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The Mountain States Telephone & Telegraph Co. v. Salt Lake City : Brief of Respondent

Utah Supreme Court

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David E. Salisbury; Gerald R. Miller; Chris Wangsgard; Attorneys for Appellant;
Roger F. Cutler; Attorney for Respondent;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE MOUNTAIN STATES)
TELEPHONE & TELEGRAPH)
COMPANY,)

Plaintiff-Appellant,)

Case No. 16000

vs.)

SALT LAKE CITY,)

Defendant-Respondent.)

BRIEF OF RESPONDENT

On appeal from the Third Judicial District Court
in and for Salt Lake County, State of Utah
the Honorable David K. Winder, presiding

ROGER F. CUTLER
City Attorney
101 City & County Building
Salt Lake City, Utah 84111
Telephone: 535-7788

Attorney for Respondent

DAVID E. SALISBURY
GERALD R. MILLER
CHRIS WANGSGARD
VAN COTT, BAGLEY, CORNWALL
& MCCARTHY
141 East First South
Salt Lake City, Utah 84111
Telephone: 532-3333

Attorneys for Appellant

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE MOUNTAIN STATES)
TELEPHONE & TELEGRAPH)
COMPANY,)

Plaintiff-Appellant,)

Case No. 16000

vs.)

SALT LAKE CITY,)

Defendant-Respondent.)

BRIEF OF RESPONDENT

NATURE OF THE CASE

The Plaintiff-Appellant, Mountain States Telephone & Telegraph Company instituted suit in 1970, wherein it challenged the validity and constitutionality of Salt Lake City's Business Revenue Tax. However, in 1971 the Court dismissed that suit with prejudice, based on a stipulation of the litigants. Thereafter, in March 1978 the Plaintiff-Company again filed suit, challenging the said Business Revenue Tax and, additionally, the City's Franchise Fee ordinance.

In this latter Complaint, the Company alleges three causes of action:

(a) That the Utility Revenue Tax and Business Franchise Fee of the City constituted a utility rate increase and

illegally usurped the prerogatives of the Public Service Commission;

(b) That the Franchise Fee and Business Revenue Tax taxed the Telephone Company disproportionately, without a rational basis; and

(c) That the City law discriminately classified the Company for City taxing purposes. This cause of action also alleged that the tax impositions were in violation of the requirements of 10-8-80 Utah Code Ann. and violated the requirements of the Federal and State Constitutions.

DISPOSITION OF LOWER COURT

The Plaintiff's Complaint, including all of its alleged causes of action, was dismissed with prejudice on Salt Lake City's Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent Salt Lake City seeks to have this Court affirm the judgment of the District Court and award costs to it.

STATEMENT OF FACTS

When viewing the facts in a light most favorable to the party against whom the Motion for Summary Judgment was brought, they demonstrate the following:

1. The Appellant-Telephone Company (hereinafter "Company") obtained the right to use the City roads and other public ways for its own business purposes. In consideration

therefor, it agreed to pay 2% of its gross revenues derived from sales within the corporate limits of Salt Lake City for that "franchise" privilege. (Bill No. 78 of 1951 attached to Affidavit of City Recorder, Mildred V. Higham; R-150). Similar agreements and ordinances were adopted with reference to Mountain States Fuel Supply Company and the Utah Power & Light Company. (Bill No. 65 of 1953 and Bill No. 4 of 1951, attached to Affidavit of Mildred V. Higham; R-150).

2. On or about December 19, 1951, Mountain States Telephone & Telegraph Company requested rate authority from the Public Service Commission of Utah to pass through to their customers franchise fees, license taxes and other local assessments; these assessments were to be a surcharge to customer billings on a pro-rata basis. Their request was approved and, on or about May 5, 1952, an order was issued by the Public Service Commission to add the pro-rata share of "taxes" and "impositions" of any city to a customer's bill. The Telephone Company, as requested, was specifically granted authority to pass through any increases in local taxes by merely filing with the Public Service Commission an amendment to the "Tax Adjustment Schedule." (Public Service Commission Report, Findings and Order dated May 5, 1952 and Admissions of Plaintiff dated May 14, 1978; R-178-191.)

3. Ogden City challenged the said Public Service Commission order; however, the Attorney General and the Telephone Company's present law firm successfully defended the Commis-

sion's order in all particulars. (Ogden City v. Public Service Commission, et al., 260 P.2d 751 (Utah, 1953)).

4. In addition to the aforesaid "Franchise Fee," each of the three above stated utilities were the subject of a Business Revenue License Tax, which tax was levied on their gross income pursuant to an ordinance passed by the Salt Lake City Commission June 29, 1967. (Bill No. 38 of 1967, attached as Exhibit "6" to Affidavit of Mildred V. Higham; R-150).

5. The three said affected utilities instituted litigation to challenge the said Business Revenue License Tax. They asserted, among other issues, that the Revenue License Tax (as opposed to the Franchise Fee) was invalid: (1) As it conflicted with the provisions of the franchise agreement, (2) Because the tax exceeded the City's legislative enabling power, (3) Because it was discriminatory against the three said utilities, in controvention to State law, plus the Federal and Utah Constitutions. (Complaint of the three above stated utilities versus Salt Lake City, Third District Court case No. 192098; R-439).

6. Identical issues were also raised in a similar lawsuit filed against Ogden City; however, the Ogden case came for hearing before the Utah Supreme Court prior in time to the Salt Lake City litigation. Salt Lake City appeared as amicus curiae in that case and the Supreme Court issued an opinion affirming the enabling power of that city to levy

the Business Revenue Tax. Also, the Court held that the tax was not discriminatory or unlawful in any particular.

(Mountain States Telephone & Telegraph Co., et al. v. Ogden City, 26 U.2d 190, 487 P.2d 849 (Utah, 1971)). Subsequent to that ruling, the three named utility companies stipulated to a dismissal with prejudice, and their litigation, against Salt Lake City was dismissed. (Stipulation dated October 12, 1971 and the Order of October 15, 1971; R-182, 445).

7. On or about July 1, 1976, the Board of Salt Lake City Commissioners passed an ordinance increasing the Business Revenue License Tax from two to four percent to balance its 1976-77 fiscal year budget. (Bill No. 115 of 1976; R-151).

8. On or about June 30, 1977, the Board of Salt Lake City Commissioners passed an ordinance increasing the Business Revenue Tax on the three named utilities in an amount equal to six percent of their gross revenue. (Bill No. 110 of 1977; R-151).

9. The Business Revenue Tax is not a "regulatory" provision; rather, the ordinance provision concerning the revenue tax specifically provides that it is not a substitute for other regulatory ordinances and enacted ". . . solely to raise revenue for municipal purposes. . . ." (Section 20-3-12.3 Revised Ordinances of Salt Lake City, Utah, 1965; R-408-410).

10. For the 1977-78 fiscal year, Salt Lake City general fund budget totalled \$39,800,000. In that budget, the

Utility Franchise Fee and the Utility Business Revenue License Tax estimated revenue totalled \$8,000,000. Thus, the said sources of revenue represent 20% of the City's general revenue budget. A loss of said income would cripple the delivery of municipal services, funded by the general fund, which includes police, fire, street maintenance, garbage pickup and other essential life supporting services provided by the City. (Affidavit of City Auditor, K. Ray Hammond, R-406, 407).

11. On July 26, 1977 (before this suit was filed), the City enacted Section 20-3-14.1 of the Revised City Ordinances which provided that there would also be levied a 6% gross revenue business tax on every business or company engaged in business, within the corporate limits of Salt Lake City, supplying telephone service, gas or electrical energy service in competition with the three above named utility companies. (R-6, 7, 14; SR-57, 236; SR-257).

12. The business organizations chiefly affected by the above stated ordinance have contested the tax by arguing, among other assertions, that they are not in "competition" with the Telephone Company in providing "Local Exchange Service" which is the service taxable under the law. (SR-237; SR-238; SR-257, 258).

13. The Telephone Company, on frequent occasions, met with representatives of this office and those other competitors who arguably could be subject to the additional taxation. The City has sought to obtain adequate information with which

to evaluate the respective positions and it has received some; however, the Telephone Company has never provided the financial data which the City and counsel representing one of the alleged competitors of the Telephone Company understood would be supplied. (R-257-258).

14. The Telephone Company has not alleged in its complaint that the City has acted in bad faith in enforcing the ordinance. (R-2-8). In fact, the City has vigorously attempted to resolve the factual and legal disputes involved, and is proceeding with vigor, equally and in good faith to enforce its taxing ordinances against all persons who may legally come under the law's provisions. It fully intends to collect and enforce said ordinances as soon as definitional, legal and conceptual problems in this specialized industry can be resolved. (R-257, 258; Cf. the refusal of the Telephone Company to respond to interrogatories on this subject in Interrogatory Nos. 23, 24 and 25 of the Telephone Company's Answer to the City's First Set of Interrogatories, R-188-190).

ARGUMENT

POINT I

THE ASSERTION THAT SALT LAKE CITY IS ILLEGALLY SETTING UTILITY RATE SCHEDULES THROUGH ITS TAXING POWERS, CONTRARY TO THE POWERS VESTED IN THE UTAH PUBLIC SERVICE COMMISSION, IS UNFOUNDED.

- A. THE PUBLIC SERVICE COMMISSION TARIFF ORDER DIRECTED AN AUTOMATIC RATE ADJUSTMENT EQUAL TO LOCAL TAX OR FRANCHISE FEE IMPOSITIONS.

It is to be noted that the Telephone Company's complaint asserts that the Respondent, Salt Lake City, is illegally setting rate schedules, which power is expressly vested in the Utah Public Service Commission. However, the undisputed facts demonstrate that on or about December 19, 1951 Mountain States Telephone and Telegraph Company requested the Utah Public Service Commission to amend its general tariff orders and authorize that Company to pass through to its customers (as a surcharge) local taxes levied against the Company on a pro-rata basis.

In summarizing the position of the Plaintiff-Company, the Public Service Commission stated:

"Mountain States [the plaintiff] contends that fair and non-discriminatory rates require the recovery of these expenses [municipal taxes] apart from state-wide rate schedules, and has filed the tariff in question to accomplish such results." Public Service Commission of Utah Investigation and Suspension Docket No. 83, Reports, Findings and Order, R-30.

The Commission noted that municipal sales, use, occupation, franchise, gross receipts and other charges against utilities had evolved to become a significant factor in utility expenses. As such, to include them within the State-wide rate would constitute a discrimination against users residing outside the respective municipalities. Therefore, it stated with respect to the Telephone Company's 1951 proposal:

"Mountain States under the proposed tariff, would recover the amount of such tax expenses from the users of its service within the respective municipalities assessing such

taxes and impositions." I. & S. Docket No. 83,
Id. at p. 4.

Thereafter, the Commission noted that these local taxes were likely to continue to raise. It observed:

"It is equally apparent that as the costs of operating municipal governments grow levies for these various taxes and fees are likely to increase unevenly, thereby accentuating the discrimination." I. & S. Docket No. 83, Id. at p. 6; R-33.

The Commission then correctly noted that the cities had the power to increase these taxes. It observed:

"Apparently each city or town may increase or decrease these exactions in its own discretion. This being so these impositions will continue to fluctuate widely so that rates constructed to spread these expanses to users of telephone service throughout the State have the aspect of unlawful discrimination." I. & S. Docket No. 83, Id. at p. 9; R-36.

Thus, the Commission granted the plaintiff's 1952 request for flexible authority to pass on any local taxes on a pro-rata basis. The utility company was directed to file a "Tax Adjustment Schedule," showing all of these special taxes and impositions which had been imposed by a city or town; thereafter, it was authorized to pass on the new tariff rate as a surcharge to its billing, without a new rate hearing. The Commission specifically ruled and held:

"Upon the filing of such Tax Adjustment Schedule as above provided, the company is authorized and directed to change the rates for exchange service and the exchanges affected thereby [imposition of municipal taxes], in accordance with such schedule and said tariff, on billing dated immediately subsequent thereto." I. & S. Docket No. 83, Id. at p. 12; R-39 (Emphasis added).

Further, the Plaintiff was specifically authorized to file amended schedules as new taxes or extractions were levied in the future by cities. The order specifically provided:

"Said company [plaintiff] shall file from time to time amendments and revisions of said Tax Adjustment Schedule at the rates and amounts of such taxes, imposition and other charges, or the base on which the tax or imposition is measured are changed, altered or amended. . ."
I. & S. Docket No. 83, Id. at p. 12; R-39.

This order was challenged in court and this Court affirmed it in all particulars. The Court summarized the central issue as follows:

"The question remains: Can the commission permit a utility to charge and bill subscribers of an area, for payment of imposts on the company levied by local governmental authority of that area?" Ogden City v. Public Service Commission, 260 P.2d 751, 753 (Utah, 1953).

Thereafter, the Court reviewed some of the abundant authority upholding similar decisions of Public Service Commissions across the country and held as follows:

"[The Commission Order surcharging local taxes] conforms more nearly to the views of this court, particularly where, as here, ever-changing and probably ever-increasing local imposts appear on the horizon which neither the legislature nor the company to date has controlled, and where, should we conclude otherwise, discrimination would fluctuate in direct proportion to the actions of a myriad of local governing bodies."
Ogden City v. Public Service Commission, Id. at p. 753 (Emphasis added).

* * *

"The order of the Commission is not only an exercise of its legal authority, but appeals to basic equities, — at least eliminating one discrimination in a field where it is impossible

to eliminate them all." Id. at p. 754 (Emphasis added).

Other jurisdictions which have considered the problem have likewise, with unanimity, upheld Public Service Commission orders allowing utility companies to pass on local taxes as a surcharge on their current billing, without new rate hearings.

On such well reasoned and authoritative opinion is the decision of the City of Scottsbluff v. United Tel. Co. of the West, 106 N.W.2d 12 (Neb., 1960). In this case the court discussed the several alternatives for tariff adjustments to cover the expense of local taxation. It noted that the surcharge method of passing through the taxes on a pro-rata basis avoided the problems of discrimination on other utility subscribers, living outside that city. It also correctly noted that such an automatic surcharge increase avoided the costly and time consuming problem of frequent rate hearings, whenever local taxes were increased. The Court then succinctly held:

"We are convinced that the department [Commission fixing telephone rates], in so far as such taxes [local city occupation tax] are concerned, has the power to fix special exchange rates applicable to the different communities, which will in effect require the ratepayers in each community to absorb a sum equal to the amount of the tax which respondent is required to pay to that municipality." City of Scottsbluff v. United Tel. Co. of the West, Id. at p. 20 (Emphasis added).

For other cases with similar ruling as Utah and Nebraska,

see: State ex rel Pacific Tel. & Telegraph Co. v. Dept. of Public Service, 142 P.2d 498 (Wash., 1943), cited with approval by the Utah Supreme Court; City of Newport News v. Chesapeake & Potomac Telephone Co., 96 S.E.2d 145 (Va.); Village of Maywood v. Illinois Commerce Commission, 178 N.E.2d 345 (Ill., 1961); City of Elmhurst v. Western United Gas & Electric Co., 1 N.E.2d 489 (Ill., 1946); City of Scottsbluff v. United Telephone of the West, 106 N.W.2d 12 (Neb., 1960); State ex rel City of Seattle v. Dept. of Public Utilities, 207 P.2d 712 (Wash., 1949); Colorado Municipal League v. Public Utilities Commission, 473 P.2d 960 (Colo., 1970).

It is respectfully submitted that the Public Service Commission of Utah has power to hold hearings and determine the appropriate utility rates. See, 54-7-1 et seq. Utah Code Ann., 1953, as amended. They have exercised that power as detailed above and permitted local impositions of taxes and fees to be made as an additure to utility billing.

Separate and apart from the Commission's power, under clear Utah law, a City has power to impose occupation taxes or fees for the use of its public property as provided in Section 10-8-80 Utah Code Ann., 1953. The power to raise taxes for City purposes is a separate function, belonging to local government. It is entirely distinguishable from the rate-making authority of the Public Service Commission in deciding how such costs may or may not be included in the

charges ultimately made by the utility companies to their customers.

Regarding the latter issue, the Public Service Commission has set those rates to automatically be adjusted upward to reflect the local tax increases, by a surcharge on a customer's bill. This tariff order has been approved by the Utah Supreme Court. Therefore, it is respectfully submitted that the Telephone Company's assertion that the City has somehow usurped the function of the Public Service Commission is specious. Appellant has presented no basis in law or fact to justify relief. Thus, the complaint was properly dismissed by the lower court.

- B. APPELLANT'S CASES DO NOT STAND FOR THE PROPOSITION CITED, AND DO NOT HOLD FOR A POSITION CONTRARY TO THE PUBLIC SERVICE COMMISSION ORDER OR THE UTAH DECISION UPHOLDING THE LEGALITY OF THAT ORDER.

It is interesting to note that the Appellant-Telephone Company has had all the above cited cases upholding the validity of the similar Public Service orders for over four months. These other jurisdictions affirmed virtually identical systems to Utah, which set utility rates to include future tax increases by merely filing notice of the increased tax cost with the regulatory body.

However, significantly, Appellant has not even mentioned those cases or attempted to distinguish those authorities supporting the City's position in its brief. Rather, it has cited three cases, whose holdings are irrelevant and immaterial

to the issue before the Court. See p. 18 of Appellant's Brief. Please note:

1. Appellant cites Dvorkin v. Illinois Bell, 340 N.E.2d 98 (Ill.App., 1975) for the proposition that the Public Service Commission has exclusive jurisdiction to set utility rates. The City has no disagreement with that assertion, but it is not at issue in this case. Rather, the undisputed facts of record demonstrate that the rate schedules were adopted by the Public Service Commission. These rate formulas permitted the utilities to automatically adjust the schedule by filing notice of a taxing cost increase which was then included as additure on the rate tariff authority, without an additional rate hearing.

Further, it is important to note that the Illinois Bell case does not stand for the proposition that such a self-implementing rate adjustment order by the Public Service Commission is illegal as inferred by Appellant. Rather, that case dealt exclusively with an allegation by a customer that a telephone company's practice of providing free service to retired officers, directors and employees violated the Public Utilities Act of that jurisdiction. The theory of the plaintiff in that litigation was that other customers were charged higher rates to subsidize the privileged class of former company employees. The plaintiff sought to have the Court fix the utility rates by ordering a reduction of rates for the class of which he was a member.

The Court correctly noted in dicta it would be a usurpation of the function of the Commission for the Court to fix the rates, as requested. However, the Court's decision, denying the requested relief, was premised on the fact that the plaintiff did not appeal from the administrative decision of the Commission when that regulatory body considered the precise issue raised in the litigation. Thus, the Court held as follows:

"The doctrine of exhaustion has long been a basic principle of administrative law, and a party aggrieved by administrative action ordinarily cannot seek review in the courts without first pursuing all administrative remedies available to him. . . ." Id. at p. 105.

Obviously, the case does not stand for proposition that the order of the Utah Public Service Commission is or was illegal. Further, it does not hold that local government may not increase its taxes for utilities for the utilities to pay in any way they may deem logical or appropriate. However, it does stand for the proposition that one cannot collaterally attach a Commission order when one has failed to exhaust administrative remedies, which the Telephone Company has done in this case and which point will be discussed hereafter at page 17.

2. The case of Mississippi Public Service Commission v. Home Telephone Company, 110 S.2d 618 (Miss., 1959) cited at p. 18 of Appellant's Brief is not related factually or in legal principle to the issues before the Court. In

this case, a challenge was made concerning certain alleged business expenses which were used by the Public Service Commission in setting telephone company rates. The Court ruled that the Public Service Commission had the power to refuse to consider excessively high salaries in setting utility rates. It held that the Commission could not prohibit the payment of such salaries, but it could exclude from "operating expenses" the excess payments, when calculating costs for rate-setting purposes.

The Court further noted that the function of rate-making was legislative in character and that the Court could not fix the public utility rates. Rather, it was the Court's function to determine whether the Public Service Commission proceeding was conducted in harmony with law, the conclusions were supported by substantial evidence or whether the rates constituted a confiscatory taking. The Mississippi Court noted that the lower court erred in fixing a rate of return for the Telephone Company and, further, correctly stated:

"The function of rate making is purely legislative in character. It is not within the power of a court to fix the rates to be charged by public utilities, although a court may restrain the imposition of a confiscatory rates, or, under the Public Utility Act, determine whether the rates as fixed are supported by substantial evidence or within the other statutory restrictions set forth in [the] Code, . . . (citations omitted)." Id. at p. 626.

The case before the bar does not have an issue concerning

what salaries may be used as operating expense, and there is no issue of a court attempting to set a utility rate. That ruling simply does not relate to the issues of this case.

3. Similarly, the case of State of Texas v. Southwestern Bell Telephone Company, cited at p. 18 of Appellant's Brief is unrelated to any issue before the Court. In that case, a privately owned telephone company, in a jurisdiction unregulated by a governmental regulatory agency, increased the rate for its intra-state long distance telephone calls. The rate increase was challenged by the Attorney General of the State as excessive.

The appellate Court held that in the absence of regulation, by an authorized governmental body, the private utility company could set its own intra-state rates, subject to judicial review under common law principles. After citing authority for the proposition that such utility rates were subject to the limitations dictated by "reasonableness" and "justice," the Court held:

"This legal obligation upon the telephone company—that of not extracting exorbitant or unreasonable charges for its services—would be meaningless if there were no judicial redress for its violation." Id. at 526 S.W.2d 529.

Again, the facts of this case and its holding have no applicability to the issues before this Court.

C. THE APPELLANT-COMPANY MAY NOT COLLATERALLY ATTACK A PUBLIC COMMISSION ORDER,

PROMULGATED AT APPELLANT'S REQUEST AND
JUDICIALLY DEFENDED BY APPELLANT, WHEN
IT DID NOT EXHAUST ADMINISTRATIVE
REMEDIES TO CHALLENGE OR MODIFY THE
ORDER.

The undisputed facts of record clearly demonstrate that the City has not undertaken to fix utility rates; rather, the Telephone Company in the instant case has utilized a 1952 Public Service Commission order to pass through certain City assessments to its customers on a pro-rata basis. It has implemented this Public Service Commission order by filing "Adjusted Tax Schedules," as per the requirements of that order. See Statement of Facts 1-3, supra.

Further, it is of significant import that the Telephone Company has, at no time since the entry of the Public Service Commission Order in 1952, sought to rescind or amend that Order or to seek judicial review of it. In fact (as noted in the Statement of Facts), the Telephone Company and its present counsel obtained the Order through its own petition to the Public Service Commission and successfully judicially defended that Order.

The law concerning Public Service Commission orders provides:

"The Commission may at any time, upon notice to the public utility affected and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall when served upon the Public Utility affected have the same effect as herein provided for original orders or decisions." 54-7-13 Utah Code Ann., 1953
(Emphasis added).

Further, the law specifically provides:

"In all collateral actions or proceedings the orders and decisions of the Commission which have become final shall be conclusive."
54-7-14 Utah Code Ann., 1953 (Emphasis added).

It is further to be noted that certiorari must be applied for within 30 days after an application for rehearing is denied or within 30 days after the rendition of a decision on rehearing; otherwise, the decision is final and not assailable. See, 54-7-16 Utah Code Ann., 1953.

This Court and other jurisdictions have consistently held that these administrative decisions cannot be collaterally attacked. These decisions are final, if appropriate review is not obtained by petitioning for a rehearing, seeking an amendment or modification or (where appropriate) seeking timely judicial review of the decision. North Salt Lake v. St. Joseph Water & Irrigation Co., 118 Utah 600, 223 P.2d 577 (1950); Dvorkin v. Illinois Bell, 340 N.E.2d 98 (Ill.App. 1975).

In the instant case, the Telephone Company is clearly attempting to collaterally attack an order it obtained. It has not sought to amend, modify or rescind, as required by law; further, it is an order which the Telephone Company has not sought to otherwise have administratively or judicially reviewed.

In addition, it is significant that the collateral attack it now seeks is selective and applies only to Salt

Lake City. Since 1952, when the original commission order was entered at the request of the Telephone Company, that Company has annually filed amendments to its Tax Adjustment Schedules with the Public Service Commission, to take benefit of that order, by passing through to its customers the local tax impositions. (R-291, 228).

As late as January 5, 1978, it filed its "Municipal Charge Adjustment Schedule," wherein it listed the tax schedules of 41 Utah municipalities from American Fork through Vernal. The Company thereby obtained legal sanction to pass through to its customers the tax impositions of these jurisdictions without the need of further hearings before the Public Service Commission or internal absorption of these costs of doing business. See R-228.

Thus, it is apparent that the Telephone Company seeks to have the advantage of the automatic rate increase schedule provided by the Public Service Commission and, yet (in this litigation) selectively seek its application. The statutory and case law prohibitions against collateral attack were certainly intended to avoid such duplicatious dealing, where a utility could retain the advantages of an order, avoid a full review by the administrative body, yet seek selective and limited judicial remedies.

It is respectfully submitted that the lower court decision dismissing the Plaintiff-Appellant's claim that the City is setting utility rates contrary to the Public

Service Commission authority is and was correct. The Telephone Company's claim is ludicrous, specious and unfounded in law or fact. This judicial action is, in fact, an illegal collateral attack on a Public Service Commission order, implemented at the request of the Telephone Company. Thus, the lower court decision should be affirmed by this Court.

POINT II

THERE EXISTS NO FACTS TO SUPPORT ANY ALLEGATION OF THE TELEPHONE COMPANY THAT THE ORDINANCE BEFORE THE COURT IS FACIALLY INVALID OR HAS BEEN DISCRIMINATORILY APPLIED OR ADMINISTERED; FURTHER, APPELLANT'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED ON THESE THEORIES.

The Telephone Company-Appellant, in its brief, stresses that the lower court erred in failing to take cognizance of alleged disputed issues of fact concerning its competition, subsequent to the Telerant decision. Its Brief co-mingles the two separate legal theories concerning alleged "facial" and "as applied" discriminatory treatment. Further, it incorrectly asserts that the City does not require its competitors to pay the same business taxes as it does. A proper evaluation of the theories require that they be discussed separately.

- A. THE CITY BUSINESS REVENUE TAXING ORDINANCE, ON ITS FACE, TREATS ALL PERSONS SIMILARLY SITUATED THE SAME AND CONSTITUTIONALLY CLASSIFIES TAXPAYERS.

It must be noted that the City law under discussion

specifically provides that the Business Revenue Tax applies to the three public service utilities and their competitors. It expressly provides:

"There is hereby levied upon the business of every person or company engaged in the business in Salt Lake City, Utah, of supplying telephone service, gas or electric energy service in competition with public utilities, an annual license tax equal to six percentum of the gross revenue derived from the sale and use of such competitive services delivered from and after November 1, 1977, within the corporate limits of Salt Lake City.

"'In competition with public utilities' shall mean to trade in products or services within the same market as a public utility taxed under section 14 of this chapter." 20-3-14.1 Revised Ordinances of Salt Lake City, 1965, as amended; R-6, 14.

Thus, it is clear that, even if one assumes that proper classification requires that appellant's competitors be included within the scope of the taxing law, the ordinance is per se proper in its scope and classification.¹

Appellant has cited three cases to support its "Point I" assertion that there exist issues of fact requiring a hearing to demonstrate discriminatory tax collection practices by the City. However, none of these cases dealt with discriminatory application of a valid statute; rather, each involved a law, invalid on its face, for failure to include within its scope those persons similarly situated. For example:

1. Note: The City asserts that there is no such requirement, which issue is discussed hereafter in Point III.

1. Salt Lake City v. Utah Light and Railway Co., 45 Utah 50, 142 P.2d 1067 (1944) is cited at page 9 of Appellant's Brief. In this case, the Court affirmed the power of the city to impose an occupation tax in addition to a franchise fee. It stated that the tax, levied in addition to the franchise payments for the Company's use of city streets, was legal. It stated:

"Neither is there any question concerning the right of the city to impose an occupation or license tax." Id. at p. 1070, citing Salt Lake City v. Christensen, 34 Utah 38, 95 P. 523.

Thereafter, it analysed the city ordinance and observed that it did not tax all within the appropriate business class. Rather, the ordinance specifically taxed only those businesses distributing electricity through "meters". The stipulated facts showed that many other businesses distributed electricity, without using meters. Therefore, the court held the law invalid on its face by stating:

"But in limiting the tax to those who use meters for the purpose mentioned in the ordinance destroys its uniformity." Id. at p. 1071.

In the case before the bar, the ordinance has no such restriction. In fact, it specifically taxes all those businesses "in competition" with the taxed utilities. Obviously, there is no similarity to the facial invalidity of the 1914 statute and the one before this Court.

2. In Orem City v. Pyne (discussed at p. 13 of Appellant's Brief), the Court likewise found an improper facial

classification in the ordinance. Here, a seller of tangible personal property (used cars) was subject to a license tax of up to \$300, but other retail sellers of tangible property (e.g., implement dealers or appliance shops), doing business at the same volume, were taxed to a maximum of \$25. The lower court correctly observed:

"Our [the court's] function is to determine whether an enactment operates equally upon all persons similarly situated." Orem City v. Pyne, 4th Dist. Case No. 4039 (1964), R-264 cited in Orem City v. Pyne, 16 Utah 2d 355, 401 P.2d 181 (1965).

Thus, the Pyne Court ruled the ordinance void.

Obviously, there is no similarity in the ordinance under analysis and the one ruled defective in the Pyne case. The Orem ordinance did not deal with public utilities and did not purport to tax them or their competitors. Therefore, it can be of little assistance to this Court, except restating the accepted legal principle that classifications between groups of taxpayers cannot be whimsical or capricious.

3. In Slater v. Salt Lake City, (cited at page 14 of Appellant's brief), this Court refused to enjoin the enforcement of a city law prohibiting sidewalk commercial solicitations, in the City's central business district. However, in so ruling, it held one provision of the ordinance discriminatory because it permitted the sale of receipts, redeemable in photographs, but prohibited the sale of magazine subscriptions. The Court found this distinction, on its face, to

be an unreasonable classification of persons "similarly situated".

Significantly, the Court did not address the alleged issue of discriminatory application of the law. Rather, in its lengthy discussion (which approved virtually all other legislative classifications), the Court aptly summarized the legal standards to be applied by the Court in reviewing legislative classifications; e.g.:

(a) The legislative body has the widest latitude in formulating classifications; the court will not concern itself with policy decisions. The Court observed:

"In fixing the limits of the class, the legislative body has a wide discretion and this court may not concern itself with the wisdom or policy of the law." Slater v. Salt Lake City, 115 Utah 476, 206 P.2d 153, 160 (1949).

(b) Distinctions between classes are constitutional, unless they are "unreasonable"; that is, the legislature may not make classifications that are arbitrary and capricious in light of the purpose of the act, by treating persons similarly situated differently. The Court stated:

". . . if we are unable to find any reasonable basis for the classification, then we cannot sustain the enactment. . . . 'There must be a reasonable basis for the differentiation between that class . . . , which basis must bear a reasonable relation to the purposes to be accomplished by the imposition of the condition. If those subjected to the condition are similarly situated to those free from the condition, the differentiation would be without basis and hence arbitrary and therefore unconstitutional. . . .'" Slater v. Salt Lake

City, Id. at p. 163, quoting Wallberg v. Public Welfare Comm., at 203 P.2d 947 (Emphasis added).

It must be specifically noted that the majority of the ordinance's classifications were upheld as "based on reason". The Court approved permits for the magazine sales, religious solicitations, sight seeing trip sales and other exceptions to the general prohibition of sidewalk vending, and noted:

"There is a valid and reasonable ground of distinction with nothing arbitrary about it." Id. at p. 163.

The City has no quarrel with these points of law, which are further discussed in Point IV, *infra*. However, contrary to the Telephone Company's assertion in its brief, there are no issues of fact to be determined on the per se or facial validity of the law. Rather, as Appellant points out at length in its Brief, the Telephone Company has matters of record, asserting that it is losing business to terminal unit sales competitors. These facts, for the purpose of the summary judgment motion, are assumed to be correct.

There may be issued as to whether "terminal" equipment competitors are in the business of selling "Local Exchange Telephone Services," taxable under the City ordinance and, thus not subject to the tax. This phrase, however, is one of art in the communication industry and the phrase apparently excludes sales of "terminal equipment." See, Statement of Fact 12; SR-237, 238; SR-257, 258. Further, there are issues of causation between the tax and the competitive loss

by the Company.

Importantly, however, the City ordinance now under evaluation, specifically includes the "competitors" of the Telephone Company in the taxing scheme. Thus, there are no factual issues to resolve on the facial or per se validity of the ordinance classifications. The Appellant-Company has simply improperly confused two separate legal theories in alleging that a factual issue exists concerning the classification problem.

Therefore, it is respectfully submitted that the lower court correctly held that the ordinance was facially valid and that it did not discriminatorily classify similarly situated taxpayers. No case cited by Appellant is similar, in fact, to the ordinance under discussion. The City law, on its fact, clearly includes all those in competition with the Appellant and patently includes within its scope all those persons similarly situated. Thus, no classification principle has been violated and, as a matter of law, the ordinance is facially valid.

- B. THE TELEPHONE COMPANY HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND, FURTHER, THERE EXISTS NO DISPUTED ISSUES OF FACT TO SUPPORT AN ALLEGATION THAT THE ORDINANCE BEFORE THE COURT HAS BEEN DISCRIMINATORILY APPLIED OR ADMINISTERED.

The law concerning a theory of discriminatory application of a taxing statute is well defined in case law. This Court has succinctly stated:

"However, before this result is reached [avoiding tax liability on the grounds of discriminatory application of a taxing statute], it must be shown that there is an intentional and systematic violation of those constitutional principles, or some designed effort to violate them, to the injury of the complainant. . . .

* * *

"A merely mistaken or inadvertent failure to properly apply the law, even if it results in discrimination, does not provide a basis for recovery by a taxpayer because of violation of his constitutional guarantees. It would be a doctrine hazardous indeed to the taxing process and to the maintenance of government to rule that if the assessor has made mistakes in taxing others, a complaining taxpayer could escape taxation. The result would be that the law could not be applied to anyone until it was correctly applied to all. It requires very little imagination to see that this would extend, not curtail, noncompliance with the law. Even though it may be difficult or impossible to achieve completely, the desideratum, of course, is that there be uniformity and equality in taxation, and that is the objective to be constantly pursued. However, the fact that this ideal is not reached should not be permitted to discourage attempts of taxing officials to bring it about, nor to defeat the legislative purpose. Where some taxpayers are not being taxed in accordance with the law, the proper way to rectify the situation is by proceeding toward uniform and proper application and not by extending the erroneous application to others."
Thiokol Chemical Corporation v. Peterson,
15 U.2d 353, 393 P.2d 391, 396 (Utah, 1964)
and authorities therein cited (Emphasis added). See also, Salt Lake City v. Robbins,
450 P.2d 730 (Utah, 1976).

It must specifically be noted that there is no allegation in Appellant's complaint that there exists a systematic and intentional failure to equally enforce the taxing statute.

Sec, the Company's Third Cause of Action, R-6. Thus, the Telephone Company failed to state a claim to support such a theory, by failing to allege an intentional and systematic violation. Further, the undisputed facts will not support that theory, even if the complaint were amended.

The undisputed facts demonstrate that Salt Lake City specifically requested the Telephone Company to outline what businesses Salt Lake City has allegedly failed to tax uniformly. Further, the City requested detailed information concerning what meetings the Company and City have had, with others, in an attempt to properly interpret the City's motive in enforcing its taxing ordinance and bring all those who should be covered within its collection ambit.

The Court will note from the responses to Interrogatories No. 23 and 24 that the Company, in essence, stated that:

(a) It could not name any business who was allegedly subject to the tax, which was not being taxed, that information being in the possession of the City and, (b) Refused to provide that information, asserting that it was irrelevant and ". . . not reasonably likely to elicit relevant information, or lead to the discovery of relevant information in this matter." See, Answer to Interrogatory No. 24 of the Appellant's First Set of Interrogatories, R-189, 190.

However, the affidavit filed by the City demonstrates that the ordinance provision which included "competitors" of the utilities in the taxing ambit was added subsequent

to 1967, in an attempt to meet objections of the Company, that competitors had an advantage. This amendment was made even though this Court had previously ruled that the classification of the telephone, gas and electric companies was valid. The amendment to include their competition was added in an effort to make the taxation scheme even more equitable. See, §20-3-14.1 quoted at page 22, *supra*.

Since that date, numerous meetings have been held between the plaintiff and other organizations which are allegedly in competition with the Telephone Company, to define whether they are legitimately within the ambit of the ordinance's taxing provisions. Further, legal research and evaluation is continuing as to the other company's assertion that such a taxation scheme violates prohibitions against burdening interstate commerce and other substantial legal issues and interpretations. See, Statement of Fact No. 13.

The undisputed facts demonstrate that the City has not knowingly or intentionally failed to assess or collect a revenue license fee from any person which was legally due. It has extended a good faith effort to assess and collect from every person within the designated class their appropriate taxes. Thus, the lower court was correct, as a matter of law and as a matter of fact, in denying the Company's claim of discriminatory application of a taxing statute.

The Company may not escape taxation on such a ground; rather, the appropriate remedy, as cited in the above cap-

tioned cases, would be to compel the City to likewise tax those who may not be included within the ambit of collection, if such an assertion were appropriate.

POINT III

THE CLASSIFICATION OF THE PLAINTIFF AND TWO OTHER PUBLIC UTILITIES, SUBJECTING THESE TO GROSS REVENUE BUSINESS OCCUPATION TAX IS NOT DISCRIMINATORY, BUT IS CONSTITUTIONAL IN ALL PARTICULARS.

Notwithstanding the fact that the City has attempted to accomodate the real or alleged competitive disadvantages occasioned by the City Business Revenue Tax by taxing competitors, a classification of the three public utilities alone would be a valid classification, as a matter of law.

The general rule with regard to the levy of any tax is set forth in McQuillin, Municipal Corporations, which states as follows:

"Classification of persons or property, or both, for taxing purposes is sanctioned, provided, of course, that such classification is fair, reasonable and not arbitrary or whimsical, and based on substantial distinctions. Stating the rule more comprehensively, the classification of persons or occupations for the purpose of municipal taxation, when founded on natural, intrinsic or fundamental distinctions which are reasonable in their relation to the object of legislation and otherwise, will be deemed valid and binding. . . ."

"In this respect the legislature is accorded a broad range of discretion, which will not be interfered with by the courts unless it is clearly apparent that the tax imposed is arbitrary, unreasonable, oppressive or prohibitive." 16 McQuillin, Municipal Corporations §44.20 (Rev.Vol. 1972) (Emphasis added).

A case closely in point is the New York Rapid Transit Corp. v. New York City, 303 U.S. 573 (N.Y., 1938). Here, the U.S. Supreme Court upheld the validity of an excise tax levied on every utility doing business within the City of New York, but which separated common carriers in a separate class. The Court held:

" . . . it has long been the law under the 14th Amendment that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, . . .

"Since carriers or other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions. Carriers may be treated as a separate class [omitting cases cited] and, as such, taxed differently or additionally. [Omitting citations] This Court has approved the adoption of modes and methods of assessment and administration peculiar to railroads [omitting citations] and upheld tax rates for railroads differing from those on other property, and as between railroad taxpayers [omitting citations]. Similarly, we have explicitly recognized that a state may subject public service corporations to a special or higher income tax than individuals or other corporations." [Omitting citations]. Id. at p. 578-579 (Emphasis added).

The propriety of classifying the three service utilities has already been resolved in the favor of Salt Lake City. In a case involving this precise issue, this Court specifically

held:

"The plaintiffs [including the plaintiff Telephone Company] comprise a distinct class of businesses within the public utility field which supplies to the public a service or product which is consumed or used by the public. We therefore conclude that the revenue ordinance which classified plaintiffs as a separate class of public utility for the purpose of taxation is reasonable and not discriminatory." Mountain States Tel. & Tel. Co. v. Ogden City, 487 P.2d 849, 850 (Utah, 1971) (Emphasis added). See, also Illinois Bell Tel. Co. v. Ames, 4 N.E.2d 494; In Re Opinion of the Justices, 149 A. 321; and Salt Lake City v. Christensen Co., 95 P. 523 cited in the case above quoted.

Other jurisdictions have unanimously held that such a classification is justified. A few other citations supporting this position are as follows: Commonwealth v. Appalachian Power Co., 68 S.E.2d 122 (Va., 1951), imposing a tax on every business furnishing water, heat, light and power, whether by electricity or gas; In the Opinion of Justices, 137 A.2d 726 (N.H., 1958), wherein the State of New Hampshire upheld a special tax levied solely on the franchises of gas and electric utilities; In re the Opinion of Justices, 149 A. 321 (N.H., 1930), wherein the State Supreme Court of New Hampshire upheld a franchise tax on gas and electric utilities and excluded all other franchisees; Illinois Bell Tel. Co. v. Ames, 4 N.E.2d 494 (Ill., 1936), wherein the State of Illinois imposed a gross receipt tax on each public utility in the business of transmitting telegraph or telephone message, selling water, gas or electricity; Potomac Electric

Power Co. v. Hazen, 90 F.2d 406 (CA DC, 1937), which upheld a gross receipt tax by the District of Columbia on several utilities including gas, electric, transportation and telephone companies based on their gross earnings for the preceding year.

The Appellant-Telephone Company's Brief attempts to distinguish this unanimous case law by: (a) Ignoring the fact that the City ordinance taxes its competitors, and (b) Asserting that the decisions were prior to the time the 1968 Carterfore and the 1974 Telerant decisions, subjecting them to increased competition.

Significantly, Appellant does not cite even one case where a state has found such a utility taxing classification unreasonable in the ten intervening years since Carterfore. In fact, it must be noted that there is not even an assertion that the states in the 4th Circuit, such as Virginia, have reversed their approval of such classifications after the 4th Circuit Court of Appeals' decision of Telerant, relied upon by the Appellant.

The writer's research supports the silence of Appellant's Brief. There appear to be no rulings as now urged by the Appellant to overrule this Court's 1971 holding, that the utilities are a separate taxing class.

The existence of some competition in the sale or leasing of terminal equipment is only one of many factors to be considered in a classification decision. It is noted by

the United States Supreme Court and approved by this Court, these companies enjoy a unique position in society and under our laws. The law is presumed constitutional and if there is any reasonable basis to sustain the legislative classification it must be upheld by the Court.

There certainly exists no issues of fact to be resolved on this facial classification issue. Therefore, it is respectfully submitted that the issue of classification has already been decided by this Court; however, in any event, the case law is abundant and not subject to challenge at this date. The classification of the Appellant and the other utilities is lawful in all particulars and within the legislative prerogative of Salt Lake City Corporation.

POINT IV

THE COMPANY'S CLAIMS ARE BARRED BY THE PRINCIPLES OF RES JUDICATA.

The Appellant-Company's Brief cleverly fails to emphasize that its present suit not only challenges the City Business Revenue Tax, but also the Franchise Fee for use of City streets which dates back to 1951. Its suit also seeks cash reimbursement of all monies paid to the City since July 1, 1977. Importantly, virtually all of the issues raised in the within case could have been or were, in fact, raised in a 1970 suit that was dismissed by stipulation, with prejudice.

The principles of res judicata prohibit a plaintiff from commencing a second action on legal and factual issues, which

has been or which could have been resolved in a previous suit. Justice Cardozo accurately stated the principle as follows:

"A judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first." Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp., 165 N.E. 456, 457 cited with approval in Ripley v. Storer, 132 N.E.2d 87, 90 (N.Y., 1956) (Emphasis added).

The rule has similarly been summarized as follows:

"Another statement of the rule [res judicata] is that any right, fact or matter in issue, and directly adjudicated on, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same." 50 C.J.S. Judgments §712 p. 173, cited in Ripley v. Storer, Id. at p. 93 (Emphasis added).

The courts have been explicit in stating that the policy reasons behind this rule is to protect the parties and allow reliance on previous litigation; further, the rule produces judicial economy by putting an end to contests of determined issues. A good summary of this rationale is stated as follows:

"On the other hand, as pointed out in 17 Iowa Law Review 81, the desirability of a prompt decision on the merits has been emphasized by this court. The doctrine of res judicata, justified by practical necessity, is designed to promulgate equal justice

for all litigants, and parties should not be required to relitigate issues which they have already litigated or have had a reasonable opportunity to litigate. Once a party has had an opportunity to be heard he has had his day in court and cannot thereafter be heard to complain, especially if it can be said that he had the opportunity to be heard on decisive merits." Stuker v. County of Muscatine, 87 N.W.2d 452, 457 (Iowa, 1958) (Emphasis added).

Likewise, this Court stated:

"The foundation principle upon which the doctrine of res judicata rests is that parties ought not to be permitted to litigate the same issue more than once; that, when a right or fact has been judicially tried and determined by a court of competent jurisdiction, or an opportunity for such trial has been given, the judgment of the court, so long as it remains unreversed, should be conclusive upon the parties, and those in privity with them in law or estate . . . public policy and the interest of the litigants alike require that there be an end to litigation, and the peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject matter shall not be retried between the same parties in any subsequent suit in any court." Mathews v. Mathews, 102 Utah 428, 132 P.2d 111 (Utah, 1942) (Emphasis added); Curry v. Educoa Pre-School, Inc. 580 P.2d 222 (Utah, 1978).

This Court has also emphasized:

"Policy would seem to dictate that when a plaintiff has once attempted to obtain his entire relief, based upon his entire claim, then the matter should be laid to rest. He should be denied a second attempt at substantially the same objective under a different guise." Wheadon v. Pearson, 14 Utah 2d 45, 376 P.2d 946, 948 (Utah, 1962) (Emphasis added) citing Cleary, Res Judicata Reexamined, 57 Yale L.J. 339, 346. See also, Campos v. Campos, 523 P.2d 1235 (Utah, 1974); National

Finance Co. of Provo v. Daley, 14 Utah 2d 263, 382 P.2d 405 (Utah, 1963); Sine v. Helland, 18 Utah 2d 22, 480 (1966); Warren Irrigation Co. v. Brown, 28 Utah 2d 103, 498 P.2d 667, 670 (1972); Wood v. Turner, 19 Utah 2d 133, 427 P.2d 398 (1967).

As the undisputed facts in the case before the bar demonstrate, the Telephone Company commenced litigation in 1970. See, the Complaint in the case of Mountain States Tel. & Tel. Co., et al. v. Salt Lake City, R-439. This lawsuit directly involved the Franchise Ordinance now under attack and the Business Revenue Tax, which imposed an occupation tax based on the utility company's gross receipts. This former litigation also specifically called in question the validity of the Business Revenue Taxing Ordinance scheme and included, in its legal challenge, the assertion that the percentage of gross revenue taxation was constitutionally infirm, because of "discrimination" which allegedly violated the State and Federal Constitutions. Further, the plaintiff alleged that the Business Revenue Tax was invalid as being in controvention of State enabling statutes and, otherwise sought to have the tax declared unconstitutional. See, Statement of Facts 1 through 6.

In the within controversy, the Telephone Company is again represented by the same legal counsel who represented it in the former suit. Here, again it has hashed up the same legal arguments seeking to have the same Business Revenue Tax scheme declared "illegal," "unenforceable" and "uncon-

stitutional." This Company is not only trying to obtain "substantially the same objective," but, in fact, seeks exactly the same objective as it sought in the earlier litigation.

Obviously the Telephone Company is prohibited in this redundant suit from relitigating the same factual and legal issues pursuant to the authority above quoted. However, some amplification concerning the specific allegations of the latest complaint will, perhaps, be of some assistance to the Court, because Appellant's Brief fails to reveal the full scope of that pleading, upon which they seek a further hearing.

A. FIRST CAUSE OF ACTION.

Count I of the Company's Complaint alleges that the Utility Revenue Tax and Franchise Tax is illegal and unconstitutional because it is alleged that the gross revenue aspect of the tax constitutes a "utility rate increase". This substantive issue is discussed in Point I, *supra*. However, the allegation is, further, barred from additional hearing by the principle of res judicata.

In 1970 the Telephone Company sought to declare the same City ordinance unconstitutional and invalid. The present pleading presents a legal issue which was not previously articulated in the former litigation; however, it was one which could and should have been raised in that earlier suit. This fact is true because the Business Revenue

Tax and Franchise Fee pass through provisions were known to exist at that earlier time. See, Statement of Fact No. 2.

Thus, Count I of the Telephone Company's Complaint, if it had any legal viability, could and should have been raised in the earlier 1970 suit. Certainly, it should not now be able to attack a rate scheme it conceived, lobbied, legally defended in 1951, yet failed to challenge in its 1970 suit. The stipulated dismissal of prejudice of that 1970 suit bars the present attempted resurrection.

B. SECOND CAUSE OF ACTION.

Count II of the Telephone Company's Complaint asserts that the Franchise Fee ordinance and the Business Revenue Tax is illegal and unconstitutional, because it allegedly is not "reasonably proportional" to the cost of service rendered by the City in implementing the ordinance. In the alternative, the Company asserts that the ordinance does not "require" the fee to be reasonably proportional to the cost of service. Further, plaintiff asserts that the City taxing scheme imposes taxes on plaintiff "disproportionally" and without a "rational basis".

The cause of action is so lacking in merit that Appellant did not even address it in its Brief. In brief, this claim fails as a matter of law, because the assertions apply only to regulatory actions and not strictly revenue measures as are involved in this case. See, exposition in Memorandum of Law, R-424-426.

However, these legal theories were also generally pled in paragraph X of the 1970 litigations's Complaint, when the Company alleged that the tax was discriminatory to the Plaintiff in controvention of the Federal and Utah Constitutions. It was further generally pled in the earlier litigation in the assertion that the Revenue Tax provisions violated Section 10-8-80 Utah Code Ann., 1953. Thus, the claims are barred under the principle of res judicata.

C. THIRD CAUSE OF ACTION.

Some portions of plaintiff's Third Cause of Action concern allegations of alleged discriminatory enforcement of Section 20-3-14.1 of the City Ordinances. These provisions impose a tax on companies which compete with the telephone company and, hence, admittedly involve issues which have not been litigated in the earlier proceedings. Thus, the principle of res judicata would not apply; however, estoppel by judgment does bar this claim and this legal theory will be discussed hereafter.

However, to the extent that Company's Third Cause of Action may purport to assert an illegal classification of the Telephone Company, Utah Power & Light and Mountain States Fuel Supply Company or to assert that these utilities are not a distinct and separate class of residents in Salt Lake City (which are subject to an occupation tax based on gross revenues), the principle of res judicata certainly apply.

It should specifically be noted that plaintiff's complaint in the 1970 litigation alleges that Section 10-8-80 and other applicable State and Federal constitutional provisions were violated by the alleged discriminatory classification of these organizations for a gross revenue tax.

The Utah Supreme Court decisively ruled against this assertion in the Mountain States Tel. & Tel. Co. v. Ogden, supra, case. Thus, in addition to the principle of stare decisis, the plaintiff is conclusively barred from again raising this issue under the principle of res judicata, by virtue of their stipulated dismissal of the former litigation.

Collaterally, it is important to note that the 1967 amendments to Section 20-3-14 of the Revised City Ordinances did not change the classification affecting the plaintiff in any particular. These amendments did increase the Business Revenue Tax from four to six percent; further, they did add a provision including competitors of the utilities within the class of persons subject to the tax. However, the classification did not exclude any member previously taxed and, thus, plaintiff cannot assert that it is suffering from any deprivation or burden by an attempt of the City to tax others who may be competing with this plaintiff.

A fortiori there has been no change in the classification which would allow plaintiff to relitigate and assert that they are improperly or discriminatorily classed.

Rather, there have only been added additional parties which would reduce any discriminatory impact on the plaintiff, even though this Court has ruled that any such discriminatory impact did not raise it to the level which created an impermissible classification in a constitutional sense.

What the Telephone Company is obviously attempting to do is to put old legal theories in new bottles, which it may not do. Appellant is attempting to have a "second shot" at establishing the facts for its old legal theories to show discriminatory classification or application of the gross revenue taxation or revenue fees.

An interesting case concerning the latter point and one closely on target for the issues in the present litigation is McCarthy v. State, 1 Utah 2d 205, 265 P.2d 387, 389 (1953); 49 A.L.R.2d 1031. In this case a California contractor sued the State of Utah in Federal Court, together with individual members of a Monument Commission, appointed by the State. The Federal Court dismissed all parties, specifically stating that the State of Utah could not be sued by a citizen of another state, under Article XI of the United States Constitution. However, the Federal Court made no specific finding as to why the individual members of the Monument Commission were dismissed.

Thereafter, the plaintiff sued in the State court and the suit was dismissed because the Court ruled that the former action constituted a bar to subsequent litigation on

implied findings of the Federal court. The State Supreme Court upheld the findings of the lower state court by holding that inasmuch as all elements of diversity were present in the Federal Court, the principle of res judicata barred further litigation. The Court held that the Federal judge implicitly found that the individual members of the commission were not liable and that the obligation was one belonging solely to the State of Utah. The Utah Supreme Court specifically observed:

"And this is true notwithstanding the fact that the Court made no such written finding. The issue having been squarely presented and determined, it is res judicata as between these parties." McCarthy v. State, Id. at p. 389.

Addressing the issue of res judicata our court correctly noted:

"Any other view would create uncertainty by undermining the conclusive character of judgments and would permit the revival of litigation once terminated; consequences which it was the very purpose of the doctrine of res judicata to avoid." McCarthy v. State, Id. at p. 389.

It is further noted:

"Whether its judgment was right or wrong, it stands unassailed and is binding upon the parties." (Emphasis added) Id. at p. 389.

The plaintiff raised the entire spectrum of discriminatory application and classification in the previous litigation. It had every opportunity to litigate these issues; in fact, they commenced separate actions against Salt Lake City and Ogden

City over these precise legal and factual disputes.

The Salt Lake litigation was terminated, by stipulation based on this Court's decision in favor of Ogden City, by able counsel who agreed that the matter should be terminated "with prejudice". The Telephone Company, thus, had full and ample opportunity to litigate all of the issues both legal and factual relating to these allegations, together with any other issue concerning the legality, constitutionality or validity of a Gross Receipt Business Revenue Tax or Franchise Fee. The Company forever barred from raising these issues against the City again.

POINT V

THE PLAINTIFF IS BARRED BY THE PRINCIPLE OF COLLATERAL JUDGMENT ESTOPPEL FROM CHALLENGING THE VALIDITY OF THE BUSINESS REVENUE TAX AND THE FRANCHISE FEE PROVISIONS OF THE CITY ORDINANCES.

Although closely related, a separate and distinct legal principle of estoppel by judgment may operate to bar a litigant from challenging a judgment or another's reasonable reliance on that judgment.

The commentators have summarized the principle as follows:

"The circumstances of a particular case may be such as to estop a person from setting up the invalidity of a judgment. In this connection it has been held that a party cannot be heard to impeach a judgment which he himself has procured to be entered in his own favor, and that one who accepts and retains the fruits of a judgment is estopped from denying its validity. Under this rule, it has been held

that one who accepts the benefits of a judgment should be precluded from questioning the validity of the burden imposed by an express condition on which the judgment was granted." 46 Am.Jur.2d, Judgments §51 at p. 350 (Emphasis added).

Also, this work correctly noted:

"In this respect, it has been declared that in the application of the doctrine of estoppel by former verdict or collateral estoppel, it is immaterial that the prior action sounded in tort and the later one in contract, or vice versa." 46 Am.Jur.2d Judgments §429 at p. 599.

The writer has found no Utah cases specifically addressing collateral estoppel by judgment; rather, the cases discussed in Point IV, *supra*, appear to merge the two principles into a discussion of res judicata. The Court has, however, recently explained its view of collateral estoppel which is summarized as follows:

"The interests of justice here require adherence to the time-honored principle that where one of two innocent parties must suffer a loss, it should fall on him who created the circumstances from which it resulted." Hanson v. Beehive Security Company, 14 U.2d 157, 380 P.2d 66, 67 (Utah, 1963); Migliaccio v. Davis, 232 P.2d 195, 198 (Utah, 1951).

This rule is particularly applicable as in the present situation where the Salt Lake City Corporation has relied on the actions of the plaintiff and the decision of the Utah Supreme Court in funding its municipal operations. Approximately 20% or in excess of \$8,000,000 of its budget for the general fund comes from these sources. The City should certainly be entitled to every favorable construction of

the principles of res judicata and collateral and direct estoppel, to protect it in its reliance upon the earlier suit's dismissal.

Further, in the case before the bar, there are two distinct issues which require the application of the principle of collateral estoppel by judgment. The first, concerns the Franchise Fee. The facts are not in dispute and demonstrate that in the early 1950's the plaintiff petitioned the Public Service Commission for authority to pass through, as a surcharge to its billing, the Franchise Fee for the privilege it had of the unfettered use of all public streets, roadways and other rights-of-way. Further, the plaintiff appeared with its present attorney in 1953 and was successful in persuading the Utah Supreme Court that such a provision, as it urged upon the Public Service Commission was legal, valid and constitutional in all particulars. See, Statement of Fact No. 3.

Thereafter, the Appellant-Company has enjoyed all of the fruits and benefits of that arrangement. For some 25 years it has dug up City streets and hung its wires on public easements without having to resort to its power of eminent domain to purchase and acquire rights-of-way of its own. See, Plaintiff's Answer to Defendant's Request for Admissions and Interrogatories No. 6 and 7.

In addition, the City has relief on the revenue generated from this source for preparing and expending tax revenues

since 1953, without objection or challenge until the within litigation. Even in the 1970 suit which challenged the Business Revenue Tax, the utility companies did not seek to raise in issue the Franchise Fee provisions, which extend for a period of 50 years from the date of the agreement. However, even if it had, it is a fact that the Telephone Company dismissed that challenge by stipulation, "with prejudice".

The law concerning such dismissals is clearly articulated and certainly a matter subject to reasonable reliance by the Salt Lake City Corporation. It is summarized as follows:

"The term 'with prejudice,' expressed in a judgment of dismissal, has a well-recognized legal import; it is, of course, the converse of 'without prejudice' and indicates an adjudication of the merits, operating as res judicata, concluding the rights of the parties, terminating the right of action, and precluding subsequent litigation of the same cause of action, to the same extent as if the action had been prosecuted to a final adjudication adverse to the plaintiff. Accordingly, a judgment so rendered operates, in a subsequent action on the same cause of action, so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein." 46 Am.Jur.2d, Judgments §482 at p. 645 (Emphasis added).

Clearly, the Appellant is estopped from challenging the validity of the 1953 Franchise Fee assessment and collection procedures under these principles by its 1953 and 1970 suits.

With reference to the Business Revenue Tax, the City has based its budgets and reasonably relied on the Company's

dismissal in establishing service levels for the City constituency, based on revenue from the Business Revenue Tax imposed on the utilities since 1971. The Company should, likewise, be enjoined and estopped from its present attack on that method of financing.

It is respectfully submitted that Company's entire claim's dismissal should be affirmed by this Court. It is collaterally estopped by the judgments heretofore rendered, at its solicitation or by its stipulation, especially since the Company has enjoyed the benefits and fruits of that litigation since 1953 and the City's reasonable reliance thereon.

SUMMARY

The City has passed an occupation tax and imposed a fee for franchise privileges (accepted and utilized by the Telephone Company), consistent with the enabling power granted the City by the Utah Legislature. The Public Service Commission, by order approved by this Court, has authorized those fees and taxes to be passed through to the Appellant-Company's customers, when the Company files appropriate notice of the local tax impositions. Thus, the City has not usurped the Public Service Commission function of rate setting and the Appellant-Company's assertion to the contrary is specious.

The Appellant-Company's Brief fails to note the significant distinction between a challenge to the facial classifi-

cation and validity of a taxing ordinance and an alleged discriminatory application of a valid statute. The bastardization of these two theories is improper and they must be separated for proper analysis.

With reference to the facial classification of taxpayers for taxing purposes, the legal principles are well established. Such laws are presumed constitutional and every reasonable presumption will be indulged in by the Court to uphold their validity. In short, legislative bodies have the broadest latitude in forming classifications. Taxing laws will be held unconstitutional only if the courts can find no reasonable basis to justify the classification and where the law patently fails to equally treat persons similarly situated.

In the instant case, the ordinance, on its face, includes within the scope of a classification of persons taxed, all competitors of the three named utilities. Thus, as a matter of law there can be no factual or legal issues concerning proper facial classification

Further, to challenge an alleged discriminatory application of a taxing statute, one must allege and establish that there was an intentional systematic failure to uniformly apply the tax. The Appellant-Company has failed even to allege such a theory.

In addition, the undisputed facts of record demonstrate that the City has exerted a good faith effort to equitably

and uniformly apply the taxing ordinance. Thus, the Appellant's Brief fails to state a claim upon which relief can be granted and, further has failed to establish any disputed issues of fact to oppose the City's Motion for Summary Judgment.

The Telephone Company-Appellant has, further, attempted to resurrect a legal dispute which originated in a suit filed in 1970 by it and two other utility companies. That suit involved virtually identical issues of fact and law. However, after an adverse ruling on the major points, all the plaintiffs, including this Appellant-Company, stipulated to a dismissal of that suit, with prejudice.

Therefore, all of the issues which were raised or which could have been raised in the former litigation are barred from retrial in the present litigation under the principle of res judicata. The issues thus barred include:

(a) The allegation of its First Cause of Action that Salt Lake City is illegally setting utility rates,

(b) The allegation of its Second Cause of Action that the gross revenue tax is not reasonably proportional to the costs of service rendered by Salt Lake City in implementing or enforcing the tax and,

(c) The tax is illegal, unconstitutional or beyond the City enabling power.

Also, each of those subjects are barred under the principle of collateral estoppel by judgment.

Thus, the Appellant-Telephone Company's Complaint fails to state a claim upon which relief can be granted. There are no material issues of fact and the lower court properly dismissed the litigation. This Court should affirm the lower court's ruling.

Respectfully submitted,

ROGER F. CUTLER
Salt Lake City Attorney
Attorney for Respondent
101 City & County Building
Salt Lake City, Utah 84111
Telephone: 535-7788