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

Utah Supreme Court

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In the
Supreme Court of the State of Utah

OGDEN CITY, a municipal corporation,
Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF
UTAH, a body politic, and MOUN-
TAIN STATES TELEPHONE AND
TELEGRAPH COMPANY, a corpo-
ration,

Defendants.

Case No.
7884

FILED

OCT 24 1952

Clerk, Supreme Court, Utah

**BRIEF OF DEFENDANT MOUNTAIN
STATES TELEPHONE AND
TELEGRAPH COMPANY**

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BRIEF OF DEFENDANT MOUNTAIN
STATES TELEPHONE AND
TELEGRAPH COMPANY

STATEMENT OF FACTS

The parties herein may be designated as follows: de-
fendant Public Service Commission of Utah as “the Com-
mission”, the Mountain States Telephone and Telegraph
Company as “the Company”, and Ogden City as “the City.”
Emphasis has been supplied.

There is no substantial question of fact in this case. We believe that the issues of law may be determined by the consideration of certain simple basic propositions. An understanding of such issues requires that attention be fixed upon the relevant facts and that other matters be set to one side. Because we believe that the statement of the City does not focus attention upon the essential facts, the Company presents the following statement:

The operations of the Company necessarily involve revenue and expense. We have here under consideration a particular class of company expense, namely expenditures which it makes and must make to cities and towns in this State in the discharge of franchise, excise and occupational taxes and similar impositions and the so-called free service which the Company has agreed to render to certain municipalities (R. 109). These impositions and so-called free service will be referred to collectively in this brief as "municipal levies".

Included within and typical of such municipal levies is the money which the Company must pay to the City and the free service which it has agreed to render to the City under a franchise and agreement of 1941. The franchise (R. 21) provides in part that

"Section 4. In lieu of all license, franchise, occupation and other similar taxes, the Company shall pay to the City of Ogden upon passage, approval and acceptance of this ordinance, an amount equal to one per cent (1%) of the total exchange revenue derived from telephones located within the Ogden city limits."

The agreement (R. 22) provides in part that

“Mountain States Telephone & Telegraph Company will provide your city (Ogden City) with the following:

“1. Twenty-four individual Line Flat Rate Business telephones, or the equivalent, until the population reaches 50,000, and one individual Line Flat Rate Business telephone, or the equivalent, for each additional 5,000 population over 50,000 up to a maximum of 100,000 population.

“2. We will also furnish the city police department with toll service not to exceed \$600.00 per year.”

The annual value of said free service for the year 1952 is estimated by the Company to be equal to .44 per cent of the Company's gross local exchange revenue in Ogden for that year, making the annual franchise tax and the value of free service equal to 1.44 per cent of the Company's 1952 estimated gross exchange revenues received from the Ogden City customers of the Company (R. 18-125).

The relationship arising in connection with the imposition of municipal levies and the payment of the same is a relationship, however, entirely between the Company on the one hand and the cities and towns throughout the State, including Ogden City, on the other hand. The telephone customers are not a party to the imposition of these municipal levies, and the duty of the payment of the same rests entirely upon the Company (R. 161-62, 181).

While this case relates to the matter of this particular kind of company expense, neither the proposed tariff of the Company nor the order of the Commission here under review disturbs or impairs the relationship between the Company and Ogden City or any other city or town imposing upon the Company the obligation to discharge municipal levies (R. 161-64). This case is not concerned with the imposition of municipal levies nor with the obligation or duty of the Company to discharge such levies. This case is, however, directly and necessarily concerned with the matter of the source of certain company revenue; and the proposed company tariff and the order of the Commission here under review undertake to provide and prescribe the sources of company revenue to pay these levies. Thus the relationship to which this case applies is the relationship between the Company on the one hand and its customers on the other hand (R. 161-64). In the apparent failure of the City to perceive these facts lies its fundamental misconception of the nature of the proposal of the Company and the order of the Commission.

The only source of revenue which the Company has is from its customers (R. 128). The money which the Company receives from its customers for intrastate telephone service is derived from rates which the Company publishes and files with the Commission (R. 161-64). The determination of these rates and charges is one of the important functions and duties of the Commission and is a subject of its jurisdiction (R. 33).

In the past the Company has obtained the money with which to pay its expenses, including municipal levies, from

its customers on a state-wide basis (R. 110). The mechanics of fixing exchange rates has been to divide the telephone exchanges of the State into groupings based upon the number of customers within an exchange and to fix rates uniform within each group of exchanges throughout the State (R. 129). In making such rates the Commission has fixed the same at levels sufficient to provide overall revenue to the Company high enough to pay all of the Company's expense and in addition thereto to provide a return on the Company's properties at the percentage fixed by the Commission (R. 119). Thus these state-wide rates provided moneys with which to pay all of the expenses of the Company, including the municipal levies here involved. The effect of these rates was therefore such that the telephone bill of a customer living within a city or town which imposed no municipal levy included a portion of the amount required by the Company to be paid to other cities and towns levying such impositions (R. 110).

Under the tariff involved in this case, the Company proposes that it will no longer obtain the money with which to pay municipal levies from all of its customers, but rather that it will, so far as practicable, derive money for such purpose from its customers on a prorata basis within the respective communities where the municipal levies are imposed (R. 110).

When these municipal levies were first imposed upon the Company they were so nominal that the amounts involved would have had no appreciable effect upon the rates paid by the users of telephone service throughout the State.

No substantial change occurred in the extent of these taxes for many years. The Company now finds that these levies are rising sharply and today present a serious tax problem (R. 117).

At the time of hearing before the Commission, in forty-six cities and towns within the State municipal levies were imposed on the Company, estimated by it for the year 1952 to be equal to percentages of its gross exchange revenue within such municipalities ranging from .39 per cent in Midvale to 7.28 per cent in Scofield (R. 18—Exhibit 2). In thirty other cities and towns the amount of municipal levies in the same period was so small that when related to the lowest priced service within the exchange would not produce a charge of one cent per month (R. 19—Exhibit 2). In ninety-four cities, towns and communities no municipal levies were then imposed (R. 20—Exhibit 2). So-called free service is rendered by the Company to each county in the State where it has exchanges except Washington. This county free service is, however, spread quite uniformly throughout the State; it represents a small item of overall expense, and the Company does not regard the practice of including this expense in its state-wide rates as being discriminatory. The Company does not propose that the tariff here involved shall have any effect upon the so-called free service currently being rendered to counties (R. 121).

With respect to municipal levies, however, the Company has reason to believe that the present disparity in the rate of imposition in the respective cities will continue and may become greater as time goes on (R. 117). The Com-

pany has no means of anticipating what city may next call upon it for the payment of such levy or what the rate may be (R. 116).

The Company therefore reached the decision that its practice of including municipal levies in its state-wide rates was unjust and discriminatory and that the removal of such discriminatory practice required the adoption of its proposed tariff, whereby money for the payment of such levies would be collected, so far as practicable, where imposed (R. 116-117). The Commission found that the practice of including the expenses of municipal levies in state-wide rates was unjust and discriminatory (R. 28-29) and ordered the Company to file a tariff for the recovery pro-rata of municipal levies within the cities and towns where imposed (R. 35).

There is no doubt or uncertainty as to the nature of the tariff which the Commission's order authorized the Company to file. It is a tariff dealing simply and exclusively with revenue. This is clear from the testimony of Mr. Sawyer in answer to questions from Mr. Thain of the Commission's staff (R. 161) as follows:

"Q. Now, what do you propose to do with your municipal taxes if the proposal you now make is approved by the Commission?

"A. Well, this particular tax, as I mentioned, is imposed upon the Telephone Company, and as such is an expense against our operations the same as other general operating expenses. So, we propose to add this additional expense to our regular tariff rates in those towns where this particular expense is

imposed. In other words, it amounts to varying our schedules to the extent of this expense in these towns.

"Q. In other words, all of the tax which you will bill will in effect become a revenue? That is, it will be credited to the revenue account of the company?

"A. Yes.

"Q. And the tax payments will show up as a tax expense in the tax accounts of the company?

"A. Yes; that is the way it is accounted for now. In picking up the revenue for this expense in connection with our present state-wide schedules it is a revenue, and there will be no change in the accounting for that particular revenue over the way we do it now."

And again at R. 162 as follows:

"Q. What you mean to say is that in the past any municipal taxes have been included as part of your overall expenses in determining the setting of rates?

"A. That's right.

"Q. Which this Commission has authorized you to charge?

"A. That's right.

"Q. And accordingly, anything that was in there then, theoretically at least, is in your revenue now?

"A. That's right.

“Q. But insofar as practical in the future you are going to kind of isolate it and add it on to your bill here?

“A. Yes; we will determine what that expense is in each town and adjust the rates in that particular town to take care of that expense. That takes it out of your state-wide rate schedules then.”

The Company did not, however, propose at this time to disturb its state-wide rate schedules previously authorized (R. 118-119). The operation of the tariff in question in connection with existing state-wide rate schedules would therefore improve slightly (about .21 per cent) the earnings of the Company. This improvement would raise the Company's earnings on the rate base heretofore allowed by the Commission from approximately 5.26 per cent to 5.47 per cent, which is below the level heretofore found by the Commission to be reasonable (R. 118-119, 30). And once the change proposed by the tariff were made, the Company thereafter would not have any improvement in or lessening of its earnings by reason of the recovery locally of moneys with which to pay municipal levies because subsequent billing would be automatically adjusted to provide for any increase or reduction in these municipal levies (R. 30).

STATEMENT OF POINTS RELIED ON

I.

THE EVIDENCE SUPPORTS THE COMMISSION'S FINDINGS THAT THE INCLUSION OF MUNICIPAL LEVIES IN THE COMPANY'S STATE-WIDE RATES IS AN UNJUST AND

DISCRIMINATORY PRACTICE AND THAT SUCH PRACTICE SHOULD BE ABOLISHED BY THE COMPANY'S COLLECTING, SO FAR AS PRACTICABLE, MONEYS TO PAY SUCH LEVIES FROM ITS CUSTOMERS IN THE MUNICIPALITIES WHERE SUCH LEVIES ARE IMPOSED.

II.

THERE IS NO EVIDENCE TO SUPPORT THE CITY'S CONTENTION THAT MONEYS TO DISCHARGE ITS MUNICIPAL LEVY SHOULD BE PAID BY THE STATE-WIDE CUSTOMERS OF THE COMPANY.

III.

THE ORDER OF THE COMMISSION IS WITHIN ITS JURISDICTION AND VALID. IT NEITHER IMPAIRS ANY FRANCHISE OBLIGATION OF THE COMPANY TO THE CITY NOR IN ANY MANNER RELEASES OR EXTINGUISHES ANY INDEBTEDNESS, LIABILITY OR OBLIGATION OF THE COMPANY TO THE CITY.

IV.

THE ORDER OF THE COMMISSION FIXES RATES; IT IMPOSES NO TAX OF ANY KIND ON THE TELEPHONE CUSTOMER.

ARGUMENT

We perceive but one issue in this case, namely whether just and nondiscriminatory practices require that the Company construct its rates so that, so far as practicable, money to discharge municipal levies shall be collected from its customers within the municipalities where such levies are imposed rather than from its customers on a state-wide basis. The Company will, however, undertake to deal with each of the Points relied upon by the plaintiff in its brief and will do so in the following argument under defendant's Points herein designated.

I.

THE EVIDENCE SUPPORTS THE COMMISSION'S FINDINGS THAT THE INCLUSION OF MUNICIPAL LEVIES IN THE COMPANY'S STATE-WIDE RATES IS AN UNJUST AND DISCRIMINATORY PRACTICE AND THAT SUCH PRACTICE SHOULD BE ABOLISHED BY THE COMPANY'S COLLECTING, SO FAR AS PRACTICABLE, MONEYS TO PAY SUCH LEVIES FROM ITS CUSTOMERS IN THE MUNICIPALITIES WHERE SUCH LEVIES ARE IMPOSED.

Under this point the Company will deal with the arguments advanced by plaintiff under its Points numbered 1, 2 and 3.

At the outset of its argument, the City, under its Point 1, appears to urge that the order of the Commission here under review is unlawful in that the Commission, by some step taken in the hearing before it, unlawfully cast the burden of proof on the City. *Mountain States Telephone and Telegraph Company v. Public Service Commission of Utah*, 105 Utah 230, 142 P. 2d 873, Rehearing denied 105 Utah 266, 145 P. 2d 790, is cited as an authority in point. That was a discrimination case initiated by the Commission, involving two rate schedules, namely, the intrastate toll rates of the Mountain States Company and the interstate joint toll rates of the Mountain States Company and the American Company and other associated Bell companies. At the hearing the Commission showed the differential in charges prevailing for like mileage under the two rates. The court held that such showing made out a prima facie case of discrimination and that the burden was then on the Mountain States Company to justify the differentials. We are unable to perceive how that decision bears upon the problem here under consideration. In the case at bar the Company must produce evidence upon which the Commission may find that the practice of recovery from its customers through state-wide rates of money with which to pay municipal levies is unjust and discriminatory. Actually, as the record will show, the Company assumed the burden and proved its case. If the City intends to complain of some informality in the procedure of the Commission, the answer to any such contention is found in Section 76-6-1, Utah Code Annotated 1943, which provides that

“All hearings, investigations and proceedings shall be governed by this chapter and by rules of

practice and procedure to be adopted by the public utilities commission; in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation or proceedings, or in the manner of taking testimony, shall invalidate any order, decision rule or regulation made, approved or confirmed by the commission."

and in *Gilmer v. Public Utilities Commission of Utah et al.*, 67 Utah 222, 247 Pac. 284, where, at page 238 of the Utah Report, the Court said:

"There is also some complaint that the order of the commission was irregular. If that were so, however, in view of the statute (section 4820, *supra*) it would not invalidate the order of the commission that is complained of here."

The City next contends that there is no evidence to support the findings of the Commission that unjust discrimination exists in the practice of the Company of collecting money with which to pay municipal levies from its customers on a state-wide basis. Defendants in nowise concede this contention of the City for there is, we believe, in Exhibit 2 and in the testimony of the witness Sawyer ample evidence to support the Commission's findings.

A determination of the question of the sufficiency of the evidence to support the Commission's findings requires at the outset a brief consideration of the controlling statutes and decisions of this Court. The controlling statute is, we believe, Section 76-6-16, Utah Code Annotated 1943, which provides in part that

"* * * No new or additional evidence may be introduced in the supreme court, but the

cause shall be heard on the record of the commission as certified by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the state of Utah. *The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.* * * *

No good purpose could be served by citing the many cases which have construed this statute, for, as observed by this court in *Union Pacific R. Co. et al. v. Public Service Commission et al.*, 103 Utah 459, 135 P. 2d 915, at page 462 of the Utah Report,

“The rule is so well established as to require no citation of authority that the reviewing power of the court is confined to the questions as to whether the commission regularly pursued its authority, whether its findings are justified by the evidence, and whether its orders contravene any right under the Constitution of the United States or the Constitution of the State of Utah.”

There are, however, two cases from this Court dealing with the scope of review, which we believe are particularly helpful. These are the *St. John Station Case, Los Angeles & Salt Lake R. Co. v. Public Utilities Commission of Utah*, 80 Utah 455, 15 P. 2d 358, and the later case of *Los Angeles & Salt Lake R. Co. v. Public Utilities Commission et al.*, 81 Utah 286, 17 P. 2d 287.

In the *St. John Case* the court, at page 472 of the Utah Report said :

“* * * What we are really asked to review, therefore, is the question of the judgment of the commission as applied to the evidence. But we cannot like can the Supreme Court of New Mexico, substitute our judgment for the judgment of the commission. We must determine whether any reasonable mind could have come to the same judgment as the commission on the evidence controlled by the principles of law heretofore discussed. If there is any evidence upon which any reasonably judging mind could come to the same conclusion that the commission came to, then we must affirm the decision. * * *”

In the later case, at page 291 of the Utah Report, the court said :

“In the *St. John Station Case* we considered at length the scope of the inquiry which this court could entertain in a case of certiorari from the commission under section 4834 (now Sec. 76-6-16, *supra*). We held that we had no authority to determine from our own judgment whether, under the evidence, the agency should be discontinued, and thus put ourselves in the place of the commission, but we must determine whether any reasonable mind could come to the same judgment as the commission came to on the evidence controlled by the principles of law discussed in that opinion. If there is any evidence upon which any reasonable judging mind could come to the same conclusion that the commission came to, it would be our duty to affirm the decision of the commission.
* * *

So in the case at bar, the review extends to a consideration of the judgment of the commission as applied to the

evidence and the inquiry will be whether there is any evidence upon which any reasonably judging mind could come to the same conclusion that the commission came to. What then, is the record before us?

There is no essential dispute of facts. The facts were presented by the oral and documentary evidence of the witness Sawyer. Neither the City nor any party appearing in opposition introduced any evidence.

The Company, in meeting the problem presented by these municipal levies, might have (a) done nothing, (b) collected locally from its customers only amounts necessary to pay those levies imposed since its last general rate case, or (c) collected locally from its customers, so far as practicable, all moneys necessary to pay municipal levies. It discarded (a) because it believed that the time had come when circumstances necessitated a change in the practices previously employed. It discarded (b) because it considered that if it were correct in its basic premise of the discrimination in its present practice, simple justice required that the practice be completely removed and not removed only as to some customers and retained as to others (R. 176-77). The Company therefore determined to pursue course (c).

The facts are that for many years municipal levies were so nominal that they could have made no appreciable difference in rate schedules one way or another. In recent years they have been rising sharply in certain cities and towns. They now constitute a substantial item of company expense. They are fixed by a percentage levy of the gross receipts of the exchange revenue of the Company in the

particular city or town. The Company has no real control over the rate of levy or where these levies may next be imposed. At the time of hearing before the Commission, forty-six cities and towns imposed these levies, which, when related to local exchange revenue, ranged from .39 per cent to 7.28 per cent. Thirty other cities, towns and villages imposed municipal levies, but these were so low that when related to the lowest priced telephone service within the exchange would not produce a charge of one cent per month; and in ninety-four cities, towns and communities, no municipal levies were imposed.

In the past these municipal levies were reflected in the bills of every exchange customer in the State entirely without regard to whether or not the city or town in which that customer resided imposed any municipal levy. Thus the customer in City A, which imposed no municipal levy, paid the Company money to discharge in part the municipal levy of City B.

On this evidence the Commission reached the conclusion that the practice of the Company of collecting from all its exchange customers in this State money with which to pay these municipal levies imposed by only certain cities and towns, and with wide disparity of rate as between certain cities and towns, was an unjust and discriminatory practice.

Would a reasonably judging mind have necessarily reached a contrary decision? We think not.

Testing the matter by another approach, suppose but one city in the State imposed a municipal levy and that this

levy was five per cent of the Company's gross exchange revenue within the city and no other city or town in the State imposed any municipal levy and that the rates of the Company were such that every exchange customer in the State contributed money for the payment of this levy and the Commission found that this practice was unjust and discriminatory, could any reasonably judging mind say that the Commission must have reached a contrary conclusion?

As we perceive the argument of the City in relation to this question, it tacitly admits that there is at least *prima facie* discrimination in the practice of the Company in recovering from its customers on a state-wide basis money with which to pay municipal levies. But the City in effect asserts that the discrimination cannot be abolished for the reasons which it assigns.

It is first suggested that the Commission having previously approved state-wide rate schedules which included money for the payment of municipal levies, the approval is *res judicata* and cannot in this proceeding be disturbed. It would seem manifest to us that if the Commission now finds that a practice previously allowed is demonstrated to be unjust and discriminatory, it is not only the power but the duty of the Commission to correct the abuse as quickly as possible.

See:

Skinner & Eddy Corporation v. United States et al., 249 U. S. 557.

Then the City in effect seeks to avoid the discrimination under consideration by developing the proposition that

there are elements of discrimination in the state-wide rate schedules. The Company makes no contention that its basic rate schedules are free from all discrimination. Basic telephone rates are now and for many years in the past have been arranged on what is known as the state-wide theory of rate making. This system has been adopted by the regulatory commissions in almost all States for promulgating rates for telephone service. It has two basic concepts: First, that the rate for service shall be graduated according to the value of the service to the user; and, second, that the rates for telephone exchange service shall be graduated according to the number of telephones in use in each exchange, with the same rates applying in every exchange of approximately the same size. For example, all exchanges having four hundred to eight hundred telephones would have the same rates for the different classes of service. To the extent that one exchange in this classification might have just over four hundred telephones and another might have just under eight hundred telephones, it is, of course, obvious that there is some reasonable discrimination under this theory of rate making. Likewise it is reasonable to expect that although the rate for telephone service is not primarily based on the cost of service, nevertheless it may very well cost the Telephone Company more to furnish service to a user living five miles from the central office than it would to one living five blocks from such office inasmuch as a pair of wires is necessary to serve each single line and must run the entire distance from the central office to the user's premises.

The state-wide method of making telephone rates and occasionally rates of other utilities has been approved by all of the courts of last resort reviewing the question. Typical of these decisions are:

City of New York v. Feinberg et al., 109 N. Y. S. 2d 131, decided January 9, 1952;

People ex rel. P. U. C. v. Mountain States Tel. & Tel. Co., et al., 243 P. 2d 397, decided February 6, 1952;

Cumberland Tel. & Tel. Co. v. City of Memphis et al., 200 Fed. 657, at 660;

P. S. Gas Co. v. Board of PUC, 87 A. 651, at 654;

St. Louis and S. F. Ry. Co. v. Gill, 156 U. S. 649, at 665;

Michigan Bell Tel. Co. v. Odell, 45 Fed. 2d 180 at 181, and cases cited therein;

Board of Supervisors of Arlington County v. Commonwealth of Va. ex rel. C. & P. Co. of Va., 45 S. E. 2d 145.

However, the City does not attack the state-wide theory of rate making but contends that it objects to 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.

The position of the Company in answer to the contentions of the City is this: There are concededly elements of reasonable discrimination in state-wide rate making. It is neither possible nor practical to remove all of these elements of discrimination. We have here under consideration

a particular item of Company expense, namely, municipal levies. The inclusion of money to pay these municipal levies in state-wide rates is an unjust and discriminatory practice. This is one practice which can be isolated, effectively dealt with, and abolished by the proposal under consideration. Manifestly, then, the injustice and discrimination which can readily be reached should be removed at once and to that extent the state-wide rate making practice bettered and improved.

In its Point numbered 3 the City contends in effect that the benefits of its franchise with the Company flow out to the users of telephone service throughout the State and that accordingly the Telephone customers state-wide should provide the money with which to pay the municipal levy of the City.

Consideration of this argument requires further examination of the taxing provisions of Ogden's franchise. The measure was patently a revenue raising imposition. It was expressly levied in lieu of all license, franchise, occupation and other similar taxes.

It was not pretended to be commensurate with any benefit or protection which the Company might receive because it provided that

"The Company shall pay to the City of Ogden upon the passage, approval and acceptance of this ordinance, an amount equal to one per cent (1%) of the local exchange revenues derived from telephones located within Ogden City limits."

The amount of free service which the Company was required to render was also graduated according to the population of the City.

The money which is derived from this revenue raising measure goes into the general funds of the City and is expended by the City for such municipal purposes as it sees fit.

The franchise features of these impositions are actually incidental and insignificant. This is illustrated by the fact that for some twenty-two years the Company had no franchise whatever in Salt Lake City but was taxed and continued to pay Salt Lake City an imposition measured by a percentage of its gross exchange revenue within the City (R. 181).

Apart from the nature of the imposition involved is the contention of the City sound on principal? We think not. To illustrate, a telephone customer in Ogden calls Tooele. The facilities of the Company in Tooele are as valuable to the Ogden customer as those in Ogden are to the Tooele customer, yet Tooele imposes only a nominal tax upon the Company, while the municipal levy of Ogden is 1.44 per cent. Thus while the benefits from the existence of the Company's plant in Ogden flow out to other cities, so also do the benefits from plants in other cities flow into Ogden. One benefit serves to offset the other.

Viewing the foregoing aspects of the practice here under consideration and turning back again to the test which must guide us in this case, could any reasonable mind come to the same judgment that the Commission came to in this

case? We believe that the conclusion of the Commission is not only that of a reasonably judging mind but the only conclusion which could properly be reached on the record presented.

For the reason that every case of this kind must be determined from an examination of the record presented, decisions from other jurisdictions may be of little assistance, and the foregoing discussion should conclude the argument under defendant's Point I. We shall, however, consider certain decisions from other jurisdictions.

City of Elmhurst v. Western United Gas & Electric Co. et al., 1 N. E. 2d 489 (Ill. 1936).

The gas company here served an area called its northern territory. The Illinois Commerce Commission made an order approving a rate schedule in this northern territory of the company and, as a part thereof, authorized the company to add to its uniform charges for gas service a percentage differential sufficient to meet the annual payments collected by five cities, including Elmhurst, by virtue of respective franchise ordinances. Similar taxes were not exacted in other cities in the northern territory except the five cities in question. The Elmhurst franchise ordinance required a three per cent levy on gross receipts on business done within its boundaries. Elmhurst complained to the Commission about the three per cent additional allowance on the rates. The Commission dismissed this complaint, and the lower court sustained.

The opinion reviews several Illinois statutes, most of which are generally the same as those of Utah, concerning

unreasonable rates and prohibiting discrimination. One section prohibited utilities from establishing rate differentials as between localities and between classes of service and customers. Whether precisely covered by similar Utah statutes or not, the Commission has always considered telephone rates on the same basis as required in Illinois. No question was raised as to the basic rates, so the controversy settled around the three per cent addition to cover the cost of the franchise payment based on gross receipts. The court at page 491 of the Northeastern Report says:

"It is argued that annual franchise payments should not be charged against the patrons of the appellant, and that the practical effect is to give those who are nonusers of gas the benefit of the franchise rate paid by gas users. Such is the effect. It is seldom that the imposition of a tax or franchise charge does not work a hardship on some individuals. The human race has not yet reached that degree of perfection whereby taxing systems have been evolved which in their practical operation do not, on occasion, work some degree of injustice to some individuals."

Elmhurst contended that the franchise payment was a capital charge. The court dismissed this contention at page 491 of the Northeastern Report, saying:

"Franchise payments are properly chargeable as an element of the cost of operation which should be borne by the consumers of the utility's product or service (*Consolidated Gas Co. v. Newton* (D. C.) 267 F. 231; *Chicago Railways Co. v. Illinois Commerce Comm.* (D. C.) 277 F. 970; and the amortization of the franchise expenses should be charged as an operating expense. (*Streator Aqueduct Co. v. Smith* (D. C. 295 F. 385, 391)). It would be unjust to spread

the burden of this annual franchise payment over the whole northern division. It should be borne by the company's consumers residing within the city as that city alone receives the advantage of such annual payment. So, also, it is immaterial in what form the pro rata share of the consumers' payment of the annual payment be made to the city. There is no statute in this state prescribing the method of allocating such item and it may properly be written on the consumer's statement as three per cent."

In conclusion, at page 492 of the Northeastern Report, the court said:

"The order of the Commerce Commission does not, as applied to the customers of the public utility within the appellant city, create an unreasonable difference between localities and classes of service."

It will be readily apparent that the facts in the *Elmhurst* case are closely identical to those in the case at bar, the only difference being a gas service rather than a telephone service was involved. It is apparent the gas company rates were arranged on somewhat the same basis as the telephone rates in Utah, and certainly the direct question of discrimination in favor of the users within the city limits of the city exacting a franchise, as compared to the users elsewhere in the state, was directly raised. The decision appears to be so closely in point as to be sound authority for the Court to consider in disposing of the issues in the instant matter.

State v. Department of Public Service, 142 P.
2d 498 (Wash. 1943).

This case came to the Washington Supreme Court on an appeal of numerous issues involved in a general rate case. The Washington Commission (designated as "the Department" in the opinion) entered an order that all occupational and franchise and similar municipal charges might be passed on to the rate payer. Upon the record, commencing at page 532 of the Pacific Report, the court undertook to determine whether or not the Washington Commission, under the law of that State, had authority to issue this order. The municipal exactions in question consisted of occupation taxes and franchise taxes. The court considered these taxes separately.

The occupation tax levies ranged from four per cent in Seattle to one per cent in Olympia, Shelton and Dayton. The cities contended that any discrimination against persons living outside the cities in question was so slight as to be negligible. The court in answering this contention at page 535 of the Pacific Report said:

"As above stated, the bases upon which excise taxes have been levied by the cities vary greatly, ranging from four per cent of the gross income to one per cent. No one can say how far this variation might be extended. It suggests large possibilities of municipal action. Manifestly there is an element of unjust discrimination in allowing one community to levy and collect from respondent or any public utility engaged in business throughout the state an occupation tax which in turn the utility would collect by a state-wide increase in rates. If such taxes were generally levied and varied little in the percentage of gross revenue by which the tax is computed, the matter might well be unimportant; but the contrary is the fact."

The cities further contended that the order in question was in violation of constitutional and statutory powers enjoyed by the cities. In answer to this contention, the court, at the same page, said:

"By Rem. Rev. Stat. Sec. 10391, the department is vested with authority over rates to be charged by public utilities. In the case of *State ex rel. City of Seattle v. Public Service' Commission*, 103 Wash. 72, 173 P. 737, 739, this court held that the department (then the commission) had the power 'to fix reasonable or sufficient rates at the request of the carrier notwithstanding the franchise contract.' An order of the commission approving a tariff filed by the utility in disregard of a franchise provision providing for commutation tickets was upheld. It would seem that the case cited is in some conflict with at least one decision of this court, but it is not necessary to consider that matter here. In any event, the department enjoys wide powers in exercising its authority to fix rates."

The Washington court then undertakes to deal with the matter of franchise taxes and reaches the conclusion that the Department had no power to pass these impositions along to local rate payers unless the Department found that such taxes were excessive or out of proportion to the privilege accorded to the utility. If the Department so found then it would have the power to fix the proper proportion between general operating expense and the local rate payers. We do not intend in the least to disparage the Supreme Court of Washington, but we are unable to follow the logic of this proposition. Either the Department did or did not have jurisdiction to deal with the problem. If it did not

have jurisdiction, then we would think it clear that it could not break down a franchise tax payment and undertake to determine how much of the same represented compensation for a privilege accorded to a utility by the municipality and how much was in excess of such compensation. If, however, the department did have jurisdiction, we would think it clearly had power to deal with the entire problem. We believe that the Washington court loses sight of the fundamental fact that the Department was not dealing with the relationship between the company on the one hand and the cities on the other, but rather with the relationship of the company to its rate payers, which relationship involved only the matter of rates, a subject entirely and peculiarly within the jurisdiction of the Department. This fundamental fact was clearly recognized by the Illinois court in its decision in the *Elmhurst* case, *supra* and has been recognized by the Courts of this State as will be demonstrated in the consideration of defendant's Point III.

In *State v. Department of Public Utilities*, 207 P. 2d 712 (Wash. 1949) the Supreme Court of that State again deals with the subject of the treatment of these municipal levies and appears to hold that the Washington Commission had the power to pass on to rate payers a tax for the privilege of using the streets. The decision does not disclose what difference there may be between a tax imposed for the use of streets and a franchise imposition exacted for the same purpose. On principle we can perceive no difference.

Even if the Washington cases, attempting as they do to draw a fine line of distinction between franchise taxes

and other municipal levies, are correct on principle, we believe that they are of no controlling importance here because the imposition of City by its express terms is

“in lieu of all license, franchise, occupation and other similar taxes.”

Here is an unequivocal expression that the tax in question was intended to embrace all the other specified impositions.

In the following decisions by state public utilities commissions, the same general question as presented in the case at bar was considered, namely, whether the recovery of municipal levies of all forms considered here, including franchise payments, represents a discrimination in the utility's rate structure. In other words, the commissions were concerned with whether an unjust and discriminatory practice resulted from the collection from rate payers in the entire territory served of money necessary to discharge these municipal levies. The decisions all indicate, after finding such a method of recovery would be discriminatory, that the discriminatory practice could be cured if municipal levies were recovered within the boundaries of the cities enacting the various forms of municipal levies.

See:

Detroit Edison Company, 16 PUR NS 9, at 24
(Mich. 1936) ;

Re Consumers Power Co., 14 PUR NS 36, at 41
(Mich. 1936) ;

Re Southern Bell T. & T. Co., 7 PUR NS 21, at
33 (N. C. 1934) ;

Re Idaho Power Company, PUR 1921C 238, at 242;

Swarthmore v. Philadelphia M. & S. S. R. Co., PUR 1921E 252, at 261 (Penn.);

Re Southern California Gas Co., PUR 1922A 277.

There is every reason to classify the franchise tax payment in the same category as other municipal license and occupation taxes of any nature whatsoever, at least to the extent that the cost of the franchise payment from the Company to the City is based upon the gross receipts received from exchange service within the city limits. The other forms of municipal levy are likewise based upon the same measure of tax. Conceivably, there might be some ground for drawing a distinction if a company contracted with a city for a franchise covering a period of years and made one single payment at the time of entering into the franchise to cover the entire franchise period. Under such circumstances the company on the one hand would be making one single payment, the amount of which would be subject to negotiation between the parties and would be payable at the time the contract was entered into. Variations in the gross receipts of the company from the customers residing within the city limits of the municipality would make no difference as to the entire cost over the life of the contract. There might be and probably would be justification for capitalizing the single payment as a capital charge rather than an operating expense. On the other hand, all these courts agree that the cost of these municipal

levies when based on gross receipts, whether for a franchise payment or any other form of tax, is an operating expense.

If a differentiation is to be made between franchise taxes and other forms of municipal exaction, so that money to discharge franchise tax payments are collected from the general rate payers over the State and the money with which to pay other forms of levy from the customers residing within the city limits of municipalities adopting other forms of tax, then obviously it would be to the advantage of a city considering such a tax to put it in the form of a franchise payment, thereby requiring the general body of customers over the State to share in the cost of the tax.

If this Court is disposed to follow the Washington decisions exclusively and rule that the Commission is authorized to approve a tariff permitting the municipal exactions to be included in the rates of the customers within the city limits of those cities enacting such levies *only if they are not franchise taxes*, then, in the opinion of the defendant Company, the Court, as a matter of law, or the Commission as a matter of administrative regulation may as well disapprove the tariff in its entirety. The very object of the tariff is to avoid what the Company considers and the Commission found to be an unjust and discriminatory practice. To draw a fine distinction between franchise payments and other forms of municipal levies, all of which are based on gross receipts, would leave just as serious a situation with respect to discriminatory practice as now exists.

State ex rel. City of St. Louis v. Public Service Commission, 245 S. W. 2d 851 (Mo. 1952), is a case involving

a private water company serving sixty-six incorporated and numerous unincorporated areas in St. Louis County. Five separate rates were provided for different classes of customers, *but the same rate for each class applied in the entire territory, regardless of the size of the city or other considerations.* Previously the company's property had been valued and its rates fixed on a system-wide basis. Sixteen of the sixty-six incorporated areas levied special taxes on the gross receipts of the company within the area of the separate municipalities. Levies ranged from two to five per cent of the gross receipts. There, as in the case at bar, the company contended that the practice of recovering money with which to pay these levies from its customers on a system-wide basis was discriminatory, and the company proposed to the commission to correct these inequities between the customers. Tariffs were filed by the company to cover the change in rates in order to take care of these municipal levies, but otherwise to make no change in the basic rate schedule.

One basic difference in the facts, however, develops from the disclosure that the water company proposed to pass on franchise taxes only where they exceeded two per cent; that is, if the city collected a five per cent franchise tax, only three per cent would be included in the rate for water service to the customer. The reason for eliminating the first two per cent from consideration is not apparent.

Upon hearing, the commission found the practice in question to be discriminatory in that the consumers in one area were burdened with a part of the taxes levied or pay-

ments exacted in another area and that the consumers in municipalities seeking to obtain revenue from such taxes should bear the burden of providing the revenue with which to pay the tax. The commission's order made no differentiation between the form of tax and considered franchise taxes along with license taxes, occupation taxes, street rentals and kindred levies in other forms. The commission further found the cost should be included in the rate for water service by adding to each individual customer's bill a separate item. This latter finding is in accord with the Commission's finding in the case at bar.

Upon review the intermediate court sustained the commission's order. The Supreme Court reviewed to determine whether the commission's order was *reasonable* and *lawful* or, conversely, arbitrary and without reasonable basis, concluding that upon the record there was no reasonable basis for the commission's order. The judgment of the circuit court was reversed.

In the Missouri case no showing was made or evidence presented to show what change would be made in the company's rate of return if money to pay these taxes were recovered locally, and the Missouri court appears to have taken the position that in the absence of any showing of the extent of benefit to the company from the proposed change in rate practice it should not approve the tariff. In the case at bar, however, the Company showed affirmatively the earnings benefit which it would receive (.21 per cent or from 5.26 per cent to 5.47 per cent) and that the rate of return with this improvement in earnings would be less than that previously authorized by the Commission.

The Missouri court also takes the position that inasmuch as the largest part of the gross revenues received for water service rendered came from the largest municipalities, and inasmuch as, for the most part, the largest municipalities were the ones enacting the tax levies, the discrimination resulting from these municipal levies would tend to be cured. The opinion suggests, although there was no evidence on the subject, that it undoubtedly cost less to furnish the water service in the larger municipalities, and therefore the profit should be greater in such cities because the water company charged the same rate for metered and unmetered water service, regardless of the size of the town and regardless of the distance from the reservoirs or the length of the distribution lines. Telephone rates, on the other hand, vary as between classes of service, that is, there is more than one rate for business service and there are several classes of residence service in each exchange. Furthermore, the lowest rates for each of the classes of service apply in the smallest towns and they are graduated upward by groups, depending on the number of customers in the exchange. These practices contribute substantially toward the elimination of any discrimination between users in large and small communities.

There is, moreover, a basic difference between telephone rates and water rates. The latter rates are measured by a unit of consumption, such as a gallon. Telephone rates are based on value. This value depends upon how many telephones each customer is able to reach, both within the area of the exchange and elsewhere. It is for this reason that telephone rates not only vary as between classes of

service in each exchange, but also vary as between exchanges, depending upon the number of customers in the exchange. A water user, however, is concerned only with the water drawn through his connection or meter. Apart from the possibility of pressure, he is not concerned with how many or how few other water customers are served or where they may be located.

The Missouri court assumes, upon the grounds above suggested, that, apart from the question of municipal levies, there was discrimination in the flat system-wide rates of the water company, and holds that until such other discrimination was isolated and determined the discrimination arising from the municipal levies should not be removed. It is noted that the Missouri court thus proceeds at the outset upon a pure assumption not supported by any evidence. In the case of the telephone rates, however, this same assumption may not fairly be made. Moreover, as the witness Sawyer pointed out, the figures to develop the cost of telephone service between various communities were not and never have been available (R. 134-35). If the courts are to insist that the matter of possible discrimination as between users in different communities be refined down to absolute costs, then it would be extremely difficult for the Company to do so. This same difficulty might not be experienced with a water company, because its rates being based upon a unit of consumption, costs might be reduced to that unit. It is difficult for us to believe that the unavailability of such cost figures of the Company should afford a reasonable excuse for not now eliminating such an obvious discrimination as is produced by failure to recover

locally money to discharge the municipal levies here involved.

We in no manner concede that there is anything unreasonable in the conclusion reached by the Commission in the case at bar, admitting however for the purposes of argument that different courts or different commissions might reasonably reach different results in weighing and considering the evidence presented in such a case, then in this very difference of result so reached is found a fundamental reason why the Missouri case is not decisive or controlling here. The reason lies in the differences in scope of review permitted under the Missouri and Utah statutes.

Under the Missouri statutes, decisions of its public service commission are first subject to review by the circuit courts, with appeal to the Supreme Court.

The controlling statute on review by the circuit court appears to be Section 386.510, Missouri Revised Statutes, 1949, which provides that

“Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the circuit court of the county where the hearing was held or in which the commission has its principal office for a writ of certiorari or review (herein referred to as a writ of review) for the purpose of having the *reasonableness* or *lawfulness* of the original order or decision or the order or decision on rehearing inquired into or determined. * * * No new or additional evidence may be introduced upon the hearing in the circuit court but the cause shall be heard by the court without the intervention of a

jury on the evidence and exhibits introduced before the commission and certified to by it. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon such hearing the circuit court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission's failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any case which is reversed by it to the commission for further action. No court in this state, except the circuit courts to the extent herein specified and the Supreme Court or the various courts of appeals on appeal, shall have jurisdiction to review, correct or annul any order or decision of the commission or to suspend or delay the executing or operation thereof, or, to enjoin, restrain or interfere with the commission in the performance of official duties. The circuit courts of this state shall always be deemed open for the trial of suits brought to review the orders and decisions of the commission as provided in the public service commission law and the same shall be tried and determined as suits in equity."

The jurisdiction of the Missouri Supreme Court is derivative, and on an appeal to that Court the question is whether the order or decision is *reasonable* and *lawful* or, conversely, whether it is arbitrary and without reasonable basis.

A careful reading of the Missouri decisions discloses that the Supreme Court exercises the power to *weigh* the evidence.

See:

State v. Public Service Commission of Missouri,
47 S. W. 2d 102;

State v. Public Service Commission, 252 S. W.
446.

Thus the power of the Missouri court is much like that of the Supreme Court of New Mexico, considered by this Court in *Los Angeles & Salt Lake R. Co. v. Public Utilities Commission of Utah*, *supra*, where it was shown that the New Mexico statute provided for a review by the Supreme Court of the *reasonableness* and *lawfulness* of an order made by the State Corporation Commission upon the evidence adduced before the Commission and that the Supreme Court upon the evidence determined the *reasonableness* and *lawfulness* of the order made by the Commission: *Thus the judgment of the Supreme Court of Missouri, like that of the Supreme Court of New Mexico, operates directly on the evidence and not on the decision of the commission.* This the Utah courts may not do under the provisions of said Section 76-6-16, *supra*, as was clearly pointed out by the Court in *Los Angeles & Salt Lake R. Co. v. Public Utilities Commission of Utah*, *supra* (St. John case).

The inquiry in this State must be not whether the decision of the Commission is reasonable and lawful, but whether any reasonably judging mind could have reached

the same decision as the Commission reached. Tested in the light of that inquiry the order and decision of the Commission should be sustained.

II.

THERE IS NO EVIDENCE TO SUPPORT THE CITY'S CONTENTION THAT MONEYS TO DISCHARGE ITS MUNICIPAL LEVY SHOULD BE PAID BY THE STATE-WIDE CUSTOMERS OF THE COMPANY.

The Company under this Point will deal with the City's argument under its Point 4. However, inasmuch as questions of law will be considered under subsequent Points, we will deal here only with the evidence.

The City contends that the evidence shows that the Company must derive the revenue with which to pay the exactions imposed by the municipal levy of 1941 from its rate payers on a state-wide basis.

The evidence on this subject is oral and documentary. It consists of the testimony of the witness Sawyer and the franchise ordinance and the free service agreement (R. 21-22—Exhibits 3 and 4).

Considering first the exhibits: An examination of the franchise ordinance shows that it is in part, as the testimony of the witness Sawyer indicated (R. 182), a working agreement between the Company and the City. Thus the City, in Section 1, grants to the Company certain privileges

with respect to the poles and wires of the Company, and the Company, in Section 3, grants certain privileges to the City with respect to its wires. In Section 4, however, we find the taxing provisions whereby the City, in lieu of all license, franchise, occupation and other similar taxes, imposes the levy upon the Company.

We have carefully searched this instrument for any language to indicate any expression of intent with respect to the source of the Company's revenue with which to pay the tax. None has been found.

There is nothing in the free service agreement which in any way suggests how the cost of providing that service would be recovered by the Company.

Turning to the testimony of Sawyer, Mr. Thatcher, in cross-examination, suggests to the witness that the real parties in interest in the franchise negotiations of 1941 were the inhabitants of Ogden; and Mr. Sawyer replies, "I would say that is correct." No further evidence on this subject appears in the record.

Putting to one side at this time the consideration of any questions of law, the simple fact is that we have here purely a relationship between the City and the Company under which a tax was imposed upon the Company and it agreed to provide certain free service. There is not one scintilla of evidence that the parties ever agreed upon or even considered *how* the Company would raise the money to discharge these levies.

III.

THE ORDER OF THE COMMISSION IS WITHIN ITS JURISDICTION AND VALID. IT NEITHER IMPAIRS ANY FRANCHISE OBLIGATION OF THE COMPANY TO THE CITY NOR IN ANY MANNER RELEASES OR EXTINGUISHES ANY INDEBTEDNESS, LIABILITY OR OBLIGATION OF THE COMPANY TO THE CITY.

Defendant will here deal with the City's Points 5, 6 and 7, in which it is contended that the order under review impairs the City's contract and releases and extinguishes the obligation of the Company to the City and is beyond the power of the Commission and void.

A simple way to test the validity of this argument is, we believe, to consider the relationship of the City and the Company before and after the order.

As observed at the outset of this brief, this case touches two relationships, one between the Company and the City, the other between the Company and its rate payers. The latter relationship is affected by the order; the former is not. *Before the order in question, the Company was obligated to pay the City certain taxes and to render certain services. This duty remains completely unimpaired, for the City will receive precisely the same money and service, at the same time, at the same rate, and from the same taxpayer as before.*

The City contends that the real parties in interest in the franchise negotiation of 1941 were the inhabitants of the City. Conceding this to be so, the inhabitants of the City are not the same body of persons as the Company's rate payers. The City may, in certain matters, act for its inhabitants, but the Commission controls the relationship between the Company and its customers, particularly with respect to rates and charges. That relationship alone has been changed for, by the order of the Commission, a rate practice previously employed will be removed and another rate practice prescribed.

The Commission is here dealing with the matter of rates and charges. The general jurisdiction of the Commission over this subject is found in Section 76-4-1, Utah Code Annotated 1943, and express jurisdiction is found in Section 76-4-4, of the same code.

The City, however, invokes the obligations of contract provisions of the Federal and State Constitutions and the provisions of Article I, Section 18, Article VI, Sections 27 and 29, and Article VII, Section 8 of the Utah Constitution as imposing a restraint upon the power of the Commission.

The position of the City in its most favorable light may be stated thus: In 1941 a franchise was granted by the City to the Company pursuant to which the Company agreed to pay certain moneys to the City. In granting this franchise the City represented its inhabitants and the money which the Company was obligated to pay to the City was for the benefit of such inhabitants. The levy of 1941 would, however, be collected state-wide by the Company. Now the

Company proposes to collect the levy money from a body of Ogden inhabitants alone, thereby, as the City contends, increasing the rates which this body of inhabitants must pay and rendering the franchise levy of 1941 less valuable and beneficial to the inhabitants of the City.

Substantially the same contentions as here made by the City have in a series of cases before this Court been made by municipalities and other parties and in each case denied. We believe it unnecessary to consider these cases in detail.

In *Salt Lake City et al. v. Utah Light & Traction Co.*, 52 Utah 210, 173 Pac. 556, which was one of the earliest and most carefully considered cases on this subject, the Court in dealing with the contract provisions of the State and Federal Constitutions and the provisions of Article XII, Section 8 of the Utah Constitution and holding the same not to be violated by the order of the Commission, at pages 217 and 218 of the Utah Report pointed out that

“* * * This objection has often been made in cases where either the city or the street car company has sought relief from a rate fixed by franchise ordinances like those in question here. It should be observed, however, that where the controversy has arisen between the contracting parties merely, and in ordinary actions or proceedings, the courts have usually compelled compliance with the provisions of the franchise ordinances treating them as contracts. Where, however, as here, the application was made to Utilities Commissions in pursuance of a legislative act, the courts have, with few exceptions, held that a constitutional or statutory provision prohibiting the Legislature from passing laws authorizing the construction and operation of street railways in

cities without the consent of the local authorities does not authorize such authorities to fix rates which may not be changed by the Legislature or by a utilities commission created for that purpose. In other words, it is universally held that the regulation and fixing of rates is a governmental function, that is, a legislative function, which will not be deemed to have been surrendered by the sovereign state unless it has been done in clear and unequivocal terms."

In *City of St. George v. Public Utilities Commission et al.*, 62 Utah 453, 220 Pac. 720, the provisions of Article VI, Sections 27 and 29, were relied upon. In meeting this contention the Court at page 464 of the Utah Report says:

"We can see nothing in either of these sections which prevents the state from enforcing its governmental functions to regulate rates for public utility service. Section 27 clearly refers to obligations which arise out of contracts other than those pertaining to public utility service. It has so often been held that it would be useless to cite the numerous authorities that, unless the sovereign has in express terms or by unavoidable implication surrendered its governmental function to regulate rates for public utility service, such surrender will be held not to exist."

In *Murray City v. Utah Light & Traction Co. et al.*, 56 Utah 437, 191 Pac. 421, the Court, at page 439 of the Utah Report said:

"* * * It is not questioned that the city authorities have and had the right to grant to the defendants or their predecessors the privilege to operate a street railway upon the streets of such city. Neither is it questioned that the right exists to prescribe conditions or limitations under which

such privilege may be exercised. The power, however, to fix the fare to be received by the utility, or the defendants in this action is retained by the state and can be exercised by it whenever the necessity requires action upon its part."

Again, in *United States Smelting, Refining & M. Co. v. Utah Power & Light Co. et al.*, 58 Utah 168, 197 Pac. 902, the contract provisions of the State and Federal Constitutions were invoked. The Court, in answering these contentions, at page 182 said:

"It has been held repeatedly, both by the Supreme Court of the United States and the courts of last resort of many of the states, including this court, that the regulation of rates for public utilities is a governmental function coming directly within the police power of the state, and that for that reason the establishing or modifying of rates, although contractual, does not violate the constitutional provision aforesaid."

Each of the foregoing Utah cases involves a direct interference with a rate fixed by contract or franchise, while in the case at bar, even conceding for argument the City's contention, the Commission's order has only an indirect and remote effect upon the franchise granted to the Company by the City.

Furthermore, the constitutional prohibition against the impairment of the obligations of contract does not prohibit a State's reducing the obligation some contracting party owes to it but rather prohibits a State's impairing the obligation which it owes to others. If it is to be assumed in the instant case that the State, by the action of the Commission

in approving the proposed tariff is reducing or impairing an obligation, it is only reducing or impairing the obligation which a third party owes to one of its instrumentalities, namely, the municipality of Ogden; and this situation is identical with the one which would exist if the State were reducing the obligation of the third party to the State itself.

See:

City of New Orleans v. New Orleans Water Works Co., 142 U. S. 79, 35 L. Ed 943;

Hunter v. Pittsburgh, 207 U. S. 169, 52 L. Ed. 151;

Worcester v. Worcester Consolidated Street R. Co., 196 U. S. 539, 49 L. Ed. 591;

City of Pawhuska v. Pawhuska Oil & Gas Co. et al., 250 U. S. 394, 63 L. Ed. 1054;

Trenton v. New Jersey, 262 U. S. 182, 67 L. Ed. 937.

The City in effect concedes this rule of law but seeks to avoid its application upon two grounds. It first advances the theory that although the City may be bound by the application of the rule, its inhabitants are not and cites *Western Securities Co. v. Spiro*, 62 Utah 623, 221 Pac. 856. This case holds that a court will, under certain circumstances, pierce the corporate veil, particularly where a corporation is utilized as a subterfuge to defeat public convenience, to justify wrong, or to perpetrate fraud. We are unable to perceive how that decision is in point here. In any event, the facts in support of such a contention were very much stronger in the case of *Salt Lake City et al. v.*

Utah Light & Traction Co., supra, for in that case the franchise ordinance provided for the issuance of so-called commutation tickets, which permitted transportation at a reduced rate, which rate was changed and raised by the order of the Commission. It was contended that many persons built homes in the suburbs of Salt Lake City and along the street railway outside of Salt Lake City, relying upon the benefit of the cheaper transportation under these commutation tickets, and that the Commission had no power to deprive inhabitants of the benefit accruing from this provision of the franchise. This Court answered such contention at pages 224 and 225 of the Utah Report, saying in part:

“It is, however, further contended that, because the franchise ordinances provided for the so-called commutation tickets and in reliance on them many persons have built homes in the suburbs of Salt Lake City and along defendant’s line of street railway outside of Salt Lake City, for that reason the defendant should be held to be estopped from increasing the rates of fare without the consent of those persons. It needs no argument to show that the elements of estoppel are lacking in this case. A conclusive answer to the contention, however, is that any one who purchased commutation tickets and who built a home did so subject to the right of the state to change or alter the fares fixed in the franchise ordinances in case it was found that such fares were unfair or unreasonable.”

The second contention of the City is that in 1951 it adopted the “Council-Manager Charter of Ogden City,” pursuant to the provisions of Article XI, Section 5, of the

Utah Constitution, and thereby enjoys constitutional protection which it might not otherwise have. The ready and conclusive answer to this argument is found in the section itself, which provides in part that

“* * * this grant of authority shall not include the power to regulate public utilities, not municipally owned, if any such regulation of public utilities is provided for by general law, nor be deemed to limit or restrict the power of the legislature in matters relating to state affairs, to enact general laws applicable alike to all cities of the State.”

The general law for the regulation of utilities in this State is found in said Title 76, Utah Code Annotated 1943, and in the provisions of Sections 76-4-1 and 76-4-4 of that title as relates to the case at bar.

It appears that contentions substantially the same as here made by the City were urged by Elmhurst in the case of *City of Elmhurst v. Western Gas Co.*, *supra*. In disposing of such contentions, at page 492 of the Northeastern Report, the Supreme Court of Illinois said:

“There is no interference with the contract created by the original franchise and acceptance thereof by the predecessor of the appellee, and the order of the commission in nowise contravenes the constitutional inhibition against the impairment of contracts.”

The contentions of the City under its Points numbered 5, 6 and 7 are therefore without merit.

IV.

THE ORDER OF THE COMMISSION FIXES
RATES; IT IMPOSES NO TAX OF ANY KIND
ON THE TELEPHONE CUSTOMER.

Under this Point, defendant will deal with the argument advanced by the City in its Point 8, wherein the City contends that the order of the Commission in effect unlawfully transforms a franchise fee exacted from the Company into a purchase, sales or use tax on the users of telephone service.

The determination of the question here raised requires consideration again of the essential nature of the Company's proposal and the Commission's order.

The City seems unwilling to face these simple, inexorable facts: The Company is obligated to pay the municipal levy to the City. Nothing in the order of the Commission has in any manner released the Company from that duty or impaired the measure of the obligation. Neither in substance nor form will that duty be changed. The Company fully intends to pay this imposition and the accounting practice before and after the order will be the same. This is made abundantly clear by the testimony of the witness Sawyer (R. 161-62).

The only source of company revenue for the payment of taxes is from its customers. Regardless of how this burden may be apportioned or distributed, it will fall upon the user of telephone service. The charges which the Company may make to its telephone customers and the revenue

which the Company receives must and may only be reflected in rates filed with and approved by the Commission. Although the money which the Company would collect from the inhabitants of Ogden would put the Company in funds with which to pay taxes to the City, it is not taxes which the Company receives from the customer but revenue for service, which must be treated by the Company in its accounting like any other revenue which it receives. Of this there was no doubt, either in the mind of the Commission or of the Company. The following questioning of Mr. Sawyer by Mr. Thain (R. 161) makes this clear:

“Q. In other words, all of the tax which you will bill will in effect become a revenue? That is, it will be credited to the revenue account of the Company?”

“A. Yes.”

The decision of the Commission is equally clear through the use of the following language (R. 33) :

“The tariff affects only the source of revenue for the discharge of these taxes. This involves directly the matter of rates. Ogden City has jurisdiction over its municipal franchise. This Commission has jurisdiction over the rates of Mountain States.”

The City appears never to have perceived this point. Its failure to do so is demonstrated in the cross-examination of Mr. Sawyer by Mr. Thatcher in connection with the billing to governmental agencies (R. 141-42), where Mr. Sawyer endeavors to make clear to Mr. Thatcher the exact nature of the relationship between the Company and its customers as follows:

"Q. In your investigations have you considered whether or not if you bill it as a separate tax as approved or as proposed that will have to be eliminated for all bills for telephone service to the Federal Government?

"A. No, it won't be. This is a fluctuation of our *rate structure* in these towns to take care of this expense, and as such the Government—all government accounts will be subject to this charge, they will not be exempt from it. This is a *rate*—this is a *rate* to take care of a tax expense on the Telephone Company and will be adjusted in our rate schedules in these towns in the amounts indicated here, so that the Federal Government would be subject to the *same rates* as any other customers, so far as this is concerned."

Had the City perceived that rates and revenue are involved in the relationship between the customer and the Company, it would have understood readily that the Government, like any other customer, must pay a published rate.

Once these propositions are fully understood, the answer to the contentions of the City under this Point become obvious. There has been no transfer of tax from the Company to the telephone customer. The relation between the Company and the customer, strictly and accurately speaking, does not involve tax. That relationship involves rates and revenue, and the money which the Company would collect from the inhabitants of the City would be taken into and only into the revenue accounts of the Company. With that revenue the Company would be enabled to meet its municipal levy to Ogden. But the treatment of this revenue

in the accounting of the Company would be no different than the treatment of any other revenue which it might receive.

It is clear that the Commission cannot engage in the field of taxation. It is equally clear, however, that in the regulation of rates, the Commission may enable the Company to obtain revenue to pay taxes which are levied upon it. If the proposed tariff is finally disapproved, then in all future rate adjustments of the Company revenues from basic state-wide rates must be provided sufficient in amount to enable the Company to pay these municipal levies. Thus, under any concept, the recovery of money to pay these municipal levies is a rate matter for consideration of the Commission.

It appears that the Supreme Court of Washington in *State v. Department of Public Service, supra*, was met with the same argument as now advanced by the City, and in disposing of it, at page 535 of the Pacific Reporter, said:

“There is no basis for the argument advanced by the cities to the effect 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, whether these payments will be included in respondent's general operating expenses or segregated and passed to the rate payers in the respective municipal corporations to which the moneys are paid.”

CONCLUSION

The evidence supports the order of the Commission. The order is within the jurisdiction of the Commission over rates, charges and practices of the Company. It contravenes no constitutional prohibition. It is reasonable and valid and should be affirmed.

Respectfully submitted,
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