

1979

# The Mountain States Telephone & Telegraph Co. v. Salt Lake City : Reply Brief of Appellant

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,	)
	)
Appellant,	)
	)
v.	)
	)
SALT LAKE CITY,	)
	)
Respondent.	)

---

REPLY BRIEF OF APPELLANT

---

CASE NO. 16000

---

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE HONORABLE DAVID K. WINDER, PRESIDING

---

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FILED

MAR 20 1979

IN THE SUPREME COURT  
OF THE STATE OF UTAH

\* \* \* \* \*

THE MOUNTAIN STATES                    )  
TELEPHONE & TELEGRAPH                )  
COMPANY,                                 )  
  )  
                  Appellant,             )  
  )  
                  v.                        )  
  )  
SALT LAKE CITY,                         )  
  )  
                  Respondent.            )

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Appellant,	)	Case No. 16000
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SALT LAKE CITY,	)	
	)	
Respondent.	)	

\* \* \* \* \*

I. ISSUES DEALT WITH IN THIS BRIEF

Appellant hereby submits the following brief with respect to the issues of res judicata and collateral estoppel. These issues were raised by respondent in its brief, and were not dealt with in appellant's initial brief in this matter.

II. ARGUMENT

1. THIS SUIT IS NOT BARRED BY RES JUDICATA

Although respondent's argument is less than clear in specifying the basis for its contention that res judicata is applicable to this action, its argument seems to infer that it relies on that species of res judicata outlined in §48 Restatement, Judgments, (1942), which is usually referred to as "bar." This doctrine, however, bars suit only as to

"the original cause of action." The 1971 case relied on by respondent, the "original cause of action" with respect to the res judicata issue in this action, involved taxes imposed prior to October, 1971 (R. - 182, 445). The present suit deals with taxes imposed under a different enactment than the one involved in the 1971 litigation (R. 172), and accrued during 1977, 1978, and 1979. It is universally held that in tax litigation res judicata, in its Restatement §48 meaning, has no application in a suit challenging the propriety of a tax obligation accrued in tax periods subsequent to those at issue in the original litigation. The leading case on this point is Commissioner v. Sunnen, 333 U.S. 591, 68 S. Ct. 715 (1948). In the years following the Sunnen decision, its holding has been followed by every state and federal court which has considered the issue.<sup>1/</sup>

The holding of these cases also disposes of respondent's argument that this Court should hold that issues raised by this action are barred because they

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<sup>1/</sup> Because of the large number of state and federal jurisdictions which have followed the Sunnen holding, those citations are set forth in Appendix I to this Reply Brief.

could have been litigated in the 1971 suits. In addition to the obvious factual impossibility of litigating the question of the City's disproportionate application and enforcement of the tax at issue in 1971 because the facts on which those allegations are predicated did not come into existence until 1974, the rule of these cases disposes of this argument. These cases hold that in tax litigation, res judicata in the sense of bar is not applicable at all in litigation involving subsequent tax periods; and res judicata, meaning collateral estoppel, is available only as to issues actually tried and adjudicated in the prior litigation. See also Restatement, Judgments §68 (1942).

2. THIS SUIT IS NOT BARRED BY COLLATERAL ESTOPPEL.

Respondent argues in its brief that a rule which it calls "collateral judgment estoppel" bars this suit, citing certain sections of American Jurisprudence 2d, but disclaiming knowledge of any Utah cases in point. Both the language of the authority quoted in respondent's brief and the Utah case of McFarland's Estate v. Holt, 18 U.2d 127, 417 P.2d 244 (1966) show that in order for a party to be estopped under the doctrine asserted by respondent, that party must have:

1. prevailed on the issue in question in



some prior litigation; and

2. must assert, in the subsequent suit, a position inconsistent with the resolution of that issue which it obtained in the earlier litigation.

In order for this doctrine to apply to this appeal, appellant would have to have prevailed in the 1971 litigation. Appellant did not prevail in the 1971 litigation. Appellant's present position on the constitutionality of its taxation by the City would also have to be inconsistent with its position in that litigation. Appellant's position on that issue is consistent with the position it took in the 1971 litigation.

At various points in its argument, respondent argues or infers that it is somehow entitled to have this Court insulate its allegedly discriminatory taxation from judicial review by virtue of one or more aspects of the past history of its taxation of appellant.

It argues that the existence of its franchise agreement and the benefits received by appellant under that agreement insulate its subsequent taxation. This Court held in Mountain States Telephone & Telegraph Co. v. Ogden City, 26 Utah 2d 190, 487 P.2d 849 (1971), that Utah cities have no power to enter into any franchise agreement which involves,

or intrudes upon, the City's separate power to tax pursuant to §10-8-80 UTAH CODE ANN. That opinion specifically ruled invalid so much of the franchise agreement as purported to deal with any issues having to do with the City's imposition of revenue taxes. The tax imposition challenged by the present suit consists of revenue taxes, and whatever benefits may have been conferred by the remaining provisions of the franchise agreement have no bearing on appellant's right to bring this litigation.

Respondent also argues that it has somehow demonstrated reliance of such a nature that it should not be required to defend the validity of the tax at issue. Relying on Hanson v. Beehive Security Company, 14 Utah 2d 157, 380 P.2d 66 (1963), Salt Lake City argues that it is an innocent party to the tax transaction challenged here because it "...has relied on the actions of the plaintiff and the decision of the Utah Supreme Court in funding its municipal operations." (Respondent's Brief at 46.) This is apparently an argument for an estoppel predicated on some conduct independent of any prior adjudication, because Beehive Security, the authority cited for this contention, involved the construction of a deed and raised no issue as to the preclusive effect of a prior judgment. Respondent seems to claim that as long as its representatives thought their tax increases were valid

under the prior rulings of this Court, they should be excused, as a matter of law, from having to defend the legality of those taxes. This, however, is an argument predicated on a mistake in law, and in Utah a mistake in law gives rise to no right to legal or equitable relief. Starley v. Deseret Fords Corp., 93 Utah 577, 74 P.2d 122 (1938); Andrus v. Blazzard, 23 Utah 233, 63 P. 888 (1901).

More fundamentally, respondent cannot succeed on this appeal with any argument predicated on estoppel. Utah has a statute, §59-11-11 UTAH CODE ANN., which specifies that action which a taxpayer must take in order to perfect the right to seek judicial review of taxation of the type at issue here. Payment of a tax under protest, as was done in this case, gives notice to the taxing entity that the propriety of the tax is in dispute. Peterson v. Bountiful City, 25 Utah 2d 126, 477 P.2d 153 (1970). The procedure prescribed by §59-11-11 is Utah's exclusive remedy by which the right to judicial review may be obtained as to the legality of the type of taxes challenged in this suit. Pacific Inter-mountain Express Company v. State Tax Commission, 7 Utah 2d 15, 316 P.2d 549 (1957); Shea v. State Tax Commission,

101 Utah 209, 120 P.2d 274 (1941). Where the taxpayer has followed a statutory procedure which is the exclusive remedy by which judicial review of the propriety of a tax may be obtained, estoppel is not available to the taxing entity to bar the taxpayer's suit. Oklahoma Tax Commission v. McAfee, 421 P.2d 602 (Okla. 1969).

All of respondent's arguments with respect to collateral estoppel ignore the fact that appellant now has competition in a major part of its business, where it had no competition at the time of the 1971 litigation. As was more fully discussed in appellant's brief, pp. 5-9, this competition reflects a drastic change which has occurred in appellant's legal status as the result of the Interconnect cases.

A change in the law upon which the determination of an issue hinges renders collateral estoppel inapplicable to a subsequent suit in which that issue is raised. The leading case on this point is State Farm Insurance Co. v. Duel, 324 U.S. 154, 162, 65 S. Ct. 573 (1945) and the application of the rule of that case to tax litigation indistinguishable from the present appeal is illustrated by U.S. v. Texaco, 579 F.2d 614, decided by the U.S. Court of Claims in 1978. In that case the plaintiff taxpayer challenged the legality of certain taxes assessed for its 1957 tax year.

The legality of these same taxes had previously been litigated for the plaintiff's tax years 1946 to 1953 inclusive. The plaintiff claimed that the decision as to the legality of the 1946-53 taxes collaterally estopped any suit for a contrary adjudication as to the 1957 taxes. The court noted that a Supreme Court decision rendered between the two suits had changed the law which controlled the main issue in dispute; and held collateral estoppel inapplicable, stating:

\* \* \* where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive, \* \* \* a judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable \* \* \*

579 F.2d at 616

As courts have noted repeatedly, "collateral estoppel is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers." CBN Corp. v. U.S., 364 F.2d 393 at 396 (Ct. Claims 1966). As the Fifth Circuit noted in Moch v. East Baton Rouge, 548 F.2d 594 at 598 (1977), the application of collateral estoppel to prevent judicial review of government practices which

have allegedly become impermissible because of changes in the controlling law would allow "to continue ad infinitum a constitutionally infirm system outlawed everywhere else."

In a case where its previous rulings on the constitutionality of state support of certain private schools had been rendered untenable by intervening U. S. Supreme Court decisions, the U. S. District Court in Virginia said:

[The intervening Supreme Court decisions were] a substantial change in the law and ended further viability of our decision. Now to continue its efficacy would be unjust to those initially and now affected by that order.

Again, when as here private litigation has extensive implications of public import, the rule of res judicata or estoppel is not allowed to stultify reassessment of the prior decision. The public interest supersedes the private interest.

Griffin v. State Board of Education, 296 F. Supp. 1178 at 1182 (E. D. Va. 1969); see also Whitcomb v. Chavis, 403 U. S. 121, 91 S. Ct. 1858 (1971); Dore v. Kleppe, 522 F.2d 1369 at 1374-75 (5th Cir. 1975).

In U. S. v. General Electric Co., 358 F. Supp. 731 (S.D.N.Y. 1973), the defendant in an anti-trust suit attempted to defend on the grounds that those aspects of

its marketing system which the government sought to challenge had been successfully defended in previous litigation. The opinion shows that the company's marketing system was not significantly different from the system which had been at issue in the prior litigation. The company claimed that it had relied on the earlier decisions in planning its marketing system and was, therefore, entitled to have its practices insulated from review by collateral estoppel. The court responded to the reliance argument:

"...But this is not a reason for holding the system is still valid. I see no basis for a finding that because G. E. has enjoyed a preferred position under the antitrust laws for many years, its immunity should be made virtually perpetual."

358 F. Supp. at 742.

It is significant to note that the respondent concedes that it takes the position in this appeal that it is entitled to the same perpetual immunity from judicial review which was denied in the General Electric case. Respondent's brief says: "The Company forever barred [sic] from raising these issues against the City again." (Respondent's brief at 45).

State courts, as well as federal courts, have held that collateral estoppel is unavailable where there has been an intervening change in the controlling law. Melenderes v. City of Los Angeles, 115 Cal. Rptr. 409 at 417 (Ct. App. 1974); Hialeah Race Course v. Gulfstream Park Racing Assn., 210 So.2d 750 (Fla. 1968); Manilow v. City of Miami Beach, 213 So.2d 589 (Fla. 1968); Smith v. Allstate Insurance Co., 150 S.E.2d 354 (Ga. 1966).

This Court has also recognized that collateral estoppel is unavailable after a change in the controlling law. Sprague v. Broyles Bros. Drilling, 4 Utah 2d 344, 294 P.2d 689 (1956); State v. California Packing Corp., 105 Utah 191, 145 P.2d 784 (1944). None of the cases cited by respondent at pages 36-38 of its brief involved the application of either res judicata or collateral estoppel following a change in controlling law. The same statement is true of McCarthy v. State, 1 Utah 2d 205, 265 P.2d 387 (1953) cited at pages 43-45 of respondent's brief.

### III. CONCLUSION

Two facts are of crucial importance in dealing with respondent's argument that this suit is barred either by res judicata or by collateral estoppel. The



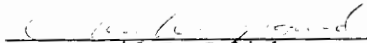
first is the fact that this is a tax litigation. The second is the fact that the Interconnect cases have, since 1974, brought about full economic competition in the sale of all types of telephone terminals and their related equipment.

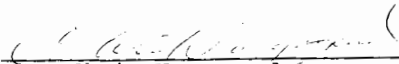
The fact that this is a tax suit dictates that respondent's res judicata argument must fail. Res judicata bars suit only on the same cause of action, but this suit involves a different tax enactment, a different tax period, and a different cause of action.

Recognition of the fact that appellant had no direct competition at the time of the 1971 litigation between these parties, but has lost almost half its equipment market to such competition between 1974 and 1976 (R. 297-99) is crucial to the proper resolution of respondent's collateral estoppel arguments. This dramatic change has been the result of a change, imposed by the Federal Communications Commission and the Federal Courts, in the law controlling the question of whether appellant would be permitted to continue to enjoy the freedom from competition which it had enjoyed throughout most of this century. That freedom from competition has been the basis for many court decisions, like the decision of this

Court in the 1971 Ogden City case supra, which have sustained the validity of taxing public utility companies on a different basis from other businesses. The controlling legal basis for those decisions has now changed. This change makes collateral estoppel inapplicable to this suit; it also makes the decision of the Third District Court unjust and legally unsound.

RESPECTFULLY submitted this 26<sup>th</sup> day of March,  
1979.

  
\_\_\_\_\_  
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## APPENDIX I

Authorities following the holding of Commissioner v. Sunnen 333 U.S. 591, 68 S. Ct. 715 (1948);

### First Circuit

1973                    United States v. Felix Benitez  
Rexach, 482 F.2d 10 (1st Cir. 1973)

### Fourth Circuit

1955                    Fairmont Aluminum Co. v. Commissioner  
of Internal Revenue, 222 F.2d 622  
(4th Cir. 1955)

### Fifth Circuit

1967                    Mississippi River Fuel Corp. v.  
Roland Cocreharn, 382 F.2d 929  
(5th Cir. 1967)

### Seventh Circuit

1974                    Frank C. Howard v. United States,  
497 F.2d 1270 (7th Cir. 1974)

### Ninth Circuit

1966                    Southwest Exploration Co. v. Robert  
A. Riddell, 362 F.2d 833 (9th Cir.  
1966)

### Tenth Circuit

1975                    Adolph Coors Co. v. Commissioner of  
Internal Revenue, 519 F.2d 1280  
(10th Cir. 1975)

### Court of Claims

1977                    Missouri Pacific Railroad Co. v.  
United States, 558 F.2d 596 (1977)

## State Courts

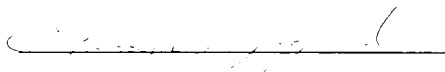
Arkansas, 1947	<u>Missouri Pac. Hospital Ass'n v. Pulaski County</u> , 199 SW.2d 329
Arkansas, 1947	<u>Clayton v. City of Little Rock</u> , 204 SW.2d 145
Connecticut, 1975	<u>Connecticut Light &amp; Power Co. v. Tax Commissioner</u> , 362 A.2d 958, 169 Conn. 58
Connecticut, 1974	<u>Joseph W. Pepin v. City of Danbury</u> , 368 A.2d 88, 171 Conn. 74
Florida, 1973	<u>Container Corp. of America v. Gene Long</u> , 274 So. 2d 571 (Fla. App. 1973)
Illinois, 1978	<u>Hopedale Medical Foundation v. Tazewell County Collector</u> , 375 NE.2d 1376
Illinois, 1955	<u>Oak Park Club v. Brenza</u> , 131 NE.2d 89, 7 Ill. 2d 389.
Kentucky, 1948	<u>German Gymnastic Ass'n of Louisville v. City of Louisville</u> , 209 SW.2d 75, 306 Ky. 810
Kentucky, 1946	<u>Louisville Garage Corp. v. City of Louisville</u> , 198 SW.2d 40
Minnesota, 1954	<u>State v. P.K.M. Electric Co-Operative</u> , 65 N.W. 2d 871
Missouri, 1951	<u>Young Men's Christian Ass'n v. Sestric</u> , 242 S.W. 2d 497
New Mexico, 1952	<u>Town of Atrisco v. Monohan</u> , 240 P.2d 216, 56 N.M. 70
New Mexico, 1950	<u>Albuquerque Broadcasting Co. v. Bureau of Revenue</u> , 216 P.2d 698, 54 N.M. 165
New York, 1963	<u>Town of Harrison v. County of Westchester</u> , 196 N.E. 2d 240, 13 N.Y.2d 258

## State Courts

New York, 1963	<u>Harold E. Sundberg v. Joseph H. Murphy</u> , 242 N.Y.S.2d 329
New York, 1955	<u>People ex. rel. Watchtower Bible &amp; Tract Society, Inc. v. Haring</u> , 146 N.Y.S.2d 151 286 App. Div. 676
Oregon, 1977	<u>Lethin v. Dept. of Revenue</u> , 563 P.2d 687, 278 Or. 201
Pennsylvania, 1965	<u>Appeal of Rieck Ice Cream Co.</u> , 209 A.2d 383, 417 Pa. 249
Tennessee, 1956	<u>Roanes-Anderson Co. v. James Clarence Evans, Commissioner, etc.</u> , 292 S.W.2d 398
W. Virginia, 1955	<u>Western Maryland Railway Co. v. Board of Public Works</u> , 90 S.E.2d 438

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed a true and correct copy of the foregoing Reply Brief of Appellant in Case No. 16000, postage prepaid, this 11 day of March, 1979, to Roger F. Cutler, City Attorney, Attorney for Respondent, at 101 City & County Building, Salt Lake City, Utah 84111.

A handwritten signature in dark ink, appearing to be "James H. ...", is written over a horizontal line.