplying service to its customers.

POINT III

RES IPSA LOQUITUR IS NOT APPLICABLE TO THE FACTS OF THIS CASE

Applicant alleges that the instant case presents a proper factual situation for application of the doctrine of res ipsa loquitur. This court in numerous cases has considered the doctrine and the factual elements required for its application are well establishedin this jurisdiction. Significantly, the court has on several occasions dealt with the doctrine of res ipsa loquitur as specifically applied to public utility service.

In Loos v. Mountain Fuel Supply Company, 108 P.2d 254 (1940), an action was brought for injuries and damages sustained as a result of a natural gas explosion occurring in a pipe beneath a rental unit of Utah Motor Park. The gas company supplied gas to the motor park at two meters. The motor park then piped the gas to the furnaces and ranges in individual cabins within the park. The gas company had no control over the gas pipes and appliances within the motor park and beyond the gas meters. There is no evidence of specific negligence on the part of the gas company, and plaintiff sought to have such negligence established by application of the doctrine of res ipsa loquitur. The court there held that the doctrine could not be invoked against

the gas company because it did not have any control over the gas facilities where the explosion occurred.

A more thorough treatment of the subject is found in the frequently cited case of Wightman v. Mountain Fuel Supply Co., 5 Utah 2d 373, 302 P.2d 471 (1956). This was an action seeking damages resulting from a natural gas explosion in a private residence. The gas company installed all the piping to the meter. All piping beyond the meter and to the individual gas appliances had been done by a local plumber. This court, in holding that the evidence was insufficient to justify submission of the case to a jury under the doctrine of res ipsa loquitur, stated as follows:

> In order to invoke this doctrine it is generally recognized that the following elements must be present: (1) That the accident was of a kind which, in the ordinary course of events, would not have happened had due care been observed; (2) That it happened irrespective of any participation by the plaintiff; and (3) That the cause thereof was something under the management or control of the defendant, or for which it is responsible.
>
> It is to be conceded that elements (1) and (2) above are satisfied by the facts in the instant case. It is element No. (3) that here gives us concern. This requisite is generally phrased in terms of "exclusive control" over the instrumentality which caused the injury. However, as pointed out by Dean Prosser, the use of such terminology is often not realistically applicable to the situation. He makes reference to examples of malfunctioning machinery, defective appliances and other situations where the instrumentality has passed beyond the control of the person responsible for its condition and is being used by and under the complete

control of the plaintiff. As suggested by that eminent authority, it would seem more accurate to appraise the situation in terms of the defendant's responsibility for the instrumentality, its condition or function, rather than merely its control. Whether it is in the defendant's exclusive control or not, if the evidence reasonably eliminates other explanations than the defendant's negligence, that provides the basis upon which the jury may be permitted to infer that it was defendant's negligence which resulted in the injury. We are therefore not here concerned with what degree of control the gas company had over the pipes leading into the meter and the meter itself which it had installed. We proceed upon the assumption that the gas company was responsible for that part of the system, leaving the responsibility upon the Wightmans for their house piping, furnace and gas water heater.

This brings us to the issue, crucial to the plaintiff's case, whether her evidence was sufficient upon which to base a finding that the source of the explosion was in the area for which the gas company was responsible. Such proof cannot rest upon speculation or conjecture, nor upon a mere choice of probabilities. To give rise to a jury question there must be something in the evidence from which the jury could reasonably believe that there is a greater probability that the explosion occurred in that part of the installation than in the pipes or appliances installed by and under the care of the Wightmans. Only if there is some such basis in the evidence would there be any foundation to permit the jury, under res ipsa loquitur, to infer that some defect or lack of due care in the gas company's part of the installation caused the leak and the resulting explosion.

The standards set forth in the Wightman case were later affirmed in Talbot v. L.D.S. Hospital, 21 Utah 2d

73, 440 P.2d 872 (1968), and in Lund v. Mountain Fuel Supply Company, 15 Utah 2d 10, 386 P.2d 408 (1963).

A recent decision by the Supreme Court of Montana, Hash v. Montana Power Company, 524 P.2d 1092 (1974), is one of many from other jurisdictions which reaches the same conclusion as that of the Wightman case with respect to the application of res ipsa loquitur. In that case, which concerned a fire originating in a meter box affixed to plaintiff's building, the court in holding that res ipsa loquitur was not applicable stated as follows:

> To hold that defendant must supply an explanation for every fire that occurs on private property to which it supplies electricity, when it can be shown that the fire developed through arcing in the meter box would have virtually the force and effect of making defendant strictly liable for injuries which occur without proof of negligence on its part.
>
> Even if it might be determined that a power company is in the same relative position to the general public as that of a common carrier and, therefore, as a matter of public policy, it should be required to explain accidents which occur through its equipment, this case does not fall within that principle. The fire occurred on plaintiff's property within equipment owned by it. There is no reason to believe that defendant is in a better position to explain how the accident happened than is plaintiff.

In the foregoing Montana case, the theory was advanced by plaintiff's expert witness, in the absence of any specific showing of defendant's negligence, that the fire was caused by a power surge through the electric lines

serving plaintiff's property. That theory was apparently rejected by the jury in view of the power company's evidence, similar to evidence presented in the instant case, that no irregularities in electric service were brought to the power company's attention by its other customers and that no defects were found in the service lines.

The facts of the instant case, particularly with regard to the necessary element of control by the defendant, clearly do not fall within that type of case to which the doctrine of res ipsa loquitur can be applied. The physical manner in which electric service is supplied to plaintiffs is far different from that where a short drop line conveys power from a distribution line at the rear of a residence or building lot to a meter affixed to a house or building. Electric power is delivered to plaintiffs at certain metering points from which it is then conveyed through plaintiffs' own lines and associated facilities to various points of use on their respective ranches. Plaintiffs' witness Beck, in his testimony (R. 14), described four customer-owned lines on the Deseret ranch that are respectively one-half mile long, one hundred yards long, one hundred yards long, and one-quarter mile long. These lines, together with transformers, fuses and other devices are owned, operated and maintained by Deseret. Utah Power has no control whatever over these lines or their operation or maintenance. Accordingly, while the damaged pumps were both owned, operated and maintained

by plaintiffs on their own respective properties, the additional element is present here, particularly in the case of Deseret, that the power to serve such pumps is conveyed on their own electric facilities at various, but substantial, distances from the metering point to the actual point of use. The requisite element of defendant's control is completely lacking.

Plaintiffs rely on the contention that the court should disregard all of the traditional control factors and find that res ipsa loquitur applies because the electric power was "faulty." Under such theory plaintiffs allege that consideration need not be given to such independent factors as referred to above, i.e., the damage occurring solely on plaintiffs' properties, occurring to their electrical equipment, the operation and maintenance of which are under their exclusive control, and the occurrence of damage at a considerable distance from the point where electric power is delivered to the interconnected electrical facilities owned by plaintiffs. This contention, relative to control by the defendant, was fully considered and disposed of by this court in the Wightman case. On that issue the court stated:

> Finally, plaintiff makes the contention that it was not the pipes, appliances or meter which caused the explosion, but the gas itself, which is under the exclusive management and control of defendant, so the rule of res ipsa loquitur would apply. The position cannot be sustained. If such were the case, the rule could be invoked against the supplier of gas in any case of

> injury resulting therefrom, regardless of whether the facilities were installed by the gas company and regardless of the amount of control or the kind of care exercised over them by others. This would be an impractical and insuperable burden which is not imposed by the law in Utah nor of other jurisdictions.

One additional factor that must be considered in determining whether or not negligence should be predicated on the theory of res ipsa loquitur relates to the evidence regarding the time when each plaintiff sustained damage to its respective pump. There is a complete absence of competent evidence that the damage to the respective pumps resulted from a simultaneous occurrence. No showing was made that the incidents were simultaneous and, to the contrary, the evidence is completely conflicting in this regard. Mr. Beck (Deseret) stated the damage occurred around the 18th or 20th of June and he immediately called Mr. Nytch (R. 13). Mr. Nytch stated he was called on June 21 (Dep. 17). Mr. Arneson (Anschutz) placed the time of the pump damage as sometime in June (R. 31). Mr. Slaugh (Anschutz) testified the incident occurred ". . . somewhere around the 18th or 20th of June, somewhere there . . . ," (R. 38) and he immediately called Mr. Arneson and Mr. Nytch (R. 37). Mr. Nytch stated Mr. Slaugh called him five days or so after the incident occurred (Dep. 4). It is apparent that this evidence not only fails to establish that the pump damage occurred simultaneously on both properties, but there is no clear showing as to the specific time the damage

occurred on either property. Further, and indicative of the lack of unanimity in establishing a believable time of occurrence, Mr. Arneson stated the Anschutz pump was out of service for sixty to seventy days (R. 29) but that repairs were completed by August 4 (R. 32). The obvious conclusion drawn from that testimony of the manager of the Anschutz Ranch is that the damage to its pump occurred between May 24 and June 4.

POINT IV

THE TRIAL COURT PROPERLY CONCLUDED THAT DEFENDANT DID NOT BREACH THE WRITTEN AGREEMENT TO SUPPLY ELECTRIC SERVICE TO PLAINTIFF DESERET OR THE IMPLIED AGREEMENT TO SUPPLY PLAINTIFF ANSCHUTZ

An electric service agreement between Utah Power and Deseret was introduced and received in evidence as Exhibit 2-P. No similar agreement between Utah Power and Anschutz is in evidence but plaintiffs in Point V of their brief nevertheless refer to agreements with both parties and, in fact, refer therein to specific terms of an agreement with Hatch (Anschutz) regarding amounts of kilowatts, cycles and volts of power to be supplied under such non-offered agreement.

With respect to the one electric service agreement that is in evidence (Ex. 2-P), the agreement specifically provides that it is subject to the Company's Electric Service Regulations, designated as Original Regulations, P.S.C.U. No. 8, which were attached thereto and made a part thereof (R. 71). These regulations were described by Mr. A. R.

Dunn, Utah Power's Manager of Rates, as being a set of rules setting forth the conditions, definitions and characteristics under which the Company agrees to supply electric service to a customer and under which the customer agrees to accept service from the company (R. 70).

Regulations No. 18 and 24 are particularly pertinent to the instant case. Said regulations read as follows:

THE SUPPLYING AND TAKING OF SERVICE

> 18. Continuity of Service. The Company shall use reasonable diligence to provice steady and continuous service, but does not guarantee its service against irregularities and interruptions. The Company having used reasonable diligence shall not be liable to Customers for any damages occasioned by irregularities or interruptions.
>
> 22. Customer's Responsibility. The Customer assumes all responsbility on Customer's side of the Point of Delivery for service supplied or taken, as well as for the electrical installation and appliances used in connection therewith, and will indemnify, save harmless and defend the Company against all claims, demands, costs or expense, for loss, damage or injury to persons or property, in any manner directly or indirectly connected with, or growing out of, the transmission or use of electric service by the Customer, at or on the Customer's side of the Point of Delivery.

Plaintiff Anschutz's knowledge and acceptance of its responsibility for all repairs on the Customer's side of the point of delivery is clearly evidenced by the testimony of its manager, Mr. Arneson. He was specifically asked if Hatch (Anschutz) Ranch accepted responsibility for repairs on the

users side of the meter and he answered affirmatively (R. 27).

Defendant has been unable to find any case where this court has considered a situation involving a claimed breach of a public utility agreement. Plaintiffs cite cases from other jurisdictions and defendant could likewise supply similar cases in support of its position. Such cases, however, from other jurisdictions, are of little value here because they do not involve the specific qualifying conditions contained in the Electric Service Regulations, as quoted above, relative to the supplying and taking of service applicable to the Deseret agreement and to the service agreements with all other customers of Utah Power.

With respect to the implied agreement to supply service to Anschutz, the result is the same. All electric service supplied by Utah Power was and is subject to the Electric Service Regulations filed as a part of the tariffs for such service. To hold that the service provided by the Company to a particular customer was not subject to same would not only be discriminatory as to other customers but would directly circumvent the jurisdiction and authority of the Public Service Commission. The Commission's jurisdiction in this area is clear. Section 54-4-1, Utah Code Annotated, 1953, as amended, vests the Commission with jurisdiction ". . . to supervise and regulate every public utility in this state and to supervise all of the business

of each such public utility in this state . . . ." The Commission's responsibility with regard to rules and regulations applicable to the furnishing of utility service is set forth in §54-4-18, Utah Code Annotated, 1953, as amended, wherein it is provided in part that:

> . . . the Commission shall have power after a hearing to ascertain and fix just and reasonable standards, classifications, regulations, practices, measurements of the service to be furnished, imposed, observed and followed by all electrical, gas and water corporations; . . . . (Emphasis added)

The service agreement and regulations are specifically clear in stating that Utah Power does not guarantee its service against irregularities and further that the customer assumes all responsibility on its side of the point of delivery for service supplied. With such language applicable to the agreements in question, the trial court could not conclude otherwise than that there was no breach of contract by defendant.

POINT V

THE TRIAL COURT COURT PROPERLY CONCLUDED THAT THERE WAS NO IMPLIED WARRANTY OF FITNESS APPLICABLE TO THE ELECTRICAL POWER SUPPLIED BY DEFENDANT TO PLAINTIFFS

The trial court, in addition to its conclusion that there was no breach of the agreement to supply plaintiffs with electric power further concluded that defendant made no specific or implied warranties as to the supply of such power.

At the outset reference is again made to the Electric Service Regulations set forth in Point IV above relative to the supply and taking of electric service. The specific disclaimer of a guarantee in Regulation No. 18, and the specific assumption by the customer, in Regulation No. 22, of all responsibility on its side of the point of delivery for service taken, fully negates the imposition of any implied warranties applicable to the relationship between the parties. Such conclusion applies not only to Deseret with whom a specific written service agreement is in evidence but applies equally to Anschutz inasmuch as the aforesaid regulations are a part of Utah Power's tariffs, designated as P.S.C.U. No. 8, filed with and approved by the Public Service Commission of Utah and are applicable to all electric service supplied to all customers within the state of Utah.

The principal that the provisions of a utility's filed service regulations cover the business relationship between such utility and its customers, and are binding on both, is firmly established and this is true irrespective of the existence of a formal written agreement to supply service. While no Utah cases on the subject were found, many decisions are available from other jurisdictions. In Cullinane v. Potomac Electric Power, 147 A.2d 768 (D. C. 1959), the court held that an electric company's rules and regulations, filed with and approved by the regulatory agency, entered into contracts made with the utility and are binding

on both the customer and the utility in the absence of any unfair practice on the part of the utility; actual knowledge thereof or assent is legally immaterial. In Carroway v. Carolina Power and Light Company, 84 S.E.2d 728 (So. Car. 1954), the court said the utility company's service regulations, on file with and approved by the Public Service Commission, have the force and effect of law and are binding on the plaintiff regardless of whether or not he agreed to them. Further, in Illinois Bell Telephone Company v. Miner, 136 N.E.2d 1 (Ill. 1956), it was held that a telephone company's tariffs on file with the Commission is a necessary component and integral part of its contract and relationships with subscribers and the subscribers are bound thereby and cannot deviate therefrom. To the same effect is a Federal Court of Appeals ruling in Slenderella Systems v. Pacific Telephone and Telegraph, 286 F.2d 488 (1966). Similarly, it was held in Wilkinson v. New England Telephone Company, 97 N.E.2d 413 (Mass. 1951) that the obligation of the telephone company to render service to a subscriber is limited by its regulations which, on filing, become an integral part of the relationship with the subscriber.

Clearly there were no written or express warranties made by Utah Power to Deseret or Anschutz. To the contrary, the intention not to so warrant is evident from Electric Service Regulations Nos. 18 and 22 and the conditions stated therein applicable to the supplying and taking of electric

service. This clear expression of the intended utility-customer relationship fully supports the trial court's conclusion that no implied warranties were made or contemplated by the parties.

CONCLUSION

The trial court, based upon the evidence presented, properly granted defendant's Motion to Dismiss. The Findings of Fact and Conclusions of Law made and entered by the trial court were fully supported by competent and substantial evidence. The Judgment of Dismissal by the lower court should be affirmed.

Respectfully Submitted,

S. G. BAUCOM
ROBERT GORDON
Attorneys for Respondent
P. O. Box 899
Salt Lake City, Utah 84110

CERTIFICATE OF SERVICE

The foregoing Brief of Respondents was served on Plaintiffs-Appellants this 6th day of June, 1975, by mailing copies of same, postage prepaid, to their attorneys, David A. Robinson, 531 South State Street, Salt Lake City, Utah 84111, and Richard L. Bird, 333 East 400 South, Salt Lake City, Utah 84111.