

1986

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

Utah Supreme Court

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UTAH SUPREME COURT
BRIEF

UTAH
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DOCKET NO. 860049

IN THE SUPREME COURT
OF THE
STATE OF UTAH

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MCCUNE & MCCUNE, et al,

Plaintiffs
Appellants

vs.

MOUNTAIN BELL TELEPHONE,

Defendant
Respondent.

Case No. 860049

(Category 9)

MCCUNE & MCCUNE, et al,

Plaintiffs
Petitioners

vs.

PUBLIC SERVICE COMMISSION
OF UTAH,

Respondent.

REPLY BRIEF

Writ of Review from a Public Service Commission Report and Order
issued November 15, 1985, and Order Denying Application for
Rehearing issued December 20, 1985.

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Clerk, S. J. [illegible]

1986

IN THE SUPREME COURT
OF THE
STATE OF UTAH

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MCCUNE & MCCUNE, et al,)	
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Defendant)	(Category 9)
Respondent.)	
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TABLE OF CONTENTS

ARGUMENT.	Page 1
RESPONDENT'S STATEMENT OF THE FACTS	1-3
RESPONDENT'S SUMMARY OF ARGUMENTS	3-4
RESPONDENT'S ARGUMENT, POINT I.	4-11
RESPONDENT'S ARGUMENT ON POINT II.	11-13
RESPONDENT'S CONCLUSION.	14-15
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Big K Corp v PSC, 689 P2d 1149 (Utah 1984)	4
Jackson v Metropolitan Edison Co., 4419 US 345 (US 1974)	11
Josephson v Mt. Bell, 576 P2d 850 (Utah 1978)	5,8, 12,14
Utah Dept. of Admin. Services v PSC, 658 P2d 601 (Utah 1983)	4
Utah Power & Light Co. v PSC, 152 P2d 542 (Utah)	8
A2.2.1 Tariff of Mt. Bell	7
14th Amendment, U. S. Constitution	11
54-4-7 UCA 1953	6
54-7-20 UCA 1953	6

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Respondent.)	

ARGUMENT FOR REPLY TO THE BRIEF OF RESPONDENT, APPELLANTS
RESPECTFULLY SUBMIT THE FOLLOWING REBUTTAL:

RESPONDENT'S STATEMENT OF THE FACTS

Mountain Bell attempts to cloud over the fact that this case precipitated from an original and still pending case in the Third Judicial District Court. The District Court case was stayed pursuant to mutual stipulation of the parties after Mountain Bell had asserted the District Court did not have primary original jurisdiction to hear "certain" matters raised in the District Court suit. A resolution of all questions as to what and what is not the primary and original jurisdiction of the

PSC regarding the claims raised by Plaintiffs against Mountain Bell and others is respectfully requested from the Supreme Court. Otherwise, both the parties and the District Court will remain in a quandry as to the proper division of responsibilities.

As for the findings, they speak for themselves, and it seems quite presumptuous for Mountain Bell to attempt through its recital of its own version to embellish them with comments which have no basis in the facts. Such phrases as "following a normal billing cycle", "receiving and investigating a complaint", "Mountain Bell discovered", "as part of a comprehensive reorganization of the general exchange tariff", "did not explicitly permit", "because the tariff did permit cross-billing between business accounts", "account for business service", "facing the prospect of disconnection of his individual business service", and "to determine the validity and applicability of the tariff provision under which Mountain Bell was proceeding" need to be seen by the honorable justices of the Supreme Court for what they are -- caricatures of the true matters of fact and an attempt by Mountain Bell to cloud over and camouflage real issues and insert desired "facts" which are not clearly facts in this matter. Particularly, there is no specific evidence creating the clarity of the facts as caricatured by Mountain Bell.

Mountain Bell has also, in reciting the tariffs regarding transfer of accounts from one account to another, attempted to insert facts not in the record regarding dates of tariffs and the entire paragraph on page 5 of Mountain Bell's brief beginning

with "This tariff provision was part of a comprehensive revision of basic exchange tariffs..." and ending with "McCune's Complaint in the Public Service Commission was filed on March 7, 1985," is not supported by credible evidence in the record and the record made reference to does not support the charicatured serf serving allegations attempted to be asserted in the honorable justices' minds to be the proven facts.

Moreover, it doesn't matter beans when the PSC complaint in this matter was filed as it pertains to the tariff in effect on transfer of accounts on the date of filing the PSC complaint. The valid law in effect when an "action arises" is the time when pertinent regulations, statutes, common law, case law, and constitutional provisions in existence at the time the action arose must be considered.

RESPONDENT'S SUMMARY OF ARGUMENTS

Mountain Bell makes a statement in its second paragraph of summary of arguments that, "This Court should accord considerable deference to the Commission's decision on this question involving the application of law (the tariff) to specific facts." This is a misguided statement not addressing the true law in existence in this state regarding review of PSC actions and the correct nature of regulations ("tariff" being just a mystifying word unique to the public utilities industry for a good old fashioned regulation, and one fashioned and written by the utility itself to boot in most instances). Regulations, first of all, are law only to that extent they

comply with constitutional and statutory law enacted by the people. Regulations are just what they say they are, provisions to carry out the provisions of paramount constitutional and statutory law. If a regulation runs contrary to the supreme constitutional and statutory and **interpretive case law**, the regulation is nothing more than a bunch of words without power, void, dead, and improper.

In addition, Mountain Bell tries very hard to avoid this honorable Supreme Court's precedent which states that this honorable Supreme Court takes **no deference** to the PSC's reasoning when general constitutional and other law is concerned. See previously cited **Big K Corp v PSC**, 689 P2d 1149 (Utah 1984) and **Utah Dept. of Administrative Services v PSC**, 658 P2d 601 (Utah 1983). General law and constitutional law applies here because the transfer tariffs in question here are applicable to legal business entities **and** individual non-business-conducting-citizens and Mountain Bell is attempting to self legislate itself around the general law pertaining to partnerships and other business entities and their sanctity as distinct separate legal entities. Other reasons why general law is directly at issue exist.

The third paragraph of Mountain Bell's summary of arguments states that constitutional rights were not violated using the attempted scapegoat that there was no "state action", but Mountain Bell has completely attempted to close the Supreme Court's eye to the existence of our own state Constitution's same standards -- indeed even broader standards -- giving all of the

residents and citizens of this great state the right to due process, equal protection, and all of the other fundamental rights enumerated in our Utah State Consitution and cited on pages 23 and 24 of Appellants' Brief. Also, to treat partners differently in the law in the carved out situation of public utility services is unequal isn't it? If we can say it is something equal, I am dumbfounded regarding the logic. Mountain Bell also summarizes in the same paragraph that the "interpretation" of the pertinent tarriffs were just and reasonable. Mountain Bell is trying to say the PSC took a proper look at the tariffs involved and construed them as they should be and looked at them consitutionally and legally by holding up established case law to them and they stood the muster. That is just not so. The PSC went on an irrational trajectory away from the proper course, never considered **Josephson v Mt. Bell's** mandates established as case precedent law in this state in 1978, never looked at the definition of "customer" in the tariff defining "customer", never applied the hardened steel principles of partnership liquidation and personal partner liability, and rather overlooked the distinctions between monopolistic public utilities and businesses in the free marketplace.

RESPONDENT'S ARGUMENT, POINT I.

Mountain Bell starts out in its first argument point on page 7 by trying to show the PSC interpreted the tariff on transfer of accounts from one telephone number to another by "necessary implication" and found it was just and reasonable.

Plaintiffs agree that the PSC has the power to approve, suspend, or modify tariffs and rules and regulations filed by a public utility. Plaintiffs further have no qualms about the PSC's emphatic duty to do so. This must be, however, so that the regulations and practices of public utilities conform to law, both statutory and case law and constitutional law. See **54-7-20 UCA 1953** cited on page 17 of Appellants' Brief.

The PSC was asked and it had a duty to decide if the tariffs in question were lawful, constitutional, just, reasonable, proper, **adequate**, or sufficient and if they are not to prescribe rules and regulations which are, including establishing methods to be observed, furnished, enforced, and employed. See **54-4-7 UCA 1953** cited on page 15 of Appellants' Brief. Did the PSC do this. No, not by the longest shot in this world!

The PSC should have but it shirked its responsibility. It evidently needs to be counseled and schooled more closely regarding its duties more thoroughly by the people through the voice of their Supreme Court.

Mountain Bell goes on on page 9 of its brief to try and get this honorable Supreme Court to let Mountain Bell legislate a unique and prejudicial tariff for itself and to allow the misguided judgment of the PSC regarding interpretation of the transfer of accounts tariffs to be given deference. But as previously stated, general law and constitutional law applies here and the PSC should have applied it but it did not or did not desire to apply it. Mountain Bell's rationale would allow them

to create their own law, as they are trying here, without question -- the same as a despot -- not a public utility subject to a higher degree of responsibility to individual citizens and businesses than the regular free enterprise businesses. Mountain Bell is trying to get the Supreme Court to look away, but the Supreme Court will look straight at the matter as the PSC should have done.

On page 11 of Mountain Bell's brief, the telephone company argues that partners are liable for partnership debt. But they do not deny that the principles about partnerships established in concrete in this nation do not allow partners to become personally liable to execution until after partnership assets are looked to first. Mountain Bell's illogical reasoning is that just because the individual sole proprietor to whom the partnership bill was attached was a customer of Mountain Bell, Mountain Bell could assess the partnership bill to him.

The above illogic would mean anybody can be liable at Mountain Bell's whim for any bill they choose. The tariff on "customer" definition does not say anything of the kind. In fact, it **is** consistent with the general law recognizing the distinctness of sole proprietorships, partnerships, corporations, and government agencies when it comes to contracts and who is responsible for them. The complete language of the tariff defining "customer" reads:

A person, firm, corporation, or governmental agency responsible for paying the telephone bills and for complying with the rules and regulations of the Company. A2.2.1, Mountain Bell Tariffs.

"Customer" is the legal entity as can be seen from the definition. The person (a non-business involved individual or a sole proprietor), a firm (partnership), corporation or government agency are responsible. The PSC should have strictly construed this definition tariff but they did not.

Josephson v Mt. Bell requires them to do so, however. See page 16 of Appellants' Brief and page 852 of the **Josephson** decision.

A partner, though secondarily liable if there are not enough partnership assets to satisfy partnership debt, is not the "customer" when it is a partnership telephone account. There is no dispute in fact that the telephone bill transferred was originally a partnership debt. See R2 and 90.

On page 13 of Mountain Bell's brief, it talks about cost-effectiveness but there was no evidence submitted proving any of the assumptions stated by Mountain Bell. As previously cited in Appellants' Brief, such cannot be considered by the PSC. See **Utah Power & Light Co. v. PSC**, 152 P2d 542 (Utah). The PSC also inserted certain "facts" not in the record through their misguided reasoning focused on rates and customer cost. But there really was nothing at all presented in the way of evidence to show how many times the telephone company would have to resort to civil courts to collect accounts, particularly against partners of partnerships. Nor was there any evidence presented at all about costs to the consumer which would have to be passed on if traditional civil courts were used from time to time such as small claims and the like. There just wasn't any evidence.

But Mountain Bell and the PSC and its administrative judge assumed some assumptions which have no basis in any facts proven at hearing.

On page 13, Mountain Bell also talks about "policy" generally towards "customers". But the customer in this particular fiasco was the partnership -- not the partner who had the partnership bill tacked on to his **sole proprietor account** without Mountain Bell first having complied with the partnership law requiring looking to partnership assets **before** going to task to deprive the partner of personal property.

Mountain Bell continues on page 13 to say the account is undisputed. That is not so. It says that there should also be an explanation of why the partnership account has not been paid. If it had pursued the matter as it was legally required, it would have a right to find out why by determining partnership assets. It has not. If Mountain Bell thinks it will lose the account by virtue of the statute of limitations, this fault is Mountain Bell's for failure to use the regular judicial process to liquidate a presently contingent claim. It still could file a civil suit to determine liability in the courts if it would.

On page 14, Mountain Bell states Plaintiffs did not order a copy of the transcript and therefore must rely on the pleadings and documentary evidence. There is no merit to such an argument. The transcript will be before the court by the time this matter is to be decided and to disallow reviewing it would be a travesty of justice. The rules provide that the record will be prepared

by the administrative agency and submitted. The secretaries at the PSC had a duce of a time even determining who took the record, who was the court reporter, and this was way after the fact when Plaintiffs checked with the PSC to see why the record had not been prepared and sent. In fact, to this date, it has not been determined who the court reporter is who recorded the pre-trial conference held prior to the regular hearing.

The prejudice and bias is clearly manifested in the record and the PSC shows its improper feelings through their very commentary in the orders. Moluntain Bell is greatly false when it says the evidence and material facts were the only consideration of the administrative judge and the PSC. The fact that the claimant or any of them are from one profession or another has **no** bearing on the matters. Considering it and letting it influence one's passion is prejudicial in and of itself. It would be good for the judicial branch to remember the statue of justice with her eyes blindfolded more regularly in their striving for objective consideration of issues by considering only those facts germane to the issues.

As far as an advisory opinion goes for aid to the District Court, all that Appellants desire is for a clear and crisp pronouncement to be made for the aid and guidance of the district courts, parties, and PSC as to whether the disconnection and transfer tariffs are to be determined valid by the PSC before a party can pursue a money damages claim involving conduct pertaining to the types of action at least purportedly covered by

them. Must an aggrieved party complaining against a public utility be required to have a determination of the validity of a tariff or practice of a public utility first determined by the PSC before it can initiate and follow through with a damage suit in regular district, circuit, or justice of the peace courts? Please answer this question for us.

On the top of page 16 of its brief, Mountain Bell states that the PSC cannot interpret. But at the first of its brief it argues to the opposite that the PSC has the power to interpret. Mountain Bell concedes and even asserts at the beginning of its brief that the PSC is the one to interpret tariffs.

RESPONDENT'S ARGUMENT ON POINT II.

Mountain Bell argues against constitutional violation but the Utah Constitution does apply, even if the federal due process clause does not. Plaintiffs feel both apply. To hold that they do not is to beg the question. The federal case cited by Mountain Bell pertaining to the 14th Amendment states that, "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State." There is much more than state regulation here. A public utility is not a regular business that is merely subject to state regulation through licensing, etc. The **Jackson v. Metropolitan Edison Co.** case, 419 US 345, 350 (US 1974) has been misquoted by Mountain Bell.

Equal protection is still a right violated because, as stated previous, to hold otherwise means that public utilities

can disregard the distinctions in law and privileges and responsibilities of sole proprietorships, partnerships, and corporations and associations, etc. and be allowed the singular privilege of disregarding the procedural requirements established because of those distinct business entity creations and get away with it. Plaintiffs deeply trust that such misplaced irrational views will not become supreme law in this state.

On page 17, Mountain Bell argues the transfer tariffs in question are just and reasonable. The one in existence in January 1985 was just, reasonable, and lawful as a correct statement of the law as far as it went but the one in existence at the time **Josephson** came down in 1978 and the one Mountain Bell so cleverly and disceptively had placed back on the books after this dispute came to fruition, are not. They run entirely contrary to the ruling in **Josephson**.

As for the question of whether business accounts should or should not be allowed transferred to personal residence accounts, the resitation of several cases running contrary to **Josephson**, our state's law, is a mere rehashing of the question already reviewed and decided by this honorable Utah Supreme Court in **Josephson v Mountain Bell** in 1978. An equal number of cases holding the opposite view were considered by our court in **Josephson** and the conclusion reached, as stated on page 18 of Appellants' Brief and pages 852 and 853 of the **Josephson** decision, the "**sounder view**" is that it is improper to transfer business accounts to private residence accounts. This is people

oriented law and in keeping with the worthy protection of fundamental rights. It is the best view (the sounder view) and is and should remain the law in this great state of Utah.

RESPONDENT'S CONCLUSION

Mountain Bell has avoided drawing any more attention to the illogical reasoning of the administrative judge regarding "denial of credit" which disregarded the distinctions between monopolistic public utilities and regular business in the free enterprise system.

It hangs its hat on the assertion that partners are as liable as a partnership for partnership debt but fails to counter the rock hard law that individual partner property cannot be resorted to prior to exhaustion of partnership assets or at least an attempt to execute on partnership assets.

True, a partner is ultimately liable on partnership debt, but this is the main distinction between a sole proprietorship and a partnership. A partnership is a separate distinct legal entity in and of itself. A sole proprietor merely does business through his own or assumed or pseudonyms. The sole proprietor is immediately responsible and subject to execution for his just debts but partners are insulated from immediate execution by the requirement that partnership assets **must** be used first before partners can individually be resorted to to come up with any remaining just partnership liability. Public utilities are no exception and are not exempt from the law and particularly the procedural and equality standards of our constitutions.

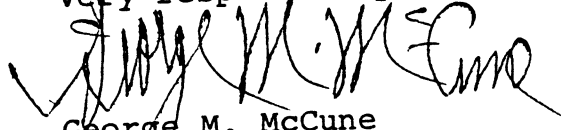
Expediency is not what is to be sustained by the judicial system. Justice is to be sustained which is founded upon fundamental principles of constitutional creation. Judicial interpretation of the constitutions and the statutory and common law are to be observed, not circumvented. Mountain Bell has used a sneaky course of action in an attempt in this instance and many others to avoid the clear legal mandate of **Josephson**. They should be stringently reprimanded for such conduct.

The tariff in existence on January 1985 is the proper tariff which should be reinstated to govern the transfer of one telephone account to another. And, if the telephone company or other public utilities are not content to use the inexpensive small claims and other civil court systems when it comes to recovering partnership accounts, then the remedy is not to take the law in their own hands and to become a law unto themselves but to promulgate additional provisions for the transfer tariff consistent with law and constitutional standards providing a process whereby the rights of individual partners will not be infringed and partnership assets will be looked to prior to any resort to the tactics which have been used by Mountain Bell and its agents and officers and employees in this case. It is respectfully requested that the arguments of defendant Mountain Bell and the faulty process of the PSC be disregarded, that the proper tariff be reinstated, that directions be given on how involved the PSC must become when disputes arise between utility recipients and the utilities before damage actions may move

forward in the regular civil courts, and what constitutional standards should apply.

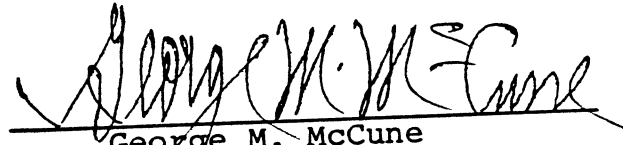
Dated this 30th day of July, 1986.

Very respectfully submitted,


George M. McCune
Pro Se

CERTIFICATE OF SERVICE

Delivered 4 copies of the foregoing Reply Brief to Floyd A. Jensen, 250 Bell Plaza, 16th Floor, Salt Lake City, Utah 84111; and an additional 4 copies to the Public Service Commission, State of Utah, 160 East 300 South, Salt Lake City, Utah 84145, on this 30th day of July 1986.


George M. McCune