

1952

Ogden City v. Public Service Commission of Utah et al : Brief of Plaintiff

Utah Supreme Court

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Case No. 7884

IN THE SUPREME COURT
of the **FILED**
STATE OF UTAH SEP 24 1952

Clerk, Supreme Court, Utah

OGDEN CITY, a Municipal Corporation,
Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH, a body politic and MOUNTAIN
STATES TELEPHONE AND TELE-
GRAPH COMPANY, a corporation,
Defendants.

PLAINTIFF'S BRIEF

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS	8
ARGUMENT	9
Point 1. The Commission unlawfully imposed upon the protesting city, rather than upon the applicant company, the burden of proof in the proceeding below.....	9
Point 2. There is no evidence to support the find- ings of the Commission to the effect that the present practice of treating the franchise fees as a general expense of the company results in some discrimination against non-city sub- scribers in the applicable rates and charges for telephone service	14
Point 3. There is no evidence to support the find- ing of the Commission to the effect that the Company's customers outside the cities (in- cluding Ogden City) contribute a part of the franchise fees and special taxes, while receiv- ing little or no direct benefit therefrom.....	36
Point 4. The finding of the Commission, to the effect that there is no evidence that the City's franchise contract was entered into with the intent that the funds to pay the city for the rights thereby acquired by the Company would come from the general income of the Com- pany, is contrary to all of the competent evi- dence in the proceeding, and contrary to law.....	44

Point 5. The order of the Commission impairs the obligation of the Company's franchise contract with the City and its inhabitants in violation of Article I, Section 10, Clause 1 of the Constitution of the United States, and Article I, Section 18 of the Constitution of Utah	50
---	----

Point 6. The Order of the Commission, by authorizing a specific and arbitrary set off, releases and extinguishes, at least in part, the indebtedness, liability, and obligation of the Company to the City under its franchise contract, in violation of Article VI, Sections 27 and 29, of the Constitution of Utah.....	58
---	----

Point 7. The Order of the Commission is void and beyond the powers of the Commission granted by the legislature, and is a void attempt to exercise power to supervise and interfere with municipal money and property and to levy municipal taxes and perform municipal functions, which powers the legislature cannot validly grant the Commission under Article VI, Section 29 and Article XII, Section 8, of the Constitution of Utah.....	60
---	----

Point 8. The Order of the Commission by its terms and in effect unlawfully transforms a lawful and proper franchise fee exacted from the Company into an unlawful purchase or use tax on telephone service by the user thereof, in violation of Article VI, Section 29, Article XI, Section 5(a), and Article XIII, Section 5, of the Constitution of Utah.....62

CONCLUSION72

AUTHORITIES CITED

Court Decisions

Atlantic City Sewerage vs. Board of Public Utility Commissioners 26 A. 2nd 71, aff'd. 29 A. 2nd 850 (N.J.L.)11

Birmingham Electric vs. Alabama Public Service Commission 47 So. 2nd 455, (Ala.).....11

City of Columbus vs. Public Utilities Commission (Ohio, 1921) 133 N. E. 800, syllabi 26 to 31.....56

City of Elmhurst vs. Western United Gas Company (Ill. 1936) 1 N. E. 2nd 144.....29, 35, 68, 72

Idaho Power Company vs. Thompson 19 Fed. 2nd 547, 58061

Logan City vs. Public Utilities Commission 72 Utah 536, 271 Pac. 961.....62

Mountain States Telephone and Telegraph Company vs. Public Service Commission 105 Utah 230, 142 Pac. 2nd 873; Rehearing denied 105 Utah 266, 271; 145 Pac. 2nd 790	792	10, 13, 29, 32, 33, 35
New York Edison Company vs. Maltbie 279 N.Y.S. 949		11
Chortino vs. Salt Lake and U. R. Co. 52 Utah 476, 488, 174 Pac. 860		38
State vs. Department of Public Service (Washington, 1943) 142 Pac. 2nd 498, 532, 536, Syllabi 44-45		29, 36, 50, 66-7, 68, 71
State vs. Public Service Commission 245 SW 2nd 851 (Mo., 1952)		24-29, 68-9
State Ex rel Seattle vs. Department of Public Utilities 207 Pac. 2nd 712 (Wash., 1949)		69, 70-71
St. George vs. Public Utilities Commission 62 Utah 453, 220 Pac. 720		59
Tucker vs. Brown 92 Pac. 2nd 221		70
Tucker vs. Brown 150 Pac. 2nd 604, 622		70

	Page
Tulsa Tribune Company vs. Oklahoma Natural Gas Company 261 Pac. 213 (Okl.).....	11
Utah Light and Traction Company vs. Public Service Commission 101 Utah 99, 118 Pac. 2nd 683, 689	37
Union Pac. R. Company vs. Public Service Com- mission 103 Utah 186, 134 Pac. 2nd 469 (Syllabi 7, 8 and 9)	39, 56, 61
Western Securities Co., vs. Spiro 62 Utah 623, 221 Pac. 856 Syllabus 5.....	53

Legal Encyclopedias Cited

23 Am. Jur. "Franchises" SS2 to 8, pp. 714 to 720	37
43 Am. Jur. "Pub. Util." Sec. 83, p. 624-5.....	58
16 C.J.S. pp. 344, note 61; 339, Note 14(3) and 342, Note 41	56
17 C.J.S. Page 744.....	48
17 C.J.S. Page 755.....	49
17 C.J.S. Page 782.....	49
18 C.J.S. "Corporations" Section 6, Pages 376- 377	53

	Page
37 C.J.S. "Franchises" SS 1 to 14 Pages 141 to 158	38
37 C.J.S. Page 166, Note 95.....	48
37 C.J.S. Page 167, Note 1.....	48
37 C.J.S. Page 167, Notes 7 to 9.....	48
62 C.J.S. Pages 68-69	54

Statutes and Constitutional Provisions

Constitution of the United States, Article I, Section 10, Clause 1.....	9, 50
Constitution of Utah, Article I, Section 18.....	9, 50
Constitution of Utah, Article VI, Section 27.....	9, 58
Constitution of Utah, Article VI, Section 29	9, 39, 56, 58, 60, 61, 62, 66
Constitution of Utah, Article XI, Section 5.....	55, 57
Constitution of Utah, Article XI, Section 5(a)....	9, 62, 66
Constitution of Utah, Article XII, Section 8	9, 38, 55, 56, 60
Constitution of Utah, Article XIII, Section 5.....	9, 62, 66
Section 15-8-13 U.C.A. 1943.....	39
Section 15-8-14 U.C.A. 1943.....	38
Section 76-4-4 U.C.A. 1943.....	5, 10
Section 76-4-24(2) U.C.A. 1943.....	2
Section 76-6-12(1) U.C.A. 1943.....	7, 10
Council-Manager Charter of Ogden City.....	57

IN THE SUPREME COURT
of the
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OGDEN CITY, a Municipal Corporation,
Plaintiff,

— vs. —

PUBLIC SERVICE COMMISSION OF
UTAH, a body politic and MOUNTAIN
STATES TELEPHONE AND TELE-
GRAPH COMPANY, a corporation,
Defendants.

STATEMENT OF FACTS

This is an action by Ogden City to obtain a review of an order of the defendant Public Service Commission authorizing the defendant Mountain States Telephone and Telegraph Company (hereinafter sometimes called the "Company") to make effective its "Second Revised Sheet 5 of its Utah Intrastate General Exchange Tariff, Section 20, 'General Regulations,' " filed with the Commission under date of December 19, 1951. (Record 34).

That order was granted upon the application (R 1-3) of the Company and over the protest (R. 136-139; 38-45) of the City.

The so-called "Tariff" which was thus approved by the Commission, so far as pertinent, reads as follows:

"1. Rate schedules of the Telephone Company, in Utah, do not include any portion of any sales, excise, franchise, or occupation tax, costs of furnishing service without charge, or similar taxes or impositions presently or that may hereafter be levied by the Federal Government, the State of Utah, or any political subdivision or taxing authority.

"2. Insofar as practicable, any such taxes, levies impositions or charges presently or hereafter levied may be billed by the Company to its exchange customers on a prorata basis, with the amount thereof added to the bill for service to the Company's subscribers in the area wherein such taxes, impositions or other charges are or shall be levied against the Telephone Company."
(R. 3 and 25).

For a clear understanding of the situation it is necessary at this point toturn back to the time when the Company's franchise to use the City's streets was negotiated and granted, and to consider some other facts in the background.

The franchise in question was negotiated and granted in 1941 to run for a period of 25 years, or until 1966. (R. 125-127; Exhibits 3 and 4, R. 21 and 22, admitted R. 152-3). It must be presumed that this franchise contract was submitted to and approved by the Commission before it was accepted and executed by the Company as provided in Section 8 of the franchise ordinance, as required by Section 76-4-24 (2) U.C.A.

By that franchise the City granted the Company the right to use its streets for pole lines, cables, etc. In consideration thereof the Company agreed to pay the City annually an amount equal to 1% of the local exchange revenues derived from telephones in Ogden City and to provide the City certain so-called "free service" during the term of the franchise. (Ibid., and R. 125-6).

In those negotiations it was understood by the Company's representative that the City Commissioners who represented the City acted in a representative capacity for the citizens and inhabitants of Ogden, so that the inhabitants were in effect the real parties in interest. (R. 127).

The Company's representative (R. 125) recognized that the franchise tax (or fee) is imposed upon the Company and not directly upon its customers (as in the case of excise and sales taxes) although the money to pay all taxes and other obligations must in the last analysis be found in the consideration paid for services furnished by the Company. (R. 127-129).

Until the present time all municipal franchise fees and taxes always have been absorbed in the general expense of the Company. (R. 1; 100; 110; 118; 140; 26).

They were, with the exception of an increase in the Salt Lake City tax, included in the overall expenses of the Company in the fixing of the presently existing rates of the Company in the Commission's case No. 3596, in which the Order was issued on August 10, 1951. (R. 100; 110; 26; 118).

A number of the cities and towns in the state have imposed or exacted sales taxes, excise taxes, franchise fees, occupational taxes and/or free services from the Company. (R. 110-115; Exhibit 2). The Company, or at least its Utah Manager, Mr. Sawyer, regards all these taxes and free services as essentially the same (R. 109), a legal position with which the City cannot agree.

Except in the case of the franchise fee paid and free services rendered Ogden City for the use of its streets, the nature of these taxes was never specified, and the Record is silent as to whether or not the sums paid other municipalities were franchise fees in the nature of rental for the special use and occupation of City streets (as in Ogden's case) or occupational or license taxes imposed on the Company's and other businesses or on the Company's business alone for purely revenue purposes, or were sales taxes on the sale of the Company's services, or excise taxes imposed on some other phase of the Company's business activities.

At any rate the amount of the taxes, and the percentage which the amount bears to the gross revenues of the Company varies from city to city. Currently the Ogden franchise fee is 1% plus free services amounting, on the basis of current revenues, to .44 of 1% of the gross receipts from local exchange revenues derived from telephones within the city limits. (R. 115, Exhibit 2; 125).

The transfer of the burden of all these charges and free services to, and the recovery of the amount of the tax and the retail value of the free services from local consumers within the municipalities involved will result in an increase in the Company's net earnings from 5.26% to 5.47% of capital invested, or an increase of .21% of

net earnings after taxes. (R. 118-119).

The existing telephone rate schedules group towns by size, according to the number of telephones on the exchange, and a rate is fixed for telephones in each group, upon the assumption that the value of a telephone to a subscriber varies directly with the number of phones which can be reached therefrom without toll charge. (R. 129-130). However, it is noteworthy in this case that geographically *the boundaries of the urban base rate, or "city service" area does not follow the city limits*; there are subscribers outside the city limits who get urban service and pay the regular urban charge, without any premium.

Moreover, neither the applicant Company nor anyone else presented any evidence whatsoever proving or tending to prove that the rates, based on the historical practice approved in the general rate case just last year, were in any way "unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provisions of law" as is required by Section 76-4-4, U.C.A. before the Commission may act. On the contrary, the Company's only witness testified on cross examination that he "could not say" as to whether or not the rural lines "pay their way" upon the rates in an equal proportion to the city or base rate areas, that the Company did not attempt to define its operations that fine on an exchange, but develops an over-all cost to furnish service in a particular exchange area, and does not break down the cost of furnishing service in the rural as compared to the city. (R. 134-135).

Again (R. 143), the witness Mr. Sawyer testified that it might be true that in a given exchange that the

Company actually has to operate at a loss; that the Company doesn't attempt to define areas around the state or within exchanges where the cost of operation might be in excess of the rates.

And again, he testified that he had no figures to submit as to what proportion of the earnings come from the several exchanges, *or whether they are bearing their fair share in the overall picture.* (R. 149-150; Emphasis added).

It is, of course, admitted that in the Ogden area (as an example) *every* phone call from the rural area, and from the urban base area outside the city limits must travel through the Ogden Exchange and along the city streets pursuant to the franchise granted by the City. To that extent *every* subscriber from outside the city limits uses and directly benefits from the franchise. On the other hand *not* every call from a city phone travels over a country road; calls between city subscribers travel only over city streets, and there is no automatic compensating use of country roads. (R. 133). This obvious discrimination is enhanced by the fact that the city taxpayer pays ad valorem taxes to maintain the country roads.

The existing discrimination, if any, is against the city and in favor of the rural subscriber, instead of *vice versa*, as was assumed by the Company and the Commission.

Although the counties of the State (except Washington County) are all furnished similar free services, no proposal or order was made to bill the cost of these to the telephone users in the several areas involved. (R. 121; 25; 34).

Upon the filing of the Company's application, the Commission, pursuant to Section 76-6-12 (1), U.C.A., suspended the operation of the proposed Second Revised Sheet 5, and entered upon an investigation of the matter without formal pleadings, and held the hearing at which the evidence disclosed the facts as above outlined.

Upon the closing of the hearing the Commission made its Report, Findings and Order approving the proposed recovery of all franchise fees and license taxes, so far as practicable, from subscribers within the respective municipalities. (R. 24-37). It apparently found as a fact in substance that the present practice of treating the franchise fees and license taxes as a general expense of the Company resulted in "some discrimination" against non-city subscribers in the applicable rates and charges for telephone service, and that the practice should be discontinued. (R. 28-29; 31). It also found that customers living outside the cities contribute a part of the cost of these taxes and impositions, while receiving little or no direct benefit therefrom. (R. 29).

The Commission further found that the City's contention that its franchise contract was entered into with the intent that the funds to pay the city for the rights acquired by the Company would come from the general income of the Company is not supported by the evidence, and that the application of the proposed tariff would not affect the City's constitutional rights, or impair its contracts. (R 33)

A petition for rehearing was filed with the Commis-

sion, setting out in detail the points to be hereinafter argued. The petition was denied, and the City thereupon brought this action to obtain a review of the Commission's proceedings.

STATEMENT OF POINTS

1. The Commission unlawfully imposed upon the protesting city, rather than upon the applicant company, the burden of proof in the preceeding below.

2. There is no evidence to support the findings of the Commission to the effect that the present practice of treating the franchise fees as a general expense of the company results in some discrimination against non-city subscribers in the applicable rates and charges for telephone service.

3. There is no evidence to support the finding of the Commission to the effect that the Company's customers outside the cities (including Ogden City) contribute a part of the franchise fees and the special taxes, while receiving little or no direct benefit therefrom.

4. The finding of the Commission, to the effect that there is no evidence that the City's franchise contract was entered into with the intent that the funds to pay the city for the rights thereby acquired by the Company would come from the general income of the Company, is contrary to all of the competent evidence in the proceeding, and contrary to law.

5. The Order of the Commission impairs the obliga-

tion of the Company's franchise contract with the City and its inhabitants in violation of Article I, Section 10, Clause 1 of the Constitution of the United States, and of Article I, Section 18 of the Constitution of Utah.

6. The Order of the Commission, by authorizing a specific and arbitrary set off, releases and extinguishes, at least in part, the indebtedness, liability, and obligation of the Company to the City under its franchise contract, in violation of Article VI, Sections 27 and 29, of the Constitution of Utah.

7. The Order of the Commission is void and beyond the powers of the Commission granted by the legislature, and is a void attempt to exercise power to supervise and interfere with municipal money and property and to levy municipal taxes and perform municipal functions, which powers the legislature cannot validly grant the Commission under Article VI, Section 29 and Article XII, Section 8, of the Constitution of Utah.

8. The Order of the Commission by its terms and in effect unlawfully transforms a lawful and proper franchise fee exacted from the Company into an unlawful sales, purchase or use tax on the user of telephone service, in violation of Article VI, Section 29, Article XI, Section 5(a), and Article XIII, Section 5, of the Constitution of Utah.

ARGUMENT

POINT I. *The Commission unlawfully imposed upon the protesting city, rather than upon the applicant company, the burden of proof in the proceeding below.*

It is conceded that the proposal to charge the franchise fees to the telephone using inhabitants of the cities involved will result in an increase in cost of telephone service to the inhabitants, and an increase in net income to the Company. Under these circumstances and under the provisions of Section 76-6-12(1), U.C.A., 1943, pursuant to which the proceeding was held (R. 4), the alteration in the established practice cannot be made "except upon a showing before the Commission and a finding by the Commission that such increase is justified."

Furthermore, under the provisions of Section 76-4-4(1), U.C.A., 1943, relating to the powers of the Commission to regulate rates, regulations, practices, etc., of utilities, the Commission has no power to order or authorize a change in a rate or practice unless substantial evidence is first presented to prove, and the Commission finds, that the existing rates or practices are inherently "unjust, unreasonable, discriminatory or preferential," or in some way in violation of some law.

In the case of

Mountain States Telephone and Telegraph
Company vs. Public Service Commission
105 Utah 230, 142 Pac. 2nd 873; Rehear-
ing denied 105 Utah 266, 271; 145 Pac.
2nd 790, 792,

this court held that an order requiring intrastate rates to be reduced to the level of intrastate rates is invalid unless based on evidence "calculated to show that existing intrastate rates were inherently unreasonable." Obviously there is no presumption that existing rates or

practices are unreasonable; the proponents of a proposed change must prove that as a fact. In the absence of such evidence there is obviously a presumption that existing practices are reasonable and non-discriminatory. This is especially true where, as here, the Commission, on August 10, 1951, less than seven (7) months before, had found and determined in its case No. 3596, that the existing practices were fair and reasonable, as required by law. (R. 26).

This is the rule elsewhere. In the case of

Birmingham Electric vs. Alabama Public
Service Commission, 47 So. 2d 455, (Ala.)

it was held that in a statutory proceeding wherein the utility attempts to designate an increased rate which becomes effective unless suspended by the Commission, the burden of establishing the basis for the increase is on the utility.

And in

Tulsa Tribune Company vs. Oklahoma Na-
tural Gas Company, 261 Pac. 213 (Okl.)

the court held that the burden rests on one seeking to establish special rates to show that the rates set by the Corporation Commission are unjust and unreasonable. See also

Atlantic City Sewerage vs. Board of Public
Utility Commissioners, 26 A. 2d 71, aff'd.
29 A. 2nd 850 (N.J.L.)

and

New York Edison Company vs. Maltbie, 279
N.Y.S. 949.

In this case the burden of proof was on the company

to establish (1) that the existing practice of including franchise fees in the Company's over-all costs was unreasonable, unjust and discriminatory, and to establish (2) that the proposed change would correct that discrimination.

Both the Company and the Commission *assumed*, without any evidence to support them, that both of these facts were true in February, although not true in the preceding August. The Commission *argued* in its "Report and Findings" (R. 28-29) that "Because of the Nature of these license, occupation, and franchise taxes and the manner in which the Company has spread the expense. . . . to all of the telephone users of the state, it *becomes apparent* that some discrimination results . . ." (Emphasis added.) However, as disclosed by the Record, summarized in the Statement of Facts, and hereinafter more fully discussed, there was nothing presented to show the extent of such discrimination, or whether such discrimination was, in the over-all picture, against or in favor of the inhabitants of Ogden City or of any other municipality. The Company's witness just had no figures to present. *There was presented absolutely no basis for comparison.*

The making of the order in favor of the proponent Company under these circumstances is obviously tantamount to *presuming* the existence of these basic facts and placing the burden on the protestant city to disprove their existence. This, as has been shown, is contrary to law.

The position erroneously, and perhaps unconscious-

admitted that the corporation and its officers in this case acted for and represented its inhabitants who are the real parties in interest, and under the American rule, the third party beneficiary is recognized as the legal obligee. *Second*, no matter who is recognized as the obligee, *the obligation of the Company is impaired*. The City is entitled to look to its original obligor, and cannot be compelled to accept a novation with new obligors who will, as the Commission anticipates, immediately bring pressure and agitate for the cancellation of the obligation. *Third*, it is the established law of this state, and elsewhere, that *"a corporate entity may be entirely disregarded in order to reach and protect the real parties in interest, and to disclose the real transaction."*

Western Securities Co. v. Spiro, 62 Utah
623, 221 Pac. 856, Syllabus 5.

See also

18 C.J.S. "Corporations," section 6, pp. 376-377,

where it is said that:

"It is clear that a corporation is in fact a collection of individuals, and that the idea of the corporation as a legal entity or person apart from its members is a mere fiction of the law introduced for convenience in conducting the business in this privileged way. It is now well settled, as a general doctrine, that, when this fiction is urged to an intent not within its reason and purpose, it should be disregarded and the corporation considered as an aggregation of persons, both in equity and at law. . . . The courts will disregard the corporate fiction whenever its retention would

produce injustices and inequitable consequences.”

See also

62 C.J.S., pp. 68-69,
where it is said that a municipal corporation may, and frequently does act as agent for its citizens, and is regarded as a trustee for its inhabitants.

If ever there was a case where the corporate entity should be disregarded in the interests of justice, this is that case. The inhabitants of Ogden stand in grave danger of being unjustly deprived of the fruits of their grant of franchise privileges by the subterfuge of paying through their corporation, with their money, a debt beneficially owned by them. The corporate entity of their municipal corporation must not be permitted to stand between them and justice.

The Company's obligation to the City's inhabitants is impaired by the Commission's order.

As to the second objection raised by the Company to this point, we readily concede that it is a general rule that Municipal Corporations cannot claim, as against the state, the protection of the “impairment of obligations” clauses. There are two clear replies by way of which the City avoids this admitted rule.

The first has already been suggested. The real parties in interest here are the individual telephone-using inhabitants of Ogden, in whose behalf the City here appears. They are under no such disability, and it seems possible, from the clamor here, that the members of the

ly, taken by the Commission on this question of burden of proof is well indicated by its statement in its Report and Findings (R.30) that "The protestant, Ogden City, sought, among other things, to show that there is discrimination in rates construed on a state-wide basis. . . ." (Emphasis added.) On the contrary, Ogden City did not seek to show, or assume the burden of showing anything. It sought only to require the Company to assume its proper legal burden of showing that present state-wide rates are unreasonable and discriminatory as claimed by the Company and that, as further claimed by the Company, its proposed new tariff would cure the same.

This case is in principle identical with *Mountain States Telephone and Telegraph Company vs. Public Service Commission*, supra. There the Commission, without supporting evidence, presumed that "there was no reasonable basis for any difference" between interstate and intrastate rates. This court struck down the order based on that presumption. In this case the Commission, without supporting evidence, presumed,

- (1) that the Company's payment of the various municipal occupation taxes and franchise fees creates a difference in the burden of telephone rates;
- (2) that such difference discriminates against the rate-payer outside the municipalities in question;
- (3) that the difference and discrimination is exactly

equal to the amount of the tax; and

- (4) that there is no reasonable basis for the presumed difference,

thus piling one unjustified presumption on another. The order based on these presumptions also should be struck down.

As we will demonstrate below, there is no evidence whatsoever in the record to support any one of these bold assumptions made by the applicant Company and the acquiescent Commission.

The indulging of this presumption in effect places the burden on the City to *disprove* a fact which the Company had the burden of proving. This is contrary to law. The Commission's order should be vacated because of this vital legal error.

It should perhaps be added here that, while the Commission's findings are so informally phrased and so argumentative that it is difficult to ascertain therefrom just what facts are found, it seems apparent that the Commission has nowhere attempted to find that the discrimination it presumed to exist is without reasonable basis. If so, then there is no finding (with or without evidence) to support the order, as is required by law and the decision of this court above cited, and the order cannot stand.

POINT 2. *There is no evidence to support the findings of the Commission to the effect that the present practice of treating the franchise fees as a general ex-*

pense of the company results in some discrimination against non-city subscribers in the applicable rates and charges for telephone service.

Throughout the hearing before the Commission the Company and its sole witness apparently assumed that the payment of varying franchise fees, as well as the payment of other taxes mentioned, as general expenses of the Company resulted in discrimination against the users of telephones outside the limits of the cities who are paid for the use of their public streets in the Company's private business, or for the privilege of doing business therein. The Commission, obviously anxious to approve the application, which had apparently been made at the instigation of one or more members of the Commission (R. 101), fell into the same error.

But there is no evidence in the record to prove that assumption as a fact.

There are only two ways in which the Company could have proved such discrimination, or proved, as required by law, that existing rates and practices are "unjust, unreasonable, discriminatory or preferential:"

- (1) It could produce evidence to show that the Commission erred in its order of August 10, 1951, approving the existing rate structure, including the practice of absorbing the fees and taxes in question in its total operation, as general expenses; or
- (2) It could prove a change in circumstances occurring since the previous hearing which for

the first time rendered the existing practice unjust, unreasonable discriminatory or preferential.

The Company of course was foreclosed by the doctrine of *res adjudicata* from a collateral attack here on the Commission's 1951 General Rate Order, and hence it could not legally follow the first alternative. It did not attempt to do so, but, on the contrary it conceded, in effect, that until recently the established practice of treating these taxes as general operating expense had an insignificant effect. See Counsel's opening statement (R. 100), and the testimony of the sole witness (R. 116-7).

The Company therefore attempted the second method, and produced evidence of a recent increase (from 1% to 2%) in the tax or fee paid to Salt Lake City, plus testimony that the Company was "informed" that several cities were considering proposals which, "if adopted," would further increase these expenses. Finally, the Company's Exhibit 2 (R. 17-20) showed that the amount of these "special taxes" as the Company chooses to call them, varies from nothing in a number of small cities to .39% of local exchange gross receipts in Midvale, to 1.44% in Ogden, to 2% in Salt Lake City, and to an isolated and insignificant high of 7.28% in tiny Schofield. *That was all.* (R. 117; 125; 140-141). One curious thing about the Company's position on this point is that according to counsel's opening statement (which he read from a prepared script) the Company in 1951 paid \$149,000 in occupation taxes, franchise fees, free service, etc. (R. 100), but notwithstanding the increase referred

to the estimate for 1952 was only \$124,623. (Exhibit 2, R. 17; R. 111 and 115). The figures don't show the increase the Company claimed.

However that may be, this evidence certainly does not prove that existing rates produce any unlawful or unreasonable discrimination against non-taxing or non-franchise communities.

Let us consider the various assumptions in which the defendants in this case (the proponents below) indulged themselves in the proceeding under review.

First, it was assumed that payment of the fees, taxes, etc., out of the general funds of the Company creates a difference in the burden of telephone rates. *But there is absolutely no proof as to what these rates are, either in or out of the communities involved*, except that the rates vary from community to community, the variation being *by groups*, according to the number of telephones in the exchange. (R 129). These rates were established, after hearing, on August 10, 1951, and all city franchise fees and license taxes then existing were considered at that time. (R. 125). These included the Ogden City 1% franchise fee and its "free service" rendered as street rental. These included all such charges now existing except half of Salt Lake City's present 2% charge. As the Commission is presumed in law to do its legal duty (at least until the contrary is shown) it must be presumed that the rate schedules so fixed did not impose an unfair and discriminatory burden on rate payers outside of Ogden, Logan, Provo and other franchise or taxing cities, even though *these charges were in-*

cluded and handled as a general expense.

There is absolutely *no* evidence to show that these rates did not in fact, with due allowance for the type of service rendered, distribute the burden equally among all rate payers, not only for variations in these charges, but also for variations in labor costs, in office rentals, in local levies of ad valorem taxes, and in the cost of transporting equipment to serve the communities, and so on through all the multitudinous cost factors of a telephone service.

Of course, it would not only strain, but would rupture credulity for us to ask the court to believe that every phone user in the state now bears exactly his fair share of the Company's various costs, and we do not do so. On the contrary, we believe that substantial inequalities exist, but that in fact they discriminate *against*, rather than *in favor of* the rate payers in Ogden City and, in general, in her sister municipalities who have franchise agreements with, or levy occupational taxes on, the Company.

Our point is that the burden is on the Company to prove the claimed difference in burden as a basis for its proposed change in practice and charges, and there is no evidence in the record either as to the actual or comparative rates paid by, or the cost burden and capital investment properly to be allocated to, the customers in and out of the communities involved. Until there is prepared a study showing separately for each area involved the amount of capital investment and the amount of op-

eration costs fairly to be allocated to each area, on the one hand, and the amount of revenue derived from each area, on the other hand, there is no possible basis for comparison, or for judging which, if any, are bearing an unjust share of the burden to the benefit of another.

Second, it was assumed that the (assumed) difference in burden discriminates against the rate payer outside the municipalities in question. Here again there is a complete absence of evidence to support the assumption; indeed, when considered in the light of matters of general knowledge, and of which the court will take judicial knowledge, *the only evidence available all tends to prove that presently it is the telephone users in Ogden and her sister cities who suffer from discrimination in phone rates.*

Let us consider the evidence before the Commission.

The existing rates classify the exchanges according to the number of telephones served, and uniform rates are established for all the towns within each group or class. The rates vary from group to group. Within each group the rates vary with the class of service, whether urban-commercial or urban-residential 1, 2 or 4 party line, or rural multi-party line service. (R. 129-130). Furthermore, some subscribers *outside the city limits*, but apparently close thereto, *get urban service at urban rates.* (R. 130-131).

There is no evidence as to the actual classification or the actual rates, or the variation therein as between the franchise-granting or taxing municipalities and the

rest of the state.

Nor is there any direct evidence to show the relative cost of serving the taxing as against the non-taxing areas. Indeed, although the Company's case when presented showed an ultimate care in preparation (questions and answers on direct examination were read from mimeographed sheets) the Company's manager on cross examination was asked, "And, as I understand it, you have no figures to show and here submit as to what proportion of your earnings come from each of these towns and *whether they are bearing their fair share of the overall picture?*" He answered, "No, I don't have a figure developed on each exchange of that type." (R. 149-150).

Moreover, he further testified that he "could not say" whether the rural lines "pay their way" in equal proportion to the city base rate areas, as the Company doesn't attempt to define its operations that fine, but only develops overall costs. (R. 134-135). And he admitted (R. 143) that it might be true that in a given exchange the Company operates at a loss, although the Company doesn't "attempt to define" areas in the state where costs might be in excess of expense of operation. It does "maintain records on the *total cost of operation within the state* and make rates to take care of those expenses." (Ibid.)

The Company's manager further admitted that cost of service varied with the distance from the exchange: " * * * it is cheaper for us to furnish service to a man

a block away than it is a mile away.” The admission that costs vary directly with distance from the exchange is implicit in the extra charge for urban service to a subscriber located outside the urban base rate area. (R. 131). This, of course, is obvious, so obvious that the Court would, we believe, take judicial notice thereof even in the absence of this admission. Probably this circumstance is the reason the Company does not do any cost accounting on an area basis: such accounting would disclose that the urban areas are “carrying” the rural areas and the areas in which new development is taking place.

If rates were made on an area basis, instead of state-wide, these urban areas would certainly be in a better bargaining position, and doubtless would refuse to “carry” the others, which would make it more difficult to extend the system into new and more sparsely populated areas. Doubtless this is the basis of Mr. Sawyer’s comment (R. 145) that it wouldn’t be to the interest of “all” the users of service “to attempt to break down rates that fine.”

Perhaps we should pause here to say that the City does *not* here object to the principle of fixing rates on a state-wide basis—what it objects to is the departure therefrom with respect to franchise fees and taxes, especially in the absence of any evidence to show any reasonable basis in fact for that departure from established and approved practice.

Let us now turn to the documentary evidence which

was introduced, Exhibit 2. (R. 17-20).

A glance at sheet 2 thereof (R. 18) discloses that the municipalities receiving franchise fees or occupational tax include substantially all of the state's larger and more densely populated cities lying within the state's central valley, in which, as the court judicially knows, there are concentrated the great bulk of our population and of our industrial and commercial activity. Salt Lake City, Ogden, Provo, Logan, Murray, Farmington, Brigham City, Price, Bountiful, Vernal, Spanish Fork, Richfield and St. George all fall in this group. In all of them the bulk of the subscribers obviously will live near the central exchanges where the unit cost of equal service will be *lowest*—how much lower the applicant Company was not interested in saying, nor the complaisant Commission in hearing. But under present rate policies these communities are the very ones where the subscriber now pays the *highest* rates, because he has available at his local exchange a larger number of telephones which he *can* call, without toll charge, (whether or not he will have any occasion to do so) if he should wish to do so.

On the other hand, turning to sheet 4 of Exhibit 2 (R. 20), we find listed the communities which are paid nothing as franchise fees or occupation tax. They include among others equally insignificant, the towns of Alton, Amalga, Annabella and Antimony; Henefer, Henrieville, Hiawatha and Honeyville; Paradise, Paragonah, Perry and Pickleville. It is doubtful if many lifetime residents

of Utah will have any idea where they are, and many people will never have heard of some of them. There is no definite information in the record, but it is obvious that few of them will have their own exchanges, and very few will actually serve, through wires and cables upon their public streets, any great number of subscribers outside their corporate limits. In these areas the bulk of the subscribers obviously live at a relatively great distance from the central exchanges, and there are obviously fewer of them, so that the unit cost of equal service will be *higher*—how much higher the Company was not interested in saying nor the Commission in hearing. Yet under present rate policies these areas are the ones where the subscriber pays the *lowest* rates for service, because he has available at his local exchange a smaller number of telephones he *can* call, without toll charge.

Obviously under these circumstances the bulk of the Company's profits are derived from the franchise communities, and those communities in fact now bear some substantial proportion of the burden and expense of serving the other areas, some of which, as the Company admits, may very well be [and probably are] operated at a loss, and contribute nothing to the overall operation.

The urban, franchise areas are "carrying" the outside areas, and the discrimination existing is *against* rather than *in favor of* the franchise areas. Very likely that is just why the Company has protected its position

in the franchise areas by negotiating long term franchise agreements with these cities, and why the Commission has approved the franchises when submitted.

The Company and the Commission obviously have forced the shoe on the wrong foot. The Commission's finding (if any there is) of discrimination against non-franchise areas not only is unsupported by any competent evidence, it is also contrary to the necessary inferences which must be drawn from the evidence before it. Its order cannot be allowed to stand.

Although it seems that recently utilities all over the nation, led and guided by the American Telephone and Telegraph Company, are recently seeking to "pass on" franchise fees and rentals, etc., to their city subscribers, we have been able to find only one case in which a court of last resort has had occasion to review and pass upon the sufficiency of the evidence adduced to support the utility's claim (nobly and unselfishly made in behalf of its downtrodden rural customers) that franchise fees discriminate against rural users. But the facts there are so nearly identical with the facts in this case, and the reasoning there adopted by the very learned and able Supreme Court of Missouri is so applicable and cogent that we cannot forebear to examine and quote from it at some length. We believe it will be very helpful to this court. We submit the principles there declared are controlling here.

That case is

State vs. Public Service Commission, 245
S.W. 2nd 851 (Mo., 1952).

There is a privately owned utility, the St. Louis County Water Company, supplied water to 66 incorporated and numerous unincorporated areas in St. Louis County, Missouri. Its rates had always been fixed on a system wide basis. Later 16 of the incorporated areas levied special taxes upon the gross receipts of the Company. Conceiving that these rates resulted in discrimination against consumers in non-taxing areas, the Company filed with the Public Service Commission a new schedule of rates, which (as here) made no change in the basic rates, but added the amount of the gross receipts taxes to the bills of consumers within the taxing municipalities, except that in cities where the Company had a franchise, *the Company proposed to absorb the first 2% (apparently as a reasonable franchise or rental fee)* and to charge the balance to the consumers within the municipality.

The Commission found that it was "an unjust discrimination for the water consumers of one area to be burdened with any part of the taxes levied or payments exacted by another area" and "that the consumers in any and all municipalities which seek to obtain revenue from such taxes or payments should bear the burden of providing such revenue." The Commission, moreover, regarded the franchises as immaterial, and held that the entire tax, "whether in the nature of license taxes, occupation taxes, street rentals, franchise payments" or otherwise should be paid by consumers within the municipality receiving the same.

The Commission also held that recovery of these expenses should be made in the rates themselves, rather than by adding the same to the bill as a separate item. (In this the Missouri Commission's order differs from the order in our case, as will be demonstrated in a later section of this brief.) It accordingly ordered new rate schedules filed which would include an allocation of these payments.

Thereupon the City of St. Louis procured from the Missouri Supreme Court a writ of review.

The court observed that this was not a general rate hearing, but a proposal by the Company (and not a consumer) to adjust inequalities resulting from the taxes. (This is also true of the case at bar.)

The court observed that the Commission might have classified the cities and towns and fixed rates on a unit basis, but that the Company is organized and operates on a system wide basis, and all its properties, "irrespective of the conglomerate political subdivisions in its system, have been valued, and both rates and the right to a fair return have been determined upon that basis."

It declared,

"* * * all taxes, including taxes on gross receipts, are a part of operating expense, * * * and no doubt were and may be taken into consideration by the Company when it becomes necessary to determine or redetermine rates or a fair return.

* * * But regardless of the respective merits of the two methods of operation, the Company operates on the system wide basis, and the Commission

has heretofore approved its rates and return on that basis, and *both are now in the anomalous position of disregarding the system basis and treating this one item of operating expense upon a segregated, municipal unit basis.*" (Emphasis supplied.)

(This also is true in the case at bar.)

The court then examined the facts and the record to determine whether or not the payments to the municipalities did *in fact* result in discrimination. Attempting to prove disparity, the Company had submitted the following:

1. Charts showing *gross* revenue per customer, and ranking the cities levying the tax;

2. Charts ranking the tax levying cities by gross revenue per mile; and

3. Charts ranking the tax levying areas with respect to revenue received from such areas as compared to taxes paid.

The Commission found that in 24 of the 66 cities served, about 75% of the revenue received came from the taxing cities. But there were no charts showing total gross receipts, or net income, nor any demonstration that there was any impairment of the Company's fair return *in the areas levying the tax.*

(Obviously the applicant there went farther than the hupplicant here in attempting to prove discrimination without reasonable basis—and failed.)

The Court there says:

"The Order and the Company's position erroneously presuppose that there was no discrimination in the former uniform rates in the first place and, of course, that assumption is without foundation. * * * It certainly costs the Company less to serve some areas than it does others, and necessarily there is a corresponding discrimination inherent in uniform rates throughout the system. In the areas that are less costly to serve there is undoubtedly a greater profit to the Company than in the more costly areas and that results in discrimination in rates in favor of the costly areas. If any of the municipalities levying the tax are in the less costly areas, the addition of the tax to their water rates obviously increases the burden of the discrimination. There is no data in this record from which precise information may be obtained, but for the most part the cities levying the tax are the greatest in density of population and contribute the greater sums to both the Company's gross and net revenue. Those areas in which the Company has a franchise or valuable contract rights certainly make the greater contribution to the Company's stability and successful operation. From an operational standpoint they are in a more favorable position for rate making purposes than some isolated, unincorporated area, or some other more costly area, and yet uniform rates ignore these disparities. In short, there is a disparity in the former uniform system wide rates and the discrimination is favorable, undoubtedly, to the more costly areas, and the taxes involved in this proceeding may or may not shift that unfavorable disparity; *from all that appears in this record the taxes may have equalized the previously existing inequalities.* But if it does, it does

not necessarily follow that the amount of the resulting difference is precisely the amount of the tax, *or that it exceeds the more favorable rate previously enjoyed by the more costly operational areas or*, in short, that the discrimination is unfair and unjust.

"There is no reasonable basis upon this record for the Commission's finding and order; accordingly *the judgment is reversed.*" (Emphasis added.)

The case is obviously and exactly in point, and supports completely the position of the City herein. Moreover it is in complete harmony with the principles established by our Utah Statutes and by this Court in the case of

Mountain States Tel. and Tel. Company vs. Public Service Commission, 105 Utah 230, 142 Pac. 2nd 873; Rehearing denied 105 Utah 266, 145 Pac. 2nd 790,

holding that a Commission order purporting to equalize rates is invalid unless based on "evidence calculated to show that existing * * * rates were inherently unreasonable."

The only other cases we have found dealing with the establishment of rate practices in which it was proposed that franchise fees or occupational taxes be "passed on" to the local consumer as an addition to his basic rate are not in point. They are

City of Elmhurst v. Western United Gas Company (Ill., 1936) 1 N. E. 2nd 144, and

State vs. Department of Public Welfare 142 Pac. 2nd 498, 532 (Wash. 1943).

In neither of these cases was there a challenge to the sufficiency of the evidence to prove that existing practice of handling these items as general operating expense produced an unfair or unreasonable discrimination against outside consumers. Moreover, in each of these cases, as the Missouri Court observes in its case above cited, there was a complete valuation of properties and complete determination of rates and fair return. And the Washington case distinguishes the *Elmhurst* case. It was decided under a statute authorizing, apparently, the segregation of single municipalities as regional units, and the fixing of uniform rates *within* the city unit. That is a basically different situation.

The assumption that the assumed difference in burden discriminates against the ratepayer outside the franchising municipalities is unjustified, and is against the law and the evidence.

Third, it was assumed that the assumed difference and discrimination is exactly equal to the amount of the tax in each municipality involved. This is obvious from the fact that the Commission purported to correct such discrimination by its order authorizing the exact amount of the tax to be "passed on" to rate payers within each municipality. It made no attempt to inquire as to possible compensating factors, such as variations in labor cost, in ad valorem taxes, in building rentals or in cost of private easements for pole-lines and cables. It made no inquiry as to whether or not there was, in the several areas, relative equality of return in proportion to the

capital investment in property used in serving such areas. Doubtless an audit and complete study will show that discrimination exists, and will disclose the amount thereof for or against the several arease, but the assertions without examination of the facts and background, that the rates found satisfactory seven months before now discriminate in the amount of the tax, to the very penny and to the hundredth of a per cent in each of 46 cities, under widely differing conditions, strains credulity to the breaking point, and assumes without proof a fact which could not possibly occur in one chance out of billions. It serves only to point up that the Company and the Commission were proceeding upon a premise basically wrong in fact and law.

This presumption just assumes the impossible. If rates are to be adjusted on a community level, evidence must be taken to establish a reasonable basis for the adjustment to be made in each community, and specific findings made for each community fixing the amount and the direction of each adjustment.

To order an adjustment equal to the amount of the tax, without any evidence to prove that the discrimination equals that amount is to act arbitrarily and capriciously, and in violation of the rule of law placing the burden of proof on the proponent Company. Whether in this case the burden of proof is conceived of as being the "risk of persuasion" or only the "burden of going forward," is quite immaterial, for here the Company has supported neither burden, and the order it procured from the Commission must fall.

Fourth, it was assumed that there was no reasonable basis for the assumed difference and discrimination.

It is of course recognized that differences in cost of service, in capital invested in rendering service, in service rendered and in operating conditions justify a difference in rate. If differences in operating conditions, costs, etc., differ, then the rates also must differ, and an exactly compensated, equal rate is unreasonable. Such was the rule established by this court in the *Mountain States Telephone and Telegraph Company* case, *supra*.

Indeed, we do not believe that defendants here would contend for any other rule. The Company fought for and established that rule in that case, and presumably its present rate system is based thereon. However, if it be conceded that in this case the burden of existing rates varies from community to community, *so do the rates*, and there is no evidence to show that the relation between burden and rate in any community was not fair and reasonable, nor was any attack made on the order of August 10, 1951, which must, under the law, be presumed to have been regularly and properly entered, and based on necessary evidence.

And it will be remembered that the Company's only witness, its Utah Manager, testified positively that he had no evidence to present to show whether any community was or was not bearing its fair share of the costs in the overall picture. (R. 149-150).

Apparently the Commission realized this, for it found only (and inferentially) that the franchise fees

and the taxes resulted in discrimination. It did not find that the discrimination was unreasonable, and in making an order without such finding it acted arbitrarily, contrary to established law, and in excess of its jurisdiction.

The Commission's order here is not based on any evidence showing that present rates are unreasonable, and it must fall under the authority of the *Mountain States Telephone and Telegraph Company case*, supra, which the Company itself brought here.

Sauce for the goose is sauce for the gander. In this old precept lies the very essence of justice, western style.

Inasmuch as the Company and the Commission are now flirting with the idea of turning further away from the system wide basis for rates and towards a local community or exchange basis, it probably is not amiss here to raise a query as to the validity of the present quasi-exchange basis where the urban subscriber's telephone rate is based on the number of telephones on his exchange *available to his call*, whether or not he has any use for them. The Company and the Commission shudder at the thought of apportioning capital and costs of operation (except taxes which can be "passed on") upon a local community basis, with appropriate variation in rates to match, but they already, and happily, apportion the fancied benefits of telephone service according to the size of the exchange, and vary the rates accordingly.

It seems unlikely that there is a sound and reasonable basis for the discrimination last mentioned. Year in and year out, it is doubtful that the average subscriber in Ogden calls more than fifty telephones, more or less, from his residence phone, or is called by more than about 50 other subscribers. Very few people "get around" so much that they have even a "phoning acquaintance" with fifty other families or business firms. Twenty or thirty families and a half dozen business firms would (as a guess) be nearer the limit of the average residence telephone subscriber's circle. But notwithstanding this relatively limited use in practice, the Ogden subscriber must pay rates based on the 20,000, more or less, telephones he *could* dial if he wanted to embark upon that monumental and idle effort.

If rate structures must be re-examined on a local basis, as the Company here proposes, then the only fair and just method, and, we submit, the only legal method, is to re-examine *all* factors of rate structure on a local basis, including this rate system which obviously charges the highest rate for the service provided at lowest cost in order to give service at less than cost to some remote and sparsely settled community. To make local adjustments on any other basis is to play tag with justice in the dark, and must inevitably result in unreasonable and unfair discriminations arrived at by purest guess work.

We do not believe that the Company and the Commission can fairly and reasonably make local rate differentials *solely* with regard to the cost of franchise

fees or occupation taxes. We do not believe they can be "a little bit pregnant" with local rate making and still comply with the law.

This court might well save much time and trouble if it would establish for the Commission's guidance in possible further proceedings, the principles above outlined, which, it is submitted, must be followed if the defendants here are to proceed with their project of rate making on a local basis.

This court has already held in the *Mountain States Telephone and Telegraph Company case*, supra, that rates should be established that will as near as possible yield a *fair return on property used in rendering each class of service*. (Syllabus No. 9). Here, although the several communities are classified for rate making, no attempt was made to prove that the communities who would bear the increased burden imposed by the order are not already yielding the Company a fair return on the property used in serving them.

At any rate, the Commission's present order is based on a finding of discrimination unfounded on any evidence, and it should be vacated.

The only other cases we have found dealing with the establishment of rate practices in which it was proposed that franchise fees or occupational taxes be "passed on" to the local consumer as an addition to his basic rate are:

City of Elmhurst v. Western United Gas
Company (Ill., 1936) 1 N.E. 2nd 144, and

State vs. Department of Public Service, 142
Pac. 2nd 498, 532 (Wash. 1943).

In neither of these cases was there a challenge to the sufficiency of the evidence to prove that existing practice of handling these items as general operating expense produced an unfair or unreasonable discrimination against outside consumers. Moreover, in each of these cases, as the Missouri Court observes in its case above cited, there was a complete valuation of properties and complete determination of rates and fair return. And the Washington case distinguishes the Elmhurst case. It was decided under a statute authorizing, apparently, the segregation of single municipalities as regional units, and the fixing of uniform rates *within* the city unit. That is a basically different situation.

We do not believe that the Company and the Commission can fairly and reasonably make local rate differentials *solely* with regard to the cost of franchise fees or occupation taxes. We do not believe they can be "a little bit pregnant" with local rate making and still comply with the law.

POINT 3. *There is no evidence to support the finding of the Commission to the effect that the Company's customers outside the cities (including Ogden City) contribute a part of the franchise fees and special taxes, while receiving little or no direct benefit therefrom.*

We have already pointed out that the only evidence in the record indicates that telephone users in the enfranchising cities in fact contribute to the support of

service to users outside such cities, rather than *vice versa*, and we will not belabor that point.

However, the Commission also states in its Report (R. 29) that the outside customers receive little or no direct benefit from the use to which the tax receipts are put. This statement also requires some consideration. It is submitted that the finding is unsupported by and is contrary to the evidence. It is further submitted that the finding is completely irrelevant, and is based on a misconception of the nature and purpose of franchise fees, or "street rentals," paid by utilities to municipalities.

As we have said, Ogden's franchise agreement with the Company is clearly established as one in the nature of a 25 year contract leasing to the Company the privilege of using the city's public streets and alleys for pole lines, telephone cables, etc., in the prosecution of the Company's private business, which it very properly conducts for private profit. This is a privilege which no private person or corporation may enjoy as of right. It may be enjoyed only upon special grant from the sovereign in Utah, the sovereign people. These concepts are fundamental, and in accord with the authorities generally. See

Utah Light and Traction Company vs. Public
Service Commission, 101 Utah 99, 118
Pac. 2nd 683, 689.

See also

23 Am. Jur. "Franchises," § § 2 to 8, pp. 714
to 720; and

37 C.J.S. "Franchises," §§ 1 to 14, pp. 141 to 158.

In Utah, the people have delegated to the local authorities the exclusive right to grant this privilege to telephone companies as to city streets, and have specifically forbidden the legislature to grant any such right without the consent of local authority. The sovereign people, in

Article XII, Section 8 of the Constitution of Utah,

have declared that

"No law shall be passed granting the right to construct and operate a * * * telephone or electric light plant within any city * * * without the consent of the local authorities who have control of the street or highway proposed to be occupied for such purposes."

This court has held that, even assuming that this constitutional provision has no application to inter-urban railroads, a municipality clearly has the right to grant *or withhold* the right to the use of the streets therein, and *thus to impose conditions respecting the use thereof for purposes other than the right of ordinary travel thereon.*

Shortino vs. Salt Lake and U. R. Co., 52 Utah 476, 488, 174 Pac. 860.

The Legislature has, perhaps superfluously, implemented this right granted cities by the Constitution. In

Section 15-8-14, U.C.A. 1943,

it has provided that

“They [the City Commissions] may construct, maintain and operate * * * telephone lines * * * or authorize the construction, maintenance and operation of the same by others * * *.”

And in

Section 15-8-13, U.C.A., 1943,

it has provided that

“They may regulate the * * * use of streets * * *.”

In the case of

Union Pac. R. Company vs. Public Service
Commission, 103 Utah 186, 134 Pac. 2nd
469 (Syllabi 7, 8 and 9),

this Court held that, under the constitutional and statutory grants of power to cities, a city may impose terms and conditions upon its grant of a franchise, and revoke the franchise for breach thereof. It further held that, although the provisions of a franchise agreement with respect to *rates* are subordinate to the Commission's exclusive control of rates, in all other matters respecting franchises for the special use of city streets the city's powers and rights are not in any way subject to the control of the Commission. The Court commented that inasmuch as it construed the Public Utilities Act as not granting the Commission any jurisdiction over city street franchises, no question is presented of delegation of municipal functions to a special commission in violation of Section 29, Article VI of the Constitution.

It is clear that, in using Ogden's streets and the streets of her sister cities, the Company is enjoying a special privilege which it could not enjoy except by consent of and arrangement with the local representatives of the inhabitants. These streets have been opened, improved and maintained by the inhabitants, either by special assessment levied on the abutting property owners or by general tax levy on all property owners within the corporate limits. The streets belong to the cities' inhabitants. In using the streets for telephone lines, the Company imposes thereon a special burden, and enjoys a special privilege *which no other inhabitant or taxpayer enjoys*. It is only proper that it should compensate the inhabitants for suffering that burden and granting that privilege.

"But," say the Company and the Commission (with one voice), "the money to pay that compensation comes in part from telephone users outside the city, who do not participate in the spending thereof, and therefore they get no benefit therefrom, and are injured."

The answer is that the first part of the charge is not true, as hereinabove demonstrated, and the second part looks on the wrong side of the problem, and is equally untrue. Conceding for the moment (for the sake of argument only) that the outside users do not participate in the benefit of the *spending by the city*, it does not follow that they do not benefit directly and materially from the payment.

They are paying for phone service. They get it. In the course of rendering that service the Company uses the city streets. Every time the rural subscriber uses his phone his call travels along the Company's lines in the streets of the city where the Franchise is located. He cannot complete a phone call even to a rural neighbor across the street without using the streets of the exchange city. In Weber County, as an example, the phones of the entire county (and part of Davis County), with the exception of about 300, phones in the Huntsville Area, are on the Ogden Exchange. Every call from a rural subscriber travels over the streets of one or the other of these municipalities — and could not be completed were it not that the citizens of these municipalities accord to them, through the Company, the privilege of clearing the calls through their streets. It is significant that in Weber County only the two exchange cities, Ogden and Huntsville, are paid franchise fees. (R. 18).

If the Company were compelled to obtain exclusively private rights-of-way for its pole lines and cables within the City limits, in order to serve its rural subscribers, the cost to the Company and the subscribers would doubtless be very substantially higher.

Moreover, from an examination of the list of en-franchising cities (R. 18), it is apparent that they are the central exchanges in the Company's complex of inter-connecting long distance service. The inference is clear and necessary that relatively very few long distance calls are handled by the Company in Utah without routing the

message through the streets of one of several of these municipalities. Here again is a direct benefit in telephone service and use of streets resulting to the users of telephones throughout the state.

Elsewhere in its findings the Commission recognizes this benefit, when it says:

"It is undoubtedly true that telephone subscribers outside Ogden City limits are benefited by reason of being served by the same telephone utility and through the same exchange as subscribers residing within the limits of the City of Ogden. . . . When a subscriber in Ogden calls a station in Roy the conversation is carried over lines *traversing the streets of Ogden for a distance*, and over lines in Weber County outside the City of Ogden for a much longer distance. *The same situation is true when a party in Roy calls a party in Ogden.*" (R. 32—Emphasis added.)

The Commission also observes (R. 32) that

"Ogden City also receives ad valorem tax benefits from telephone plant facilities located within the limits of Ogden City which are devoted to serving subscribers outside the City limits."

But it neglected to observe that the outside subscribers also receive the benefit of ad valorem taxes on that city plant by virtue of the county levy thereon. It neglected to observe that under Utah law the property-owning city subscriber pays a tax (through the County levy) to maintain County roads along which the Company's lines run, but that there is no compensating tax on County property to maintain the City streets which are used

for all County calls. And it neglected to observe that none of these ad valorem taxes pays for, or entitles the taxpayers in question to, the *special privilege* of using the city streets for the stringing of telephone lines and the laying and relaying of underground telephone cables.

In neglecting these matters, the Commission failed to take into account factors of vital importance involved in a proper determination of whether the city subscriber benefits at the hands of his country cousin, or *vice versa*. Not having considered these matters, it is apparent that the Commission's finding that the country subscriber receives no benefit from his pittance of franchise money is a mere guess, and not founded on any evidence.

The City, however, does heartily concur in the following finding of the Commission:

“Where the benefits flow *and to whom* is highly conjectural and *cannot* be accurately measured.” (R. 32—Emphasis added.)

Now that is exactly what we are contending: the finding that the country subscribers receive no benefits from franchise fees paid *is only a guess or conjecture* and cannot be measured or supported. The Commission here recognizes that there is in the record absolutely no evidence to form the necessary basis for any comparison—and the Company admitted it had no such evidence available.

This finding is an admission by the Commission that its Order is based on mere conjecture. With such an

admission in the Record, neither the finding of “no benefit to country subscribers” nor the order based thereon can stand.

The fact that the franchise fee is not spent directly on the country subscriber by the City authorities after it has been received by them of course is utterly irrelevant. They receive their benefit—their *quid pro quo*—in the special privilege of using the City’s streets in completing phone calls.

Exactly the same argument can be made with equal force (or rather, with equal lack of force) that city ad valorem taxes paid by the Company should be charged back to city subscribers because they vary in amount, and are spent on city projects rather than to benefit telephone subscribers in the far corners of the state.

Exactly the same argument can be made with equal force (or rather, equal lack of force) that the landlord who rents an office building to the Company for an exchange should have the amount of the rent charged back to him on his telephone bill because he spends it on himself and his family, instead of using it to buy hats or telephone taborets for all other subscribers. This is absurd, and the premise on which the argument is based is patently false. The attempted determination of relative benefits is without foundation either in evidence, in logic, or in law. It must fall.

POINT 4. *The finding of the Commission, to the effect that there is no evidence that the City’s franchise*

contract was entered into with the intent that the funds to pay the city for the rights thereby acquired by the Company would come from the general income of the Company, is contrary to all of the competent evidence in the proceeding, and contrary to law.

The Company's franchise with Ogden was "negotiated" by its manager in 1941. (R. 125). At that time the established rate structure, approved by the Commission, was on a state-wide basis, and the cost of all franchise fees was "absorbed" by the Company as a general expense. It was treated as a general expense in computing rates, in accord with the almost universal practice.

The manager understood at the time that the Ogden City officials, in entering into the negotiations and into the franchise, acted in a representative capacity, and that *the inhabitants of Ogden were the real parties in interest.* (R. 127). That is the way our republican form of government works—through representative public servants.

The manager, and, obviously, the representatives of the city also understood and recognized the difference between the state sales tax and the federal excise tax on telephones, on the one hand, and franchise fees and occupation taxes on the other, and that the burden of the former is imposed on the consumer, or customer, while the latter is imposed on the Company enjoying the benefits of the franchise or the license to do business. (R. 127-128).

It was also understood that the franchise fee and free service to be paid and rendered to the City under the franchise contract were in consideration of the grant of the franchise privilege to use the city streets for the Company's telephone business. (R. 125-126).

The obvious and necessary inference from this history and background, and from the situation of the parties is that in entering into the franchise agreement with the Company, the object of the City officials was to make a contract beneficial to the people they represented. Their object in selling this privilege for the special use of the streets at a stipulated consideration in money to be paid and services to be rendered was obviously to benefit the City's inhabitants by exacting from the Company a *quid pro quo* which would either result in lower taxes or in higher services to the general inhabitants—and in this connection it must be noted that a city is not operated for profit, but for service to its citizens.

If the purpose of the parties had been merely to aid the company, or merely to facilitate the rendering of telephone service to the city's population, it would have been idle—it would even have been a hindrance to the accomplishment of that purpose to exact a consideration for the franchise grant. If the purpose had been no more, the franchise ordinance and collateral agreement (R. 21-22) would not have provided for payment of a consideration. In such event all payments would have been waived, as has been done in many cities, according to the Company's manager. Obviously the purpose and intent

of both the city officials and the Company Manager were to benefit the real parties in interest: the inhabitants of the city.

It is equally obvious that this purpose would be frustrated if the exact amount and value of this consideration were immediately charged back to the inhabitants as a surcharge upon their particular telephone bills. That process merely puts money in one pocket and removes it from another, and no benefit whatever accrues. By that process the inhabitants part with a valuable right in their streets and, in the final analysis, they get nothing in return.

Clearly the parties had no such purpose in mind. Clearly it was intended that the money to pay the franchise fees would come out of the general income of the Company, in accordance with the then prevailing practice and the situation of the parties at the time.

Perhaps a simplified illustration will aid in presenting this point. Suppose the Company should at a rental of \$100 per month, lease an exchange building from a family corporation with only five stockholders. Suppose further that each stockholder is a telephone subscriber. And now suppose that the Company proposes to add \$20 to the monthly telephone bill of each stockholder, for the express and declared purpose of exacting the rent from the stockholders, "because the landlord corporation spends the rent money on the stockholders, and not on the rest of the Company's subscribers!"

This illustration, we believe, reduces the principle espoused by the Company and the Commission to its utterly silly essentials. Who can reasonably contend that, in such a case, either the landlord corporation or the Company intended that the rental should be exacted by the Company from the landlord's five stockholders—or from any three or four of them?

Clearly there was no such intention in this case, but the parties intended that the franchise fee would be paid out of the Company's general income so that Ogden's stockholder—inhabitants can enjoy the fruits and benefits of the franchise contract made for them.

Perhaps we should add a brief reference to the law governing the construction of franchise contracts.

Except that franchise contracts are always construed most strictly against the grantee Company,

37 C.J.S., p. 167, notes 7 to 9,
the rules applicable to the construction of contracts generally apply to the construction of a franchise contract.

37 C.J.S., p. 166, note 95.
Accordingly the intention of the parties governs,

37 C.J.S., p. 167, note 1;
and if the terms are ambiguous, the purpose of the parties and the history of the negotiations may be considered. Ibid., note 5.

It is, of course, a general rule of contract construction that the nature and object of the agreement and the situation of the parties may be considered.

17 C.J.S., p. 744.

The construction given the contract by the parties may also be considered.

17 C.J.S., p. 755.

In this latter connection, it is significant that for ten years after Ogden's contract was negotiated the Company, without any question, paid the franchise fee out of its general income, and made no attempt to "pass it on" to the city's stockholder—inhabitants until the move was suggested by the Commission. (R. 110). As soon as that was done, the move was actively opposed by the City as a breach of faith. Here is a clear construction of the contract by the long continued manner in which the party obligated has performed.

Moreover, the law of the place where the contract was made, in effect at the time the obligation was entered upon, is deemed a part of the contract.

17 C.J.S., p. 782.

Here the established method of constructing rates, approved by the legislative assent of the Commission from the beginning of rate making in Utah, treated franchise fees as *general operating expense* to be paid out of general income. For fifty years the Commission has applied this rule, and the Legislature, which must have known of the practice, has taken no steps to revise it. Clearly the rule has legislative approval, and is an integral part of the utility rate making law of Utah. As such it became part of the Franchise contract, and determines the nature of the Company's obligation thereunder.

And in the case of

State v. Department of Public Service,
(Washington, 1943) 142 Pac. 2nd, 498,
536, Syllabi 44-45,

the Supreme Court of Washington held, as a matter of law, that reasonable franchise payments for special street privileges, are part of a utility's general operating expense, and must be paid out of general income. It was held *error* for the Washington Department to direct that they be charged to the ratepayers of cities where franchises were held. As Ogden's contract is a contract for a franchise fee (and not an occupation tax) this case is exactly in point here and should be followed, and the order of the Commission here requiring the "passing on" of Ogden's franchise fee to her inhabitant telephone subscribers should be vacated.

The finding of the Commission here that there was no evidence of intent that Ogden's franchise payments were to be made out of general income is against all the evidence and against the law, and erroneously places on the city the burden of proof. It cannot stand.

POINT 5. *The Order of the Commission impairs the obligation of the Company's franchise contract with the City and its inhabitants in violation of Article I, Section 10, Clause 1 of the Constitution of the United States, and of Article I, Section 18 of the Constitution of Utah.*

It is apparent from what has been before that the order of the Commission impairs the obligation of the

Company upon its franchise contract made by Ogden City for the benefit of its inhabitants, the real parties in interest. It is therefore unconstitutional and void.

When this point was pressed before the Commission, the Company raised two points in attempted answer: *first*, that the obligation was not impaired, and *second*, that a city cannot claim the protection of these provisions of the national and state constitutions. It is submitted that neither answer has any validity here.

In the first place, it is here conceded that the City's inhabitants are the real parties in interest; the contract was for their benefit. Before the Order, the Company paid their representatives, out of its own funds, the amount of the franchise fee, and it was expended by their public servants for their account and benefit. After the Order, it is true, the franchise fee will still be paid to the public servants of the inhabitants, to be expended for their benefit, *but the obligation to make that payment has been lifted from the obligor Company and saddled upon the obligee inhabitants.* The obligee has been forced to assume the obligation; the inhabitants have become both obligee and obligor; and the Company, formerly the obligor, has been relieved of all obligation except to act as agent to gather the franchise fee from the available inhabitants and deliver it to their servants for expenditure. *The obligation of the Company has been whittled down from that of a debtor owing rentals for a special street privilege, to that of a mere collecting agent.*

It is as if the maker of a note were to be authorized to say to the payee, "Of course I'll pay you—but only when and if I have extracted the wherewithall from your pocketbook."

It is idle to say that the obligation is not impaired. The entire essence and benefit thereof has been destroyed.

A recognition of this practical result, which the Commission obviously intended, is implicit in the quotation from its finding in the Mountain States Fuel Supply Company case (P.S.C. No. 3755), which quotation it affectionately and approvingly included in its findings here:

"If the customers of gas within the limits of cities which impose such revenue measures are cognizant of the *burdens imposed upon them by their city officials*, such customers will keep those taxes or fees within reasonable limits. . . ." (Emphasis supplied.)

The Commission found that "This finding applies with equal force in this case." (R. 34). It was obviously aware that by virtue of its order the "benefit" (R. 29) of receipts of franchise fees would now become a "burden" (R. 34) to the city subscriber, a burden the Commission expects him to throw off.

If it be argued that the obligation runs to the municipal corporation, and not to the citizen—inhabitant stockholders, and the obligation to the corporation has not been impaired, the answer is three-fold. *First*, it is

court may have heard their shouts of "Robbery!" even as far as Salt Lake City. When the corporate fiction of the city is disregarded, as it must be here in the interests of justice, and the City Government's representative function is recognized, they stand before the court unencumbered to claim their constitutional rights. Two of them, Mr. W. I. Lowe, and Mr. Clarence E. Smith, personally stood before the Commission below.

The second reply is that the rule is based upon considerations which have no application in Utah to these facts. The reason behind the rule is that municipal corporations are regarded as mere creatures of the state, whose very existence depends upon the whim of the state legislature which created them, and which can deprive them of any right, as it can deprive them of existence.

But that situation does not obtain in Utah, and especially in the case of Ogden City. In Utah under Article XII, Section 8 of the Constitution, the legislature cannot interfere with the City's franchise power. It might repeal the general laws under which all cities (except Ogden) exist (Constitution, Article XI, Section 5), but so long as it allows them to exist as municipal corporations it cannot infringe their rights under the Constitution to grant or withhold telephone franchises, and impose conditions respecting the same. Only the people can do that, by constitutional amendment, and they have not acted. Only the Commission, the creature of the legislature has attempted to act, and it is elementary that the legislature cannot delegate to a commission, its creature, powers which it does not itself have. See

16 C.J.S., pp. 344, note 61; 339, note 14(3);
and 342, note 41.

See also

City of Columbus v. Public Utilities Commission (Ohio, 1921) 133 N. E. 800, syllabi
26 to 31,

holding that the legislature cannot delegate to the Public Utilities Commission power to nullify a City's franchise contract in violation of the Federal prohibition against impairing contract obligations.

Furthermore, franchise negotiations under Article XII, Section 8, are clearly municipal functions which the Utah legislature is specifically prohibited from delegating to *any* commission by the provisions of

Article VI, Section 29, of the Constitution
of Utah.

This court held in

Union Pacific Railroad Company v. Public
Service Commission, 103 Utah 186, 200-
203, 134 Pac. 2nd 469,

that a city's power to grant franchises, and impose conditions, is exclusive, and that no order of the Commission can reach or affect a city's rule made thereunder. It did not apply, however, the Constitutional prohibition; it held that the Legislature had not attempted to violate the restriction, and that the Commission is *without statutory authority* to regulate the terms of franchise contracts. The payment of the franchise fee *by the Com-*

pany, not the city's citizen beneficiaries, and the rendering of free service *without direct charge to the citizen beneficiaries*, are important and material conditions properly imposed by Ogden City upon the granting of the Franchise. The regulation of those conditions is a city function, entirely beyond the scope of the Commission's authority. The Commission cannot, under the pretense of exercising its rate making power, meddle in exclusively city affairs.

Furthermore, since Ogden in 1951 adopted the "Council-Manager Charter of Ogden City" pursuant to the Constitution, Article XI, Section 5, it is no longer dependent on the legislature for its corporate existence. It can no longer be abolished, nor its rights impaired by any act of the legislature or its creatures. The reason for a city's disqualification to claim constitutional protection against the legislature no longer applies to Ogden City.

It is apparent that in Utah the Legislature has no power to meddle in Ogden's franchise contract, and can delegate no such power to the Commission. Therefore there is no reason why the City is not free, with respect to such contract, to claim the protection of the Constitutional prohibitions against impairing the obligations of contracts.

Perhaps it should be added that the rate making power, under the guise and pretense of which the Commission proceeded here is a legislative function, covered by the constitutional restriction.

5.

But it must be noted that what the Commission was actually trying to do, under this guise and pretense, was to *regulate city franchise contracts*. That will be demonstrated later in this brief. But that is obviously still a legislative function.

The Order is void because it impairs the obligation of the Company's franchise contract with the City.

POINT 6. *The Order of the Commission, by authorizing a specific and arbitrary set off, releases and extinguishes, at least in part, the indebtedness, liability, and obligation of the Company to the City under its franchise contract, in violation of Article VI, Sections 27 and 29, of the Constitution of Utah.*

Article VI, Section 27, of the Utah Constitution provides that

"The Legislature shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or person . . . to any municipal corporation. . . ."

Section 29 provides that

"The Legislature shall not delegate to any special commission . . . any power to make, supervise, or interfere with any municipal . . . money, property, or effects, whether held in trust or otherwise, to levy taxes, . . . or to perform any municipal functions."

Here is a special protection for contract obligations owing to the city, if any is needed. Clearly, neither the legislature, nor (*a fortiori*) its creature, the Commission, may release the obligation to Ogden of the Company's City franchise contract.

Yet that is exactly what the Commission has attempted to do, as has been above demonstrated. It has attempted to release the Company from its obligation to the city and to impose in lieu thereof a new obligation upon Ogden City telephone users—including the city, for it uses more telephones than the “free service” affords.

The case of

St. George v. Public Utilities Commission,
62 Utah 453, 220 Pac. 720,

is not in point. The contract there was not a franchise contract, protected also by Article XII, Section 8, but was a contract for the sale of a municipal power plant for which the consideration, in part at least, was an agreement to furnish “free” city power for a term. There the Commission ordered that the city be charged the regular power rates, but fixed and *allowed as a credit against these power charges the value of the purchasing company's obligation to furnish “free” service for the term.* Thus the form, and not the substance of the obligation was affected, and the Court approved, but even then Justice Gideon doubted the propriety of approving a “re-writing” of the City's sale contract.

Here the exact reverse is true—the substance, and not the form of the obligation is affected. Here the Order of the Commission would absolutely cancel the Company's obligation, without providing any real compensatory benefit to the city and its inhabitants. It clearly violates the Constitutional prohibitions.

POINT 7. *The Order of the Commission is void and beyond the powers of the Commission granted by the legislature, and is a void attempt to exercise power to supervise and interfere with municipal money and property and to levy municipal taxes and perform municipal functions, which powers the legislature cannot validly grant the Commission under Article VI, Section 29, and Article XII, Section 8, of the Constitution of Utah.*

The Order of the Commission as above demonstrated completely re-writes the franchise contract, in its substance and effect. If carried out, it would effect a novation by which the City's phone-using inhabitants would be substituted as obligors in the place of the Company. This goes far beyond any mere change in form. A contract to grant a franchise in return for service as the "collector" of a telephone use tax, is quite a different thing from a contract to grant a franchise in return for an annual payment *by the Company* of \$13,000 in money and services. There are obvious and cogent reasons why the latter is much more beneficial to the city as a whole, and much to be preferred when negotiating a contract.

Clearly the determination of the consideration for, and conditions of a franchise grant is a matter of municipal policy. Clearly the determination of the amount a city occupation tax, and *of the person upon whom the burden thereof shall be imposed*, is a matter of municipal policy. In the fixing of such policy the local authorities are not subject to the control, direct or indirect, of the Commission. They are controlled only by general law, and the Constitution. Matters of public policy are not for the Commission.

Union Pacific Railroad Company vs. Public Service Commission, 103 Utah, 186, 200-203,

and

Idaho Power Company vs. Thompson 19 Fed. 2d 547, 580.

Under the authority hereinbefore cited, the fixing of franchise terms and conditions is purely and solely a municipal function entirely beyond the scope of the Commission's power. It is a function which the Legislature under Section 29, Article VI could not, even if it would, delegate to the Commission.

Again, this "re-write job" and this release of the Company's obligation to the City is an obvious and intolerable interference with the City's "municipal money, property and effects." The order attempting it is beyond the Commission's power, unconstitutional and void.

That there may be no question, we call attention to the fact that in the case of

Logan City vs. Public Utilities Commission 72
Utah 536, 271 Pac. 961,

this Court held that Article VI, Section 29 of the Constitution applies to the Commission here.

For these reasons also the Order of the Commission must be vacated.

POINT 8. *The Order of the Commission by its terms and in effect unlawfully transforms a lawful and proper franchise fee exacted from the Company into an unlawful purchase, sales or use tax on the users of telephone service, in violation of Article VI, Section 29, Article XI, Section 5(a), and Article XIII, Section 5, of the Constitution of Utah.*

In considering this point we must first direct the Court's attention specifically to the exact provisions of the tariff regulation which the Commission's Order approves. It provides:

"1. Rate schedules of the Telephone Company in Utah, *do not include any portion of any sales, excise, franchise or occupation tax, costs of furnishing service without charge, or similar taxes . . .*"

2. Insofar as practical, any such taxes . . . or charges . . . may be billed by the Company to its exchange customers on a pro-rata basis, with the amount thereof *added to the bill for service* to the Company's subscribers in the area wherein such taxes," etc. are levied against the Company. (Emphasis supplied).

What are the Company and the Commission saying? Clearly and unequivocally they are saying, *first*, that

franchise fees and special taxes against the Company are no longer regarded by the Company as an operating expense and so included in the rate structure, even on a local basis; and *second*, that such fees and taxes, *as such*, may be billed to subscribers within the city limits. Clearly this is not a rate increase equal to the tax or fee, for "Rate schedules . . . *do not include any portion*" thereof, and the amount is "*added to the bill for service.*" Moreover, some subscribers on the exchange, living near to but outside of the corporate limits are rated as urban area subscribers at urban area rates, but they are not to be billed for the tax, because they are not "subscribers in the area wherein such taxes" and fees are levied against the Company. The area of increase is limited strictly to the area in which the City has territorial jurisdiction for tax purposes.

Even though in its order approving the tariff regulation the Commission uses some language consistent with a rate increase on an exchange basis, it is obvious that on such rate increase is in fact contemplated, for at least some exchange customers are not to be included.

It is the *tax* which is billed to the customers. This is made more than clear by the Commission's reference to its case number 3755. (R 34). The Commission says:

"That case involved a request of Mountain Fuel Supply Company for authority to bill its customers directly *for certain municipal taxes and licenses* . . .

In that case we said:

'If the consumers of gas within the limits of cities . . . are cognizant of the burdens *imposed*

upon them by their city officials, such consumers will keep those taxes or fees within reasonable limits.' ” (Emphasis supplied.)

Notice that the language used does not here refer to an increase in rates to compensate for taxes paid by the Company, it refers to authority to bill the customers for “taxes and licenses.” It refers to burdens placed by “city officials.”

Even though the Commission in its opinion also refers to “increased rates due to such taxes,” it is submitted that the quoted “slips of the pen” reflect the true purpose and intent of the Commission; namely, to force a reform in Municipal tax structures and franchise contracts in accord with their own and the Company’s ideas of “social and economic justice.” They do not believe that the inhabitants of cities should receive any compensation for suffering the special burden of pole lines over and cable lines under the streets they have developed and paid for to carry vehicular and pedestrian travel. They will therefore order the “transfer” of the burden of paying that compensation to the inhabitants who should receive it. The compensation is effectively set off and cancelled, and the franchise “reformed.” Even though it is apparent that the bulk of the Company’s revenue and profits are derived from business done within the cities in question, they conceive it to be unjust and discriminatory for the cities to levy for public purposes an occupation license tax based on the revenues taken by the Company from the inhabitants. They will therefore order the tax “passed on,” and extracted for the second time from the in-

habitants. This effectively blocks the levying of any license tax on the Company, and the Municipal tax structure is "reformed." The Commission's policy emerges triumphant over public policy as fixed by the constitution and laws of Utah.

Stripped to its basic essentials and cleared of the pretense of "rate fixing", the actual result of the Order is that the Company now pays no franchise or occupation taxes, and the local authorities have lost the ability to extract from the Company any compensation for the use of the streets, or to impose on the Company any license tax for the privilege of earning a guaranteed 6% (or more) within the city limits.

As a result the amount of the franchise fee will become a matter of indifference to the Company. It has an absolute monopoly, so the overall cost is of little concern. In "negotiating" a new franchise their attitude obviously will be "OK boys, how much? We don't pay it, so name your own figure and we will rake it in for you!"

This hardly seems a desirable goal to seek.

On the other hand, the order fastens on the consumer in Ogden what is, in all its practical and realistic aspects, a purchase or use tax imposed on the consumer of telephone service within the city limits. No matter how one looks at it, that is the effect of the order.

It cancels the franchise tax, and levies in lieu thereof a city telephone-use or sales tax on city subscribers.

This clearly is in excess of the powers permitted by the Constitution to the Legislature or its delegatee Commission.

By Article XIII, Section 5, of the Constitution the legislature is forbidden to levy any city, town or other municipal tax, but is authorized to vest such power in the local authorities. So far it has never seen fit to vest the local authorities with power to levy sales, purchase or use taxes on the sale or purchase of any commodity or service. The Commission has rushed in where the local authorities themselves cannot tax.

And Article VI, Section 29, forbids the legislature to delegate to the Commission the power to levy any taxes—but that has not restrained the Commission from the attempt.

Ogden, as a charter city, derives its power to tax directly from Article XI, Section 5(a) of the Constitution—but here also the power granted is the “power prescribed by general law,” and we know of no provision granting any municipality the right to levy a tax of the kind here attempted.

The crux of this matter, of course, is whether or not the additional burden imposed on the City’s phone subscribers is a tax, or an increase in cost of phone service. If it is a charge for phone service, then we must concede this point. If it is a tax of any kind, then this point 8 is well taken. We submit it is in truth and fact a tax.

We have found only one other case where this problem was involved. It is the Washington case of

State vs. Department of Public Service 142 Pac.
498, 535.

The court makes no attempt to analyze the practical result, but merely declares that

“There is no basis for the Argument advanced by the cities that the department is seeking to exercise the taxing power, or to interfere with the exercise of that power by the cities. The only question concerns the allocation of the moneys paid by respondent to the cities under a taxing ordinance or pursuant to franchise provisions . . . ”

Nor does it clearly appear from that decision that there the Order in question “passed on” the tax as tax, as was attempted here, or merely increased exchange rates for service in an amount sufficient to compensate the telephone company for its cost in municipal taxes in that exchange. From the Court’s further remarks on page 535 of the Pacific Report it would seem that the latter is true. If so, the case is distinguishable on this point. The court says,

“We are of the opinion that the Department, insofar as such taxes are concerned, has the power to *fix special exchange rates* . . . which will *in effect* require the rate-payers in each community to absorb a *sum equal to* the amount of the tax . . . More than this the department cannot do.”

The case was remanded for further proceedings. It would seem that the court was authorizing a bona fide fixing of *rates* on a local, rather than on a state wide basis, and presumably the department in its further

proceedings would take evidence on all the factors necessary to fix fair rates on a local rather than state-wide basis. The case seems not to be in point either on the question of the sufficiency of evidence to prove existing discrimination, or on the question of the effect of "passing on" the tax as an exercise of tax power by the Washington Department.

In the briefs filed by the parties hereto before the Public Service Commission, which have been made part of the record and certified to this court, there are only three cases cited which deal specifically with the question of passing locally imposed franchise charges and occupation taxes on to the consumers within the area imposing the tax. We have found no other cases directly on this question. The three cases are

City of Elmhurst vs. Western United Gas Company (Ill., 1936) *supra*

State vs. Department of Public Service (Wash., 1943) *supra*

and

State of Mo. ex Rel. City of St. Louis vs. Public Service Commission of Missouri (Mo., 1952) *supra*.

The Missouri case is directly with the cities' contention that the franchise and occupation taxes may not be passed on. The Washington case is directly with the city as to franchise fees, but as to occupation taxes the Washington court allows the same to be passed on to the users in the area concerned. The Illinois case holds that the local levies there involved should be passed on to users in the area imposing the same.

The city does not agree with the Washington court's reasoning as to occupation taxes for the reasons set forth in other parts of the brief.

But conceding for the purpose of argument that occupation taxes and related local impositions can be lawfully passed on directly to users in the area, as to franchise fees or charges the Washington court, on page 535 et seq. in Volume 142 Pac. 2nd under subdivisions 43 to 46, inclusive, clearly holds that franchise charges are different from occupation or business taxes and franchise charges cannot be passed on to users in the area taxed but must be considered general operating expense of the company.

Counsel for the company, on page 12 of the Company's brief before the Commission, cites the Washington case, *supra*, and a subsequent case,

State ex rel Seattle vs. Department of Public Utilities 207 Pac. 2d 712 (Wash., 1949).

He then declares that in these "cases" the Washington Court sustained an order authorizing the Company to add "use of street" and other city taxes to its charges for municipal service. Counsel then baldly declares that "to all intents and purposes there can be no distinction between a franchise which grants the use of streets and imposes a tax based upon the Company's gross revenue for such use of streets and a tax imposed for the use of streets determined in the same manner."

It is true that in the latter case the Washington Court sustained an order which authorized the passing on of use of street taxes imposed by the cities. How-

ever, it is obvious from a reading of the case that the ground for this decision is that the order of the department was entered under the direction of a judgment entered by the Superior Court upon remittitur in the first case, from which Superior Court judgment no appeal had been taken. The court holds that under these circumstances the judgment of the court below became the law of the case and could not be disturbed, even if erroneous, in the appeal taken some six years later in a proceeding to review the order of the department entered pursuant to the first judgment of the Superior Court. The Washington Court refers to two earlier Washington cases:

Tucker vs. Brown
92 Pac. 2nd 221

and

Tucker vs. Brown
150 Pac. 2nd 604, 622,

and quotes with approval from the latter case as follows:

“If appellant was not satisfied with the judgment entered by the trial court upon the remittitur, it could have petitioned this court to correct that judgment. Having failed to take appropriate action, appellant is foreclosed from in any way objecting to the judgment.”

The Washington court, in the Seattle rate case, then says (Page 716):

“The situation presented in the two cases just mentioned, and that obtaining in this and the first rate case, are entirely alike. The Brown interests in the second case cited, were held to be

bound by the judgment of the Superior Court entered after the remittitur went down."

Although the cities had petitioned for a recall of the remittitur in the earlier rate case when the Superior Court entered its mistaken judgment on remittitur, the petition to recall the remittitur was denied. The court does not say why it was denied, but it would appear that probably the cities had mistaken their remedy and should have made a second appeal from the judgment entered on the remittitur. Perhaps they did not act in time. However that may be, this case is certainly not any clear authority for the points on which it is cited. Moreover, in the first Washington rate case,

State vs. Department of Public Service
142 Pac. 2nd 498, 533,

the Washington Court very clearly and carefully distinguished between payments due under franchise *contracts* for the use of streets and all other special municipal *taxes* and held that the former could not be passed on, and there is nothing said by the court in the later case which in any way weakens its ruling on that distinction. Counsel's assertion with respect to franchise *contracts* and use of street *taxes* is contrary to the authority on which he relies.

The agreement between Ogden City and the Company here is clearly a franchise contract, and the first Washington case is clear authority, not weakened by the second case, for the city's position that the charges there agreed to be made cannot be legally passed on, but as a matter of law must be paid by the Company as a general operating expense out of its general income.

The third case, Elmhurst vs. Western United Gas Company is referred to in the first Washington case and its reasoning rejected as to franchise payments but approved as to occupation taxes. As the Washington court observes, the Elmhurst case is distinguishable from the Washington case (and from the case at Bar) because, "It would seem that the case presented to the Illinois court did not involve a utility engaged in state-wide operations. Just how much territory the utility which was a party to that proceeding served cannot be determined from the opinion. The situation was not entirely comparable to that presented in the case at Bar." pp. 537 of 142 Pac. 2nd.

CONCLUSION

It is respectfully submitted that the Commission acted illegally, arbitrarily and capriciously, and in excess of its jurisdiction in entering the Order complained of, and that the Order should be vacated.

Respectfully submitted,

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