

1986

McCune and McCune, et al, v. Mountain Bell Telephone, McCune and McCune, et al, v. Public Service Commission of Utah: Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

MCCUNE & MCCUNE, a general partnership; :
GEORGE M. MCCUNE, an individual; JAMES :
P. MCCUNE, an individual; and ARLENE C. :
MCCUNE, an individual :

Plaintiffs and Appellants, :

v. :

Case No. 860049

MOUNTAIN BELL TELEPHONE, an assumed :
name of MOUNTAIN STATES TELEPHONE AND :
TELEGRAPH COMPANY, a public service :
corporation, :

Defendant and Respondent. :

MCCUNE & MCCUNE, et al. :

Plaintiffs and Petitioners, :

v. :

PUBLIC SERVICE COMMISSION OF UTAH, :

Respondent. :

BRIEF OF RESPONDENT

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

PETITION FOR REVIEW OF A REPORT AND ORDER, AND OF
AN ORDER DENYING APPLICATION FOR REHEARING, OF THE
UTAH PUBLIC SERVICE COMMISSION

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STATEMENT OF THE ISSUES

1. Did the Public Service Commission abuse its discretion in interpreting a tariff to permit Mountain Bell to transfer a partnership debt for past telephone service to the current business service account of a general partner?

2. Did Mountain Bell violate any constitutional, statutory or common law rights of McCune by transferring the partnership debt to his individual proprietor account?

DETERMINATIVE REGULATIONS

The Mountain States Telephone and Telegraph Company Exchange and Network Services Tariff, Section A2.2.3.2(3).

A. As constituted from December 30, 1982 to March 4, 1985:

In the event a customer is indebted to the Company for charges and services previously rendered in Utah, or for services under one or more numbers at the same location, and the customer does not pay the charges or satisfy such indebtedness, the Company may charge and bill such indebtedness for a residence account against the same customer's residence service or a business account against the customer's business service.

B. As constituted from March 4, 1985 to present:

In the event a customer is indebted to the Company for charges and services rendered at a prior time, of any nature, or for service at more than one number or location, and the customer does not pay the charges or satisfy such indebtedness, the Company may charge and bill such indebtedness against the account of the customer's present service or to the account of either service in the case where more than one number or location is being served.

STATEMENT OF THE CASE

Appellants filed a complaint in the Public Service Commission seeking an injunction prohibiting Mountain Bell from disconnecting George McCune's sole proprietor account for business telephone service, or any other accounts of the individual appellants, for non payment of a bill for telephone service rendered to a dissolved partnership, McCune & McCune, of which George McCune was a general partner (R. 1-12). Appellants also sought a declaration that Mountain Bell's actions in transferring the partnership account to the service accounts of the individual partners was unconstitutional and unlawful, and requested the Commission to invalidate and replace regulations permitting such action.

Following an evidentiary hearing, the Administrative Law Judge issued a Report and Order dismissing the Complaint with prejudice, holding that the complaints of all appellants except George McCune were moot, and that George McCune's complaint was without merit (R. 197-204). The Commission approved the Report and Order, whereupon Appellants filed a Petition for Review or Rehearing (R. 208-227), which was denied (R. 228-229). This appeal followed.

STATEMENT OF THE FACTS

The Commission's Findings of Fact, as set forth in its Report and Order (attached hereto in the Addendum), may be summarized as follows:

Mountain Bell provided service to McCune & McCune, a law partnership, until sometime in 1983 (R. 2, 90). The partnership was dissolved and the service was disconnected, leaving an undisputed balance of \$317.29 (R. 91). In June, 1984, with the account still unpaid, Mountain Bell rebilled the balance to the residence service account of James McCune, one of the general partners (R. 198). When he failed to pay the account in full, following a normal billing cycle, Mountain Bell disconnected his residence service (R. 198). After receiving and investigating a complaint about the disconnection, Mountain Bell discovered that its then existing tariff, which had recently been filed as part of a comprehensive reorganization of the general exchange tariff (R. 181-83), did not explicitly permit cross-billing from a business to a residence account, and therefore restored James McCune's residence service (R. 198).

Because the tariff did permit cross-billing between business accounts, Mountain Bell then transferred the partnership bill to an account for business service for George McCune, the other general partner (R. 198-99). Facing the prospect of disconnection of his individual business service, George McCune filed a lawsuit in district court to enjoin the disconnection, and to recover damages

(R. 250). Upon stipulation, that action was stayed to permit him to file a complaint in the Public Service Commission, to determine the validity and applicability of the tariff provision under which Mountain Bell was proceeding.

At all times material to the above described incidents, Mountain Bell's General Exchange Tariff, on file with the Commission, contained provisions relating to the transfer of an outstanding indebtedness to another account of a customer (R. 200) Those provisions and their effective dates are set forth below:

A. Prior to December 30, 1982:

In the event a customer is indebted to the Telephone Company for charges and services rendered at a prior time, of any nature, or for service at more than one number or location, and the customer does not pay the charges or satisfy such indebtedness, the Telephone Company may charge and bill such indebtedness against the account of the customer's present service or to the account of either service in the case where more than one number or location is being served.

(Mountain States Telephone and Telegraph - Utah General Exchange Tariff Section 20(L)(4)).

B. December 30, 1982:

In the event a customer is indebted to the Company for charges and services previously rendered in Utah, or for services under one or more numbers at the same location, and the customer does not pay the charges or satisfy such indebtedness, the Company may charge and bill such indebtedness for a residence account against the same customer's residence service or a business account against the customer's business service.

(Mountain States Telephone and Telegraph - Utah Exchange and Network Services Tariff A2.2.3.2(3)).

This tariff provision was part of a comprehensive revision of basic exchange tariffs occurring in all seven states in which Mountain Bell does business (designated the "ABC" tariff). The change was the result of an effort to simplify the numbering of the tariffs, among other things. It was not intended to change the wording of this provision. The provision was inadvertently changed from the previous tariff provision, and the change did not come to Mountain Bell's attention until Appellants complained about the disconnection of James McCune's residence service (R. 112). That disconnection occurred under the assumption that the previous provision had not been changed in the process of filing the ABC tariff (R. 112). As a result, Mountain Bell restored James McCune's residence service (R. 198) and then took action to reinstate the original provision, which was accomplished effective March 4, 1985, as follows:

C. March 4, 1985:

In the event a customer is indebted to the Company for charges and services rendered at a prior time, of any nature, or for service at more than one number or location, and the customer does not pay the charges or satisfy such indebtedness, the Company may charge and bill such indebtedness against the account of the customer's present service or to the account of either service in the case where more than one number or location is being served.

(Mountain States Telephone and Telegraph Company - Utah Exchange and Network Services Tariff Section A2.2.3.2(3)).

McCune's Complaint in the Public Service Commission was filed on March 7, 1985 (R. 258).

SUMMARY OF ARGUMENTS

The tariff in question provided that when a customer is indebted to Mountain Bell for prior service, Mountain Bell may transfer the debt to the customer's account for present service. As a general partner, George McCune is jointly liable and hence indebted to Mountain Bell for the partnership's debt. Thus, the tariff permits the partnership's debt to be transferred to McCune's individual account for business service.

The Public Service Commission's interpretation of the tariff to allow cross-billing of a dissolved partnership's debt to the account of one of the partners was within its authority, was reasonable, and was appropriate under the facts of this case. This Court should accord considerable deference to the Commission's decision on this question involving the application of law (the tariff) to specific facts. The Commission did not act with bias, prejudice or passion.

The transfer of the partnership's debt to McCune's individual account did not violate his constitutional rights. Due process does not apply because no state action was involved. With respect to equal protection, there is no evidence that he was treated differently from others similarly situated. McCune's statutory rights were not violated

because the tariff in question, as interpreted by the Public Service Commission, is just and reasonable, both on its face and as applied. McCune's common law rights were not violated, because Mountain Bell followed the tariff procedure. Josephson v. Mountain Bell, 576 P.2d 850 (Utah 1978), is distinguishable on its facts, and in any event should be overruled.

ARGUMENT

I. THE PUBLIC SERVICE COMMISSION DID NOT ABUSE ITS DISCRETION IN INTERPRETING THE TARIFF TO PERMIT MOUNTAIN BELL TO TRANSFER A PARTNERSHIP DEBT FOR TELEPHONE SERVICE TO THE BUSINESS ACCOUNT OF A GENERAL PARTNER.

The central issue of this case is whether Mountain Bell was entitled to transfer a delinquent account for telephone service rendered to a partnership, since dissolved, to a current account for business service being rendered to one of the partners, under the following tariff provision:

In the event a customer is indebted to the Company for charges and services previously rendered in Utah, or for services under one or more numbers at the same location, and the customer does not pay the charges or satisfy such indebtedness, the Company may charge and bill such indebtedness for a residence account against the same customer's residence service or a business account against the customer's business service.

(Mountain States Telephone and Telegraph - Utah General Exchange Tariff A2.2.3.2(3)).

The Public Service Commission determined that Mountain Bell's action was authorized by the tariff and was reasonable under the circumstances (R. 197-203). The order

dismissing McCune's complaint necessarily implied the Public Service Commission's conclusion that the tariff is just and reasonable, both on its face and as applied (R. 203).

A. The Public Service Commission has the power to interpret a tariff.

The Public Service Commission has broad power to regulate the utility business of public utilities. Utah Code Ann. § 54-4-1 provides:

General jurisdiction. The commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, and to supervise all of the business of every such public utility in this state, and to do all things, whether herein specifically designated or in addition thereto, which are necessary or convenient in the exercise of such power and jurisdiction

See White River Shale Oil Corp. v. Public Service Commission, 700 P.2d 1088, 1093 (Utah 1985).

Such power includes the power to approve, suspend or modify the schedules and regulations filed by a utility. E.g. Utah Code Ann. §§ 54-3-7, 54-3-8, 54-3-23, 54-4-2, 54-4-7, 54-7-13. This extensive regulatory authority necessarily implies the Commission's power to interpret or construe a utility's regulations with respect to the facts of a particular case, and to determine the rights and obligations between utilities and consumers. See Mountain Bell v. Atkin, Wright & Miles, 681 P.2d 1258 (Utah 1984); North Salt Lake v. St. Joseph Water & Irrigation, Co., 118 Utah 600, 223 P.2d 577 (1950). Thus, the Public Service Commission

was well within its jurisdiction to interpret the tariff at issue in this case.

- B. The standard of review of a Public Service Commission order interpreting a tariff is to uphold the order if it is reasonable or rational.

In Utah Department of Administrative Services v. Public Service Commission, 658 P.2d 601 (Utah 1983) [Wexpro II], this Court established a three part formula for review of administrative agency decisions:

1. With regard to interpretation of general questions of law, this Court applies a correction-of-error standard, giving no deference to the expertise of the Commission. Id. at 608.

2. With regard to findings of basic fact, the Court gives the greatest deference to the agency's findings, reversing only where they are so without foundation in fact that they must be deemed capricious and arbitrary. Id. at 608-09.

3. With respect to mixed questions of law and fact, or the application of findings of basic facts to the legal rules governing the case, or the "ultimate" findings of the agency on reasonableness and discrimination, or the agency's decision on questions of "special law", this Court gives "considerable weight" or "great deference" to the agency's decision, upholding such decisions if they fall within the limits of reasonableness or rationality. Id. at 609-12.

See Utah Code Ann. § 54-7-16. See also, Big K Corp. v. Public Service Commission, 689 P.2d 1349 (Utah 1984).

This third standard of review applies here because this case involves the application of a tariff, which is the law governing the relation between a utility and its customers, see Atkin, Wright & Miles v. Mountain Bell, 709 P.2d 330 (Utah 1985), to specific facts. The Commission determined that under the tariff Mountain Bell may transfer a partnership debt for telephone service to the individual account of one of the general partners. Under the intermediate standard of review applicable here, this Court should give great deference to that decision, and should affirm it if it falls within the "outer limits of reasonableness". See Wexpro II, supra, at 611.

C. The Public Service Commission's order is reasonable and should therefore be upheld.

The Public Service Commission's determination that the tariff permitted cross-billing of a partnership account to the individual account of a general partner is reasonable, both from a legal perspective and on a practical basis.

Utah statutory law provides unequivocally that a general partner is personally liable for the debts of the partnership:

All partners are liable:

. . .

- (2) Jointly for all other [non-tort/non-breach of trust] debts and obligations of the partnership

Utah Code Ann. § 48-1-12.

That a partner's liability for contractual debts is joint, rather than joint and several (as in subparagraph 1 of the same section), is simply a procedural restriction on a creditor who seeks to enforce a debt through judicial means. That is, all partners are necessary parties to a lawsuit to enforce such a debt against any one of them. See Palle v. Industrial Commission, 79 Utah 47, 7 P.2d 284, 287-88 (1932); cf. Kemp v. Murray, 680 P.2d 758 (Utah 1984) (all partners are necessary parties to an action to collect a debt to the partnership). The fact remains, however, that each partner is personally indebted for partnership obligations. See definition of "liability" in Black's Law Dictionary 1059 (4th Rev.Ed. 1968). Therefore, notwithstanding the fact that Mountain Bell would have to join James McCune in any judicial action to recover the debt from George McCune, George McCune is still indebted to Mountain Bell for \$317.29, representing the McCune & McCune debt for telephone service.

Under the tariff language (see supra p.7), the only prerequisites to cross-billing are (1) that George McCune

was a customer of Mountain Bell and (2) that he was indebted to Mountain Bell for charges and services previously rendered in Utah. At the time of the transfer, he was clearly a customer of Mountain Bell, with current working business service, and he was indebted to Mountain Bell for charges and services previously rendered. Note that the tariff language does not say "charges and services rendered to that customer under his or her own name", or similar language. It simply requires a customer to be indebted to Mountain Bell for prior charges and services.

The tariff does not require Mountain Bell to obtain a judicial declaration of indebtedness, as by obtaining a judgment against a partner on a partnership account. McCune's insistence that Mountain Bell must first obtain a judgment against the partnership and exhaust its assets before proceeding against a partner is misplaced. This is not a case of judicial collection of a debt nor of an extra-judicial attempt to execute on McCune's personal assets; it is a case of application of an administrative rule permitting a public utility to deny continuing service to a customer who fails to satisfy a past due obligation.

The Commission's interpretation of the tariff also makes practical sense. Cross-billing encourages payment by a responsible party. Payment of such indebtedness contributes to the utility's earnings, thus reducing the need for rate

increases. Cross-billing places the burden for such debts where it belongs, rather than on other ratepayers. From a cost-effectiveness standpoint, to the extent cross-billing results in payment, it is a much more efficient means of collection than any other alternative, such as collection agencies, attorneys, or even internal collection efforts. The policy which denies service to a customer who fails to pay past indebtedness is eminently fair; it does not impose any new obligation on the customer, nor does it permit Mountain Bell to recover more than what is owed. It simply benefits the public by reducing collection costs, and cuts off credit to those who abuse credit by not paying for prior service.

As applied to this case, not only is the tariff just and reasonable, but Mountain Bell would be derelict not to use it. The partnership was dissolved more than a year before the transfer took place (R. 197, 198). The account is undisputed and relatively small (R. 91). McCune has refused to give any explanation why the partnership account has not been paid, or whether it will ever be paid, or if so, when (R. 88). Mountain Bell stands the risk of losing the account altogether by virtue of the running of the statute of limitations. The cost of recovering it through judicial means makes that alternative unattractive and detrimental to

other ratepayers. Under these circumstances, it is reasonable to expect a partner such as George McCune to shoulder the responsibility for paying the partnership debt, at the risk of not having further telephone service if he fails to do so.

Under the standard of review applicable to this case, this Court should affirm the Public Service Commission Order, because it falls well within the bounds of reasonableness.

D. The Public Service Commission did not act with bias, prejudice or passion.

McCune's allegations of improper treatment received at the hands of the Public Service Commission cannot be supported by the record. McCune's Brief refers to testimony given at the hearing. (Brief of Appellant p. 11). However, McCune opted not to order a copy of the transcript of the hearing, and is therefore forced to rely on the Report and Order.

In the absence of a transcript, this Court must assume that the proceedings were conducted fairly. Bevan v. J. H. Construction Co., Inc., 669 P.2d 442 (Utah 1983). There can be no doubt that McCune was given ample opportunity to present his case. That he received an adverse ruling is not grounds for a claim of prejudice sufficient to reverse the Commission's Order. Reversal for bias must be based on

evidence of a judge's personal hostility toward a party, not on the tribunal's opinion as to the merits of the case, Haslam v. Morrison, 113 Utah 14, 190 P.2d 520 (1948); there is no evidence in the record that any feelings expressed by the Administrative Law Judge or the Commission were based on anything other than the evidence and material facts of this case.

- E. The Public Service Commission properly determined that issues regarding the disconnection of James McCune's residence service were moot.

McCune complains that the Commission failed to address the disconnection of the residence service of James McCune, holding it to be a moot question. To do so, however, would require the Commission to render an advisory opinion where it does not have power to grant appropriate relief (money damages in this case). Furthermore, McCune would have an available remedy on that claim in the district court, which is the appropriate forum to pursue a tort action for wrongful disconnection. See Atkin, Wright & Miles v. The Mountain States Telephone and Telegraph Company, 709 P.2d 330 (Utah 1985); Josephson v. Mountain Bell, 576 P.2d 850 (Utah 1978).

The Public Service Commission does not have the power to award general damages, cf. Garkane Power Association v. Public Service Commission, 681 P.2d 1196, 1207 (Utah 1984) (an order for reparation under Utah Code Ann. § 54-7-20 is

not the equivalent of a contract action for damages in a district court); the only relief it could grant for a wrongful disconnection would be to order the utility to restore service and waive the restoral charges. See, e.g. Utah Code Ann. §§ 54-7-20, 54-7-24. That had already taken place before the Complaint was filed. Thus, the Public Service Commission correctly determined that the complaint was moot as to James and Arlene McCune.

II. MOUNTAIN BELL DID NOT VIOLATE ANY CONSTITUTIONAL, STATUTORY OR COMMON LAW RIGHTS OF MCCUNE BY TRANSFERRING THE PARTNERSHIP DEBT TO HIS PROPRIETORSHIP ACCOUNT.

A. There was no violation of constitutional rights.

McCunes assert that they have been denied due process because of the disconnection or threat of disconnection of telephone service without notice and a hearing. There is a substantial question whether one would be deprived of life, liberty or property by virtue of disconnection of telephone service. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 348 n.2 (1974). More importantly, however, McCunes are not entitled to constitutional due process in this situation because a public utility's actions in disconnecting service do not constitute state action. In Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974), the United States Supreme Court stated:

"The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the 14th Amendment."

The effect of the decision was to uphold the right of the defendant, a public utility, to disconnect service to the plaintiff for failure to pay a prior bill, without notice or hearing. Jackson is dispositive of McCune's constitutional challenges in this case. Furthermore, McCune's equal protection argument fails for lack of any evidence that Mountain Bell treated him differently than others similarly situated. See Malan v. Lewis, 693 P.2d 661, 671 (Utah 1984).

B. There was no violation of statutory law.

The statutory standard for validity of tariff provisions is set forth in Utah Code Ann. § 54-3-1:

... All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable. (Emphasis added).

That section further provides:

The scope of the definition "just and reasonable" may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the State of Utah. . . .

The tariff permitting the transfer of indebtedness to current accounts is just and reasonable, both on its face and as applied to the facts of this case. See discussion, supra, pp. 10-15.

C. There was no violation of common law.

Cross-billing and disconnection have been upheld judicially where authorized by tariff. In Morse v. Pacific Gas

& Electric, 152 Cal.App.2d 854, 314 P.2d 192 (1957), the Court approved the disconnection of electrical service to a subscriber at one residence when he had failed to pay for service at another residence, under a tariff provision similar to the one at issue here. See also, Dworman v. Consolidated Edison Co. of New York, Inc., 271 N.Y.S.2d 363 (1966) (allowing cross-billing from business to residence); Denham v. Southwestern Bell Telephone Co., 415 F.Supp. 530, 534 (W.D. Okla. 1976). Cf., Northern Ohio Telephone Co. v. Public Utilities Commission, 9 Ohio St. 2d 153, 224 N.E.2d 528 (1967) (denying the utility's right to disconnect at locations other than where the default took place because the applicable tariff did not allow cross-billing).

Josephson v. Mountain Bell, 576 P.2d 850 (Utah 1978), does not preclude Mountain Bell from cross-billing from one business to another business. In Josephson, the Court held that Mountain Bell was not entitled to disconnect the plaintiff's residence service for failure to pay the charges for plaintiff's business service, because, inter alia, Mountain Bell had failed to follow the procedure set forth in the tariff of billing the charges to the residence service account before disconnecting. Id. at 852. Though presented with the opportunity, this Court did not hold the tariff to be unjust or unreasonable. Furthermore, even if Josephson were read to mean that Mountain Bell could never

disconnect a residence phone for non-payment of business service, the rationale used by the Court would not apply to this case, since the partnership service and George McCune's proprietorship service were both of a business class. The Commission reached the same conclusion (R. 277).

If Josephson were held applicable here, Mountain Bell submits that it was wrongly decided and should be overruled. It has been held that a public utility has a right to deny service at one address for failure to pay for past service at another address, where the right is founded on a filed tariff. See generally, Annot. 73 A.L.R.3d 1292 §§ 4[c], 4[e] (1976). Justice Hall's dissent in Josephson noted that it would be inefficient and detrimental to other rate payers to prohibit crossbilling for the purpose of debt collection, observing that no one should be entitled to profit from his own wrongdoing. The dissent in Josephson is better reasoned than the majority opinion, and should be adopted by this Court as the law of Utah.

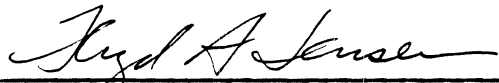
VI. CONCLUSION

Mountain Bell's tariff specifically permits the rebilling of a customer's indebtedness for prior charges and services to the customer's current service. George McCune, as a general partner of McCune & McCune, is personally indebted to Mountain Bell for service to the partnership. The tariff is reasonable, just, and in the public interest. McCune

ought to be required to pay the indebtedness if he wishes to receive further service. The Commission's interpretation of the tariff is reasonable and proper, and should be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of July, 1986.

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY

By 
Floyd A. Jensen
250 Bell Plaza, Suite 1610
Salt Lake City, Utah 84111
(801) 237-6409.

MAILING CERTIFICATE

I hereby certify that on this 2nd day of July, 1986, I caused to be mailed four (4) true and correct copies of the foregoing Brief of Respondent, by first-class mail, postage prepaid, to plaintiff's attorney, George M. McCune at Suite 2, Intrade North West, 1399 South 700 East, Salt Lake City, Utah 84105 and four (4) true and correct copies to the Public Service Commission of Utah, 160 East 300 South, Salt Lake City, Utah 84145.



ADDENDUM 1

Public Service Commission

Report and Order

Dated November 15, 1985

BUCKETED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

MCCUNE & MCCUNE, a General)
Partnership; GEORGE M. MCCUNE,)
an Individual; JAMES P. MCCUNE,)
an individual; and ARLENE C.)
MCCUNE, an Individual,)
Complainants)

CASE NO. 85-049-03

vs.)

MOUNTAIN BELL TELEPHONE, an)
Assumed Name of MOUNTAIN STATES)
TELEPHONE AND TELEGRAPH COMPANY,)
a Public Service Telephone)
Corporation, Respondent.)

REPORT AND ORDER

ISSUED: November 15, 1985

Appearances:

George M. McCune	For	Complainants
Floyd A. Jensen	"	Respondent

By the Commission:

Pursuant to notice duly served, this matter came on regularly for hearing the 11th day of October, 1985, before A. Robert Thurman, Administrative Law Judge for the Commission, at the Commission Offices, Fourth Floor, Heber M. Wells State Office Building, 160 East 300 South, Salt Lake City, Utah. Evidence was offered and received, and the Administrative Law Judge, having been fully advised in the premises, now enters the following Findings of Fact, Conclusions of Law, and the Order based thereon.

FINDINGS OF FACT

1. McCune & McCune was a general law partnership doing business in the state of Utah from November 1973 through November 1983, at which time it was dissolved. The sole partners were George M. and James P. McCune. At this juncture, as discussed below, the complaints of all parties except George M. McCune are moot, so far as this Commission is concerned, and hence we will refer to George M. McCune as "Complainant".

2. Mountain Bell Telephone, hereafter called "Respondent", is a utility holding a certificate of convenience and necessity from this Commission operating a telephone system.

3. Respondent provided telephone service to McCune and McCune in Provo, Utah, under telephone number 373-0307, which service was discontinued when the partnership dissolved, leaving an unpaid balance of \$317.29, the amount in dispute in this proceeding. The balance remained unpaid at the time of the hearing.

4. Approximately June, 1984, Respondent transferred the partnership balance to the residence account of James P. McCune. Shortly thereafter, in July or August (the date is not critical), Respondent disconnected James P. McCune's residential service for failure to pay the partnership balance. On or about September 6, 1984, Respondent rescinded its action and restored James P. McCune's residential service.

5. On or about January 16, 1985, Respondent transferred the partnership's outstanding balance to the working

business account (listed as a sole proprietorship) of Complainant. In March, 1985, this balance was billed to the proprietorship account.

6. Complainant refused to pay the transferred balance and this complaint proceeding ensued.

CONCLUSIONS OF LAW

Section 54-7-20, Utah Code Ann. 1953, provides that:

(1) When complaint has been made to the commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the commission has found, after investigation, that the public utility has charged an amount for such product, commodity or service in excess of the schedules, rates and tariffs on file with the commission, or has charged an unjust, unreasonable or discriminatory amount against the complainant, the commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection.

Although the statute mentions only authority to grant relief by way of reparations in cases of this nature, we think it reasonable to assume that we could order a utility to continue service to a customer invalidly charged under an illegal tariff provision.

At the time Respondent first transferred the partnership balance to James P. McCune, the applicable tariff provision read as follows:

In the event a customer is indebted to the Company for charges and services previously rendered in Utah, or for services under one or more numbers at the same location, and the customer does not pay the charges or satisfy such indebtedness, the Company may charge and

bill such indebtedness for a residence account against the same customer's residence service or a business account against the customer's business service. (Mountain States Telephone and Telegraph - Utah General Exchange Tariff A2.2.3.2(3))

It was in literal compliance with this provision that the transfer to James P. McCune's residence account was rescinded. As a further consequence, however, Respondent amended its tariff to read as follows:

In the event a customer is indebted to the Company for charges and services rendered at a prior time, of any nature, or for service at more than one number or location, and the customer does not pay the charges or satisfy such indebtedness, the Company may charge and bill such indebtedness against the account of the customer's present service or to the account of either service in the case where more than one number or location is being served. (Mountain States Telephone and Telegraph - Utah General Exchange Tariff A2.2.3.2(3), amended March 4, 1985)

It will be noted that either tariff provision would apply in regard to Complainant's situation. Accordingly, we are not faced with a question of interpreting the tariff. Since service has been restored to James P. and Arlene C. McCune, and the tariff provision relied upon at that time has been superseded, we conclude the complaints of these individuals is wholly moot. Accordingly, we deal only with the propriety of the transfer of the partnership balance to the sole proprietor account of Complainant.

Complainant stated his argument in several ways, but the kernel of the argument is that the Respondent's tariff, either version, is invalid as it applies to him, because it

denies him his right to have the partnership assets marshalled and exhausted before a partnership creditor may reach his personal assets. According to the Complainant, Respondent's only remedy in cases of this nature is to obtain a judgment against the partnership, attempt to execute on partnership property, and only upon a showing of exhaustion of the same is Respondent entitled to attempt collection from Complainant.

By analogy, were we to accept Complainant's position, had the partnership ordered merchandise from an office supplier and failed to pay, the supplier would not be justified in denying Complainant credit for failure to pay the outstanding balance. Such is obviously not the law. While Complainant may have the right to have the assets marshalled in judicial proceedings, he is at least secondarily liable on the partnership debt, and we know of no authority which would deny a partnership creditor the right to use such leverage as he may have by way of the right to enter into or avoid further transactions with a partner as a means of encouraging payment. Nor does this appear to us unduly harsh. The partner has the right of contribution from his copartners.

Does Respondent's status as a public utility alter the situation? Complainant argues it does and relies on the case of John C. Josephson v. Mountain Bell Telephone and Telegraph Co., 576 P.2d 850, 24 PUR 4th 65 (Utah 1978). That case involved the transfer of a business account balance to a residence account. The applicable tariff at the time was virtually identical to the

March 4, 1985, amended version quoted above. The Court's opinion is somewhat ambiguous, but the Court did not in so many words rule the tariff invalid and appears to have reasoned that Respondent did not fully comply with its own tariff in that it failed to bill the delinquent account on the debtor's residence service before terminating the same. There is additional language concerning the interests of other members of the household in maintaining telephone service, but that interest is hardly present in the instant case. Moreover, Respondent did bill Complainant. Accordingly, we do not believe the Josephson case is apposite here.


Complainant argues that Respondent could pursue its judicial remedy at minimal expense in small claims court, and we should compel it to do so. This argument from a member of the bar well acquainted with the means to force delays and increase costs strikes us as less than ingenuous. If we are comparing equities, Complainant has nothing to lose but his time in a claim against his partner in small claims court. Respondent would clearly have out-of-pocket expense. The fact of the matter is that bad debt expenses are included as operating expense in every rate case. This means that all ratepayers bear the costs caused by those who abuse the system. We see no reason why, in circumstances such as this, those ratepayers should not be accorded the benefit of Respondent's leverage in the form of the power to provide or withhold service. The balance has gone unpaid over two years. That strikes us as more than long enough.

Finally, Complainant would have us invalidate the tariff as overly broad on the basis of the Josephson case. As noted above, the Utah Supreme Court did not do so, and we are not faced in this case with a fact situation as appealing as Josephson. Accordingly, we decline to invalidate the tariff provision at this point. The complaint should be dismissed.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That the complaint in the above-captioned matter be, and the same hereby is, dismissed with prejudice.

DATED at Salt Lake City, Utah, this 15th day of November, 1985.


A. Robert Thurman
Administrative Law Judge


Approved and confirmed this 15th day of November, 1985, as the Report and Order of the Commission with the following comments:

COMMISSION COMMENTS

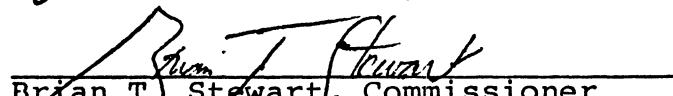
We concur in this Order, however, we frankly find this case infuriating. For a member or members of the Utah State Bar to use, or we might say, abuse the "system" over an uncontested \$317.29 two-year old debt, is absurd.

The expense to the regulated utility (billing, collection, legal, etc.) and the expense to the state regulatory agency (Administrative Law Judge, court reporter, clerical, Commission review, etc.), which is ultimately born by the rate-paying citizens of this state, could well exceed \$5,000.

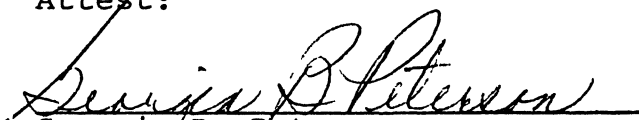
Chief Justice Burger has recently chastised the legal profession for being too litigious. No matter how valid the complainant's feel their cause is, as a strictly legal matter, we believe that it is unconscionable for members of the Bar to abuse the system to this extent and would, were it possible, impose the full cost upon complainants.


Brent H. Cameron, Chairman


James M. Byrne, Commissioner


Brian T. Stewart, Commissioner

Attest:


Georgia B. Peterson
Executive Secretary

ADDENDUM 2

Public Service Commission

Order Denying

Application for Rehearing

Dated December 20, 1985

DOCKETED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

MCCUNE & MCCUNE, a General)
Partnership; GEORGE M. MCCUNE,)
an Individual; JAMES P. MCCUNE,)
an Individual; and ARLENE C.)
MCCUNE, an Individual,)
Complainants)

CASE NO. 85-049-03

vs.)

ORDER DENYING APPLICATION
FOR REHEARING

MOUNTAIN BELL TELEPHONE, an)
Assumed Name of MOUNTAIN STATES)
TELEPHONE AND TELEGRAPH COMPANY,)
a Public Service Telephone)
Corporation, Respondent.)

ISSUED: December 20, 1985

By the Commission:


On November 15, 1985, the Commission issued its Report and Order dismissing Complainants' Complaint for want of merit and Complainants thereafter filed an Application for Review or Rehearing with the Commission on December 2, 1985.

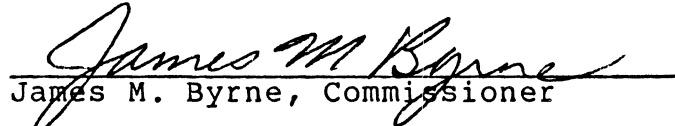
After review of the Complainants' Application for Review or Rehearing, we conclude that it sheds no additional illumination on the case and that it constitutes primarily a diatribe against the Commission and its Administrative Law Judges. Accordingly, we shall dismiss it.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That the Application for Review or Rehearing filed by Complainants in this matter be and the same is dismissed.

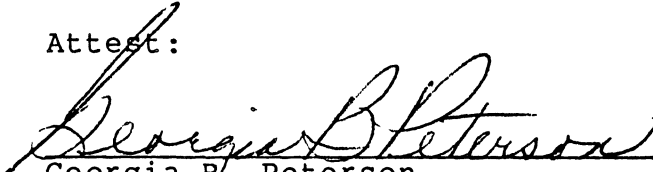
DATED at Salt Lake City, Utah, this 20th day of December, 1985.


Brent H. Cameron, Chairman


James M. Byrne, Commissioner


Brian T. Stewart, Commissioner

Attest:


Georgia B. Peterson
Executive Secretary