

1953

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

Utah Supreme Court

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Recommended Citation

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FILED

Case No. 7907

JAN 16 1953

Clerk, Supreme Court, Utah

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 UTAH
POWER & LIGHT COMPANY, a
corporation,

Defendants.

PLAINTIFF'S BRIEF

Paul Thatcher,
Jack A. Richards,
Charles A. Sneddon,
Attorneys for Plaintiff

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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 UTAH
POWER & LIGHT COMPANY, a
corporation,

Defendants.

STATEMENT OF FACTS

This is an action by Ogden City for itself and other municipalities similarly situated to review and annul an order of the Public Service Commission ordering that the defendant Utah Power and Light Company

“Shall state on customer’s bill and collect as a separate item on a pro rata basis from its customers in any municipality wherein is imposed any municipal franchise, occupation, sales or license tax.”

This order was entered upon the Commission's own motion in a proceeding upon application by the Company for Commission approval of proposed Electric Service Rate Schedules, a proceeding designated by the Commission as its Case No. 3780. No question is raised as to the validity of the other orders entered therein.

For the credit and honor of the Company it must be said that it opposed the making of this order upon the stated ground that compliance therewith would constitute a breach of faith with Ogden City and other franchise granting cities, and would be a violation of its franchise contracts. (R. 673—5).

The Commission's order presently affects existing negotiated franchise contracts between the Company and Ogden, Salt Lake City and Sandy, in which the agreed rentals or fees are 2% of gross revenues from power sold within the city limits, and a 1% business license tax levied by South Salt Lake on the business of distributing or selling electricity. There are also seven franchises with small cities, for which total annual fees of \$468.00 are paid. (R. 253).

This brief will address itself to the problem presented in the case of Ogden City, but it appears that the controlling principles are equally applicable to the problems of the other franchise cities. Moreover, all of the arguments presented except those relating to the status of the franchise agreements as *contracts* apply with equal force to the situation of the South Salt Lake business tax.

On March 14, 1951, pursuant to previous negotiations with the Company (R. 252), Ogden City adopted an Ordinance granting to the Company the right or franchise to use the city streets for its power transmission lines for a period of 50 years from January 1, 1951. (R. 229). Section 5 thereof provides that

“As a further consideration for this franchise and *in lieu of* all municipal occupation or license taxes upon the Company, its property or business within the City, the Company agrees to pay a sum equal to two per centum (2%) of the gross revenue derived by the Company from the sale and use of electrical power and energy within the corporate limits of the City.” (R. 230—emphasis supplied.)

Section 7 thereof provides that

“Utah Power & Light Company within thirty days after the effective date of this Ordinance *shall file its acceptance thereof* in writing with the City Recorder of Ogden, *otherwise the same shall be null and void.*” (R. 230—emphasis supplied.)

By Section 8 it was provided that upon such acceptance the franchises under which the Company and its predecessors had been using the City streets for more than 40 years should be repealed. (R. 230—231).

The Company accepted the offer and grant contained in the Ordinance and procured from the Commission a certificate of Convenience and Necessity to exercise the franchise so granted. (R. 232—4). The contract was complete, and the parties began their operations thereunder.

Then on March 26, 1952, the Company filed new rate schedules for electric power to be furnished by it, with an application for the Commission's approval thereof. (R. 1—5; 98—158). The Application was heard by the Commission in May and June, 1952. Previous to this time the franchise fees had been "absorbed" as a general operating expense, paid out of the Company's general operating revenues. (R. 510; 512; 514). The Company proposed to continue this practice.

However, at the hearing the question of the handling of the municipal franchise fees and license taxes was raised by Counsel for the Commission (R. 509, et seq.) and the Commission Chairman indicated that the Commission thought the public would be better informed as to franchise taxes if the tax was billed separately to the public and that such action would stop the levying of municipal franchise taxes. (R. 676).

The Company, however, reported that it had, in negotiating the franchises, represented to the franchise cities, including Ogden, that the franchise fees would not be imposed (or "passed on" to) the inhabitants of the franchise cities, and that the Company had engaged in an implied undertaking with the cities not to do so. (R. 673—4). It objected to the proposal that it violate this undertaking and charge back to the inhabitants the moneys it was supposed to pay the city for their benefit.

G. M. Gadsby, for many years the President and General Manager of the Company, was the only witness examined as to the franchise fees and their bearing on the company's rate structure.

He testified in effect that in negotiating the franchise contracts it was the intention of the Company to "absorb" the franchise fees, and not to bill the customers for the amount thereof. (R. 510—514).

He also testified that the net effect of the franchise tax transactions was too small to have really affected the question of rates at all, and that had their earnings been maintained as they were in 1950, the increase in Franchise fees could have been absorbed by the Company without any rate increase. (R. 511). Obviously other factors brought about the Company's request for a rate incrtase.

The Company has what Mr. Gadsby referred to as a "postage stamp" type of rate; that is it charges all consumers everywhere exactly the same rate for the same service. (R. 526).

In the franchise granting cities there is a "greater density of customers;" there are relatively more customers per mile of line or \$100.00 of investment. (R. 526—7). The relative cost of serving the urban customer is therefore lower.

As a result the ability of the Company to do business in Ogden and the other franchise cities *is of benefit to the customers over the whole system*. If the Company did not have the business in these larger communities, *it could not serve the other communities at the now prevailing rates*. The larger communities *make a positive financial contribution to the rates charged all customers*. Mr. Gadsby testified under oath that although he could not tell whether that contribution was equivalent to a 2% or a 5%, it is something. (R. 527).

There is no evidence to the contrary anywhere in the record.

In other words, because the rates are the same, and the cost and investment incident to serving the urban customers are lower, the urban customers in the franchise cities are already "carrying on their backs" the customers outside these urban areas—perhaps to an even greater extent than the maximum 2% franchise fees.

Moreover, as Mr. Gadsby pointed out, the great business stability and security which results from long term franchises makes the Company's bonds more attractive, so that they can be marketed at a lower rate of interest, thus lowering expenses to the ultimate benefit of the ratepayers. (R. 527).

The Company's President also testified that in the negotiation of a franchise the Company would have something to say about the amount and would not agree to pay an exorbitant charge. (R. 529). There is no contradiction in the record.

Exhibit 23 (R. 222) prepared by the Company's Auditor, Mr. Jones, was introduced in evidence (R. 666). It shows that the total of all municipal levies as applied to 1951 revenues was \$178,423 of which \$99,607 represented recent increases almost entirely attributable to increased franchise fees payable under the newly negotiated long term franchise agreements with Ogden and Salt Lake City. It also shows that the net increases, after allowing an adjustment for decrease in income taxes resulting from this additional expense, was only \$46,517. This amount obviously could have only a negligible affect on the overall rates. Other factors compelled the application of an increase, as is clearly

shown by a comparison of this figure with the figures shown by the Company's comparative income statement, Exhibit 16, (R. 196) which shows, for example, an increase of allowable operating revenue deductions of \$2,982,797 for the year ending March 31, 1952, over the year ending December 31, 1949.

The matter being submitted, the Commission on July 29, 1952, made and entered its Report, Findings and Order (R. 15—30). Section 9 of the Report deals with the problem here under consideration. (R. 24—25). It reads:

The applicant's expenses for the year 1951 include franchise taxes charged by Salt Lake City, Ogden, Sandy City, and South Salt Lake. These franchise taxes are imposed at the rate of two per cent of the gross receipts for electricity sold within the corporate limits in Salt Lake City, Ogden, and Sandy City, and one per cent of the sales in South Salt Lake. Based upon 1951 sales the amount of the franchise tax in the four cities referred to is \$178,423. The position of the applicant is that such tax expenses should be included by it in its overall expenses, and in turn, should be charged against all rate payers in the State. The Commission is of the opinion that such method of charging the tax is unfair to the rate payer residing outside of the cities imposing such taxes, and would encourage all cities served by applicant to levy as high a franchise tax as is possible and require rate payers who are not residents of the particular city to help pay the taxes for the upkeep of such city. The commission is of the further opinion that it is better public policy to have the citizens and rate payers conscious of all taxes being levied by the local municipalities. The Commission

finds, therefore, that such taxes should be filed separately and charged against the rate payers of the municipalities which levy such taxes. This Commission has previously adopted a similar policy in former hearings before it concerning both the Mountain States Telephone and Telegraph Company and the Mountain Fuel Supply Company. 4/ Nothing was introduced into the present case which would cause the Commission to change its policy as to the method of charging and collecting such taxes. It will follow that in the event any city lowers or removes these city levies, electric rates will be reduced accordingly within that city.

In Section 10 of the Report (R. 25—27) the Commission considered in detail the effect upon net return of various changes in operating expense which had occurred or which would take place as a result of the Commission's order. One of these factors was the decrease in operating expense resulting from the transfer of the charge for franchise fees from the Company to its customers in the franchise cities. The Commission (R. 27) says:

The other adjustments heretofore discussed, and their effect upon the Utah operating income for 1951 may be summarized as follows:

Decrease in Federal		
energy tax	\$334,116	
Adjustment for fran-		
chise taxes	- 178,423	\$512,539
(Note: Handled as a <i>decrease</i>)		
Increase in wages	\$207,260	
Increase in purchased power	178,192	387,452
Net adjustment (<i>decrease in expenses</i>)		\$127,087

4/ Re: The Mountain States Tel. and Tel. Co., I & S Docket No. 83
Decided May 5, 1952

Re: Mountain Fuel Supply Company, Case No. 3755
Decided April 30, 1952

A decrease of \$127,087 in operating expenses would increase the Federal income tax by 52 per cent of such amount, or \$66,085. There would be a net increase of \$61,002, therefore, in the operating income of \$4,980,156, changing such figure to \$5,041,158.

It is notable that the Commission handled this item as a *decrease* in expense and not as an *increase* in the local rates.

The finding and order excludes the Franchise taxes both from the revenues and from the expenses of the Company.

The franchise taxes are no longer recovered as a part of the charges made for electrical service, and then paid out as a Company expense; they are collected from the consumers within the franchise cities as a *separate tax* item, and then turned over to the cities without affecting either revenue or expense accounts on the Company's books. The Company has become, as to these taxes, a mere collection agent for the cities, and the burden of the tax is shifted from the Company to its customers in the franchise cities.

That this is in compliance with the intention of the Commission is made clear by the Commission's approval (R. 32) of the New Rate Schedules (Exhibit 40, R. 838—896) filed pursuant to the Findings and Order. These approved rate schedules make no provision whatsoever

for the recovery of the taxes as a part of the electrical service charges. The taxes are treated as an extraneous collateral item, not as a part of the electric service rates.

The Commission having, upon the findings quoted, made the Order complained of, Ogden City in due time served and filed its petition for a rehearing (R. 34-42).

On August 27, 1952, the Commission denied the petition (R. 43), whereupon this

STATEMENT OF POINTS

Point 1. The order of the Commission is beyond the Commission's jurisdiction, power and authority.

Point 2. There is no evidence to support the material findings of Section 9 of the Commission's Report and Findings of Fact.

Point 3. The report and findings of the Commission do not support its order.

Point 4. 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.

Point 5. The order of the Commission, by authorizing a specific and arbitrary setoff, 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.

Point 6. The order of the Commission unlawfully attempts to exercise power to supervise and interfere with municipal money and property and to levy municipal taxes and perform municipal functions which cannot lawfully be granted the Commission under Article VI, Section 29 and Article XII, Section 8 of the constitution of Utah.

Point 7. The order of the Commission unlawfully transforms a lawful and proper franchise fee exacted from the company into an unlawful tax on the purchase or use of electrical power in violation of Article VI, Section 29, Article XI, Section 5 (a) and Article XIII, Section 5 of the Constitution of Utah.

Point 8. The only case approving the passing on of a franchise fee is distinguishable. The other cases support the city's position.

ARGUMENT

General Considerations

This case represents the culmination of a policy with respect to the imposition of the burden of municipal franchise fees and license taxes which the Commission apparently resolved upon some time in 1951. As the Commission said in its findings,

“This Commission has previously adopted a similar policy in former hearings before it concerning both the Mountain States Telephone and Telegraph Company and the Mountain Fuel Supply Company.”

By a footnote to its findings (R. 25) the Commission referred to its decision re, the Mountain States Telephone and Telegraph Company, I & S Docket No. 83, decided May 5, 1952, which is now pending before this Court on certiorari, and its opinion re, Mountain Fuel Supply Company, Case No. 3755, decided April 30, 1952.

It is interesting to note the development and progress of the Commission's policy and theory with respect to municipal taxation and franchise contract fees. In the Mountain Fuel Supply Company case the Commission authorized the utility to "pass on" to the consumer within the municipalities all municipal license taxes and franchise fees imposed *after* the entry of the order. No attempt was made to disturb existing franchise contracts. In the Mountain States Telephone and Telegraph Company case the Commission granted the utility's application for authority to pass on these taxes and fees to consumers within the municipality, *including* those paid pursuant to the obligation of existing franchise contracts. In the case now before the Court the Commission has taken the last step: It has, against the protest and over the objection of the utility, required the utility to pass on to its consumers within the municipalities in question all municipal franchise fees and license taxes under existing as well as future contracts.

It must at the offset be observed that there is no specific statutory authority and it is admitted that there can be no statutory authority for such action by the Commission. The Commission has set itself up as a policy establishing body for the state with respect to the handling of municipal taxes on public utilities.

Only three courts of last resort have had occasion to consider the question of whether a public service commission may properly authorize a public utility to pass on its municipal franchise fees and license taxes to the consumers within the municipalities concerned. The cases are:

City of Elmhurst vs. Western United Gas
Company
(Illinois, 1936)
1 Northeastern 2nd 144;

State vs. Department of Public Service
(Washington, 1943)
142 Pac. 2nd 498, 532, 536, Syllabi 44-45;

and

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

The Missouri case last above cited is the only case clearly and definitely in point here and it was there that the order of the Commission directing the municipal levies in question to be passed on to the consumers within the respective municipalities was void

In the Washington case the Supreme Court of that state distinguished between franchise fees and license taxes and held that the Commission could not order the franchise fees passed on to the consumers within the franchise cities, but approved the order of the Commission in so far as it authorized license taxes to be passed on. The fact is, as will be hereinafter demonstrated, the case at Bar is stronger than either the Washington case or the Missouri case as regards franchise fees and the Washington case is distinguishable from the case at Bar in so far as it affects license taxes.

The Elmhurst case from Illinois approved an order directing franchise fees and license taxes to be passed on, but it is clearly distinguishable upon the facts from the case at Bar and many objections are here raised that were not there urged. We expect to demonstrate in this brief that on reason and authority the order of the Commission below in this case is unlawful and void.

POINT 1. *The order of the Commission is beyond the Commission's jurisdiction, power and authority.*

The Commission has boldly and openly usurped the policy making prerogatives of the Legislature. It recognized that it was fixing and determining policy. In its report (R. 25) the Commission said:

“The Commission is of the further opinion that it is better public policy to have the citizens and taxpayers conscious of all taxes being levied by the local municipalities. The Commission finds, therefore, that such taxes should be billed separately and charged against the rate payers of the municipalities which levy such taxes.”
(Emphasis supplied)

The Commission obviously did not inadvertently drift into policy making while it was concerned with rate making. It has with its eyes open declared that it is fixing policy for the State of Utah.

It must be observed that no such policy as the Commission seeks to establish has ever before been recognized in the State of Utah. On the contrary under the provisions of Article XIII, Section 5 and Article XII, Section 8 of the Constitution of Utah and the statutes enacted by the Legislature thereunder the matters of

municipal taxation and the granting of municipal franchises to electrical power utilities have been considered entirely within the prerogative of the Legislature of the state and of the legislative bodies of the municipalities, to whom the people and the Legislature have in part delegated their legislative and policy making powers in this regard. The policy which has been uniformly established and followed since statehood has been that municipal franchise fees and license taxes should be considered as a general expense of the utility to whom they were levied and should be paid out of their general funds and not passed on to their consumers as a separate tax item on their bills. The Commission, as shown by the record here, has heretofore recognized and followed that established policy. The Legislature has met many times with full knowledge of the policy that has been pursued and has never seen fit to pass any law changing the established policy. It therefore must be presumed to have approved that policy. Under the Constitution and Laws of Utah the cities have authority to grant franchises to utilities and to impose conditions. Clearly the determination of the amount of a city franchises fee, or of a city occupation tax, and of the person upon whom the burden thereof shall be imposed, is a matter of municipal policy. In fixing such policy the local authorities are not subject to 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, 134 Pac. 2nd 469;

Idaho Power Company vs. Thompson 19
Federal 2nd 547, 580.

As we have indicated, Ogden's franchise with the company is clearly established as one in the nature of a fifty year contract leasing to the company the privilege of using the city's public streets and alleys for pole lines, transmission 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.

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 electric 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 10-8-14, U. C. A., 1953,
(Section 15-8-14, U. C. A., 1943),

it has provided that

“They (the City Commission) may construct, maintain and operate electric light works . . . or authorize the construction, maintenance and operation of the same by others”

And in

Section 10-8-13, U. S. A., 1953,
(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 franchise 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. That section provides that,

“The Legislature shall not relegate 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.”

It is clear that the establishment of public policy with respect to franchises to use city streets is a municipal function vested by the Constitution and laws of Utah in the legislative authority of the municipalities,

and the Commission in attempting to overrule and reverse the policy established by the legislative authority is exceeding its jurisdiction and power and its order is void.

It is equally 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 electric power 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.

That is a very proper policy firmly established by the Constitution and statutes of Utah. It has been recognized by the decisions of this Court above cited.

Moreover, 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. By Article VI, Section 29, above referred to, the Legislature is forbidden to authorize any special commission to levy any such tax. Pursuant to these provisions of the Constitution the Legislature has authorized cities to license and tax all businesses. Thus, by the Constitution and laws of the

state power to establish public policy with respect to license taxes on business conducted within municipalities is clearly vested in the municipal authorities and not in the public service commission. The right to establish policy in this regard obviously includes the right to establish as a policy the identity of the taxpayer upon whom the burden of the tax, as a tax, shall be imposed. The local authorities (in this case the South Salt Lake City Commission) have asserted that power and determined the policy. The taxes are payable by the company, according to the ordinance, and the commission has power or authority to transfer the burden of that tax in violation of the policy established pursuant to the Constitution and Statutes of Utah.

The order of the Commission clearly is contrary to established public policy in Utah and attempts to establish a policy exactly contrary to the one already fixed and recognized. This is clearly beyond the jurisdiction of the Commission and its order in this regard is void and should be set aside by the Court.

Furthermore, under the provisions of Section 54-4-4, Utah Code Annotated, 1953 (Section 76-4-4, Utah Code Annotated, 1943) prescribing the powers of the Commission to regulate rates, regulations, practices, etc., of utilities, the Commission has power to order or authorize a change in a practice or rate only when substantial evidence is presented to prove and the Commission finds that the existing practices or rates are inherently "unjust, unreasonable, discriminatory or preferential," or in violation of law.

In the case of

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,

this court held that an order adjusting rates of a public utility is invalid unless based on evidence, "calculated to show that existing intrastate rates were inherently unreasonable." The proponents of any change in existing rates or practices must prove this jurisdictional fact. In the absence of proof of this jurisdictional fact the Commission has no jurisdiction to order a change in the existing practice, and the order is outside the authority of the Commission and void.

The order in this case should be set aside as void and beyond the jurisdiction and authority of the Commission which entered it.

POINT 2. *There is no evidence to support material findings of Section 9 of the Commission's report and findings of fact.*

Throughout that portion of the hearing in which the question of franchise fees and license taxes was under consideration, the Commission assumed that the payment of varying franchise fees and license taxes as general expenses of the company was "unfair" to the rate payers residing outside the cities in question. Assuming, without conceding, that such an "unfairness" rendered the practice "unjust, unreasonable, discriminatory or preferential," as required by the statute,

still *there is no evidence in the record to prove that assumption as a fact*, and it remains a bald and unsupported assumption.

Indeed all of the evidence in the record is to the effect that the treatment of the franchise fees as a general expense payable out of the genral revenues of the company is fair and just and tends properly and equitably to distribute the burden among all of the rate payers. It will be recalled that Mr. Gadsby's testimony (and it was the only testimony before the Commission) was to the effect that while rates in and out of the franchise granting cities were identical, in genral the costs of serving the consumers within the franchise granting cities were materially less, and, furthermore, the license to do business in the larger, more thickly populated urban areas contributed to the financial stability of the company to such an extent that it could borrow money at more favorable rates, and that these benefits were reflected in the rates throughout the system, so that the company's franchises and licenses to do business in these urban areas in fact resulted in a substantial benefit to the consumers outside the municipalities. As he said, he did not know whether this benefit amounted to 2% or 5%, but it was something. The payment of the franchise fees and license taxes to these larger municipalities is obviously a fair and reasonable adjusting factor in this case, and the existing practice of paying these fees out of the general funds of the company as a general expense is not unfair.

It must be observed, however, that clearly the burden of proving the facts which would grant the Commission jurisdiction to order a change in the existing

practice was on the Commission which on its own motion proposed the change. Even if the evidence had not been contrary to the finding, the finding is based on several assumptions, none of which find any support in the evidence. Let us consider them in turn.

First, it was assumed that the payment of the franchise fees, taxes, etc., out of the general funds of the company creates a difference in the burden of electric power rates. This, of course, is entirely unfounded. As the evidence shows, the rates of the company throughout the state are absolutely identical for identical service. The company has a "postage stamp" type of rate.

Second, the Commission assumed, contrary to the evidence, that the consumers outside the franchise cities received no benefits from the payment of the franchise fees, etc., by the company, but that consumers within the franchise municipalities receive the benefit of these taxes when expended by the city. This assumption again is directly in the face of the only evidence before the Commission and contrary to reason. It must again be recalled that Mr. Gadsby, the President of the company, testified that the ability of the company to do business in these urban localities enabled the company to give power to the consumers outside these cities at rates lower than it could otherwise have done and that therefore the outside consumers benefited thereby to the extent of 2% or perhaps even 5% of their electric power bills. The Commission obviously looked at the wrong side of the problem and considered only the benefits accruing from the expenditure of tax moneys

by the city, and not to the benefits to the rate payers which the payment of these taxes by the company purchase for them.

In this connection it perhaps should be observed that in our urban civilization it is becoming increasingly evident that city dwellers are already paying a disproportionate share of the tax load. There are many examples, but perhaps one will serve. City property owners pay county taxes to build rural roads as well as city taxes to pay for city roads. But the people outside of the cities pay no city taxes to build city roads upon which the power company may locate its power transmission lines.

What the Commission is here attempting amounts to local rate making rather than state-wide rate making and it proposes to base the local variations upon one item of expense, to-wit, the franchise fees and license taxes, and to make the cost of power vary with these changes. In so doing it made its third assumption which is entirely without basis in fact and is contrary to the evidence. *It assumed that all other expenses of rendering electric power throughout the state were equal and that these municipal charges, by which (as it further assumed) the city consumer alone benefited, created the only inequality.*

The evidence is exactly to the contrary. Namely, that it is cheaper to serve consumers within the cities where these levies are made and that for this reason, if there is any unfairness, the unfairness operates against the consumer within the cities in question. The estimate of the Company's President was that the dif-

ference was so great that it resulted in a rate benefit to the outside subscribers of from 2% to 5%, although he had no definite figures to submit. The highest franchise is 2%. At the most, even if the Commission's other assumptions could be supported, the franchise fees could only offset the pre-existing unfairness against the consumers within the cities.

The Commission obviously forced the shoe on the wrong foot. If any rate differentials should be made, the people in the large urban centers should have the more favorable rates because, as the testimony shows, it cost less to serve them.

We have found only one case in which a court of last resort has had occasion to review and pass upon the sufficiency of the evidence to support a claim that franchise fees discriminate against rural consumers. However, the facts there are so nearly identical to the facts in this case and the reasoning there adopted by the very learned and able Supreme Court of Missouri is so applicable and so cogent that we cannot forebear to examine and quote from it at some length. We believe it will be very helpful to the court and we submit the principles there declared are controlling here.

That case is

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

There a privately owned utility, the St. Louis County Water Company, supplied water to sixty-six incorporated and numerous unincorporated areas in St. Louis County, Missouri. There, as here, the rates had

always been fixed on a system-wide "postage stamp" basis. Some sixteen 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 Missouri Public Service Commission there, as here, approved a new schedule of rates which there, as here, made no change in the basic rates, but added an amount equal to the gross receipt taxes to the bills of consumers within the taxing municipalities. 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 there, as here, ordered that all the municipal exactions, "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.

In two aspects there is a difference between that case and the case at Bar, but in each instance the position taken by the Utah Commission is more patently erroneous and arbitrary than that taken by the Missouri Commission. The first difference is that the Missouri Commission held that the recovery of the municipal charges should be made "*in the rates themselves*" rather than by adding the same to the bill as a separate item, as was done by the Utah Commission. As we will point

out later in this brief, we believe this alone would invalidate the action of the Utah Commission as being an interference with the taxing power.

In the second place, in the Missouri case there was no direct testimony that the consumers outside the taxing cities received a benefit from the privileges of doing business, and of using the streets, etc., which the company received in return for the payment of the taxes, while in the case at Bar there is direct and positive testimony that the expenses of the company are less within the municipalities in question and that the outside consumers benefit thereby to the extent of 2% to 5% of the cost to them of electric power. In this regard it is obvious that the cities' case before this Court stands upon a stronger foundation than did the cities' case before the Missouri Court.

The Missouri Court in that case observed that the Commission might have resorted to local rate making and classified the cities and towns and fixed rates on a unit basis, but that the company there was organized and operated 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." That is equally true here.

The Missouri Court 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 is also 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 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 in the Missouri case a greater effort was made to prove discrimination than was made in the case before this Court, and the effort there failed. It should fail here. The Missouri 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 assumption that the assumed difference in burden is unfair to the rate payer outside the franchise cities is unjustified, and against the law and the evidence.

The Commission made a third entirely unjustified assumption when it undertook to adjust the burden of the power company rate payers by passing on the franchise fees and license taxes to the consumers within the city limits. *It assumed that the assumed difference in burden was exactly equal to the amount of the fee or tax in each municipality involved.* This is obvious from

the fact that the Commission purported to correct this unfairness by its order authorizing the exact amount of the tax to be passed on in the cities where imposed. It made no attempt to inquire as to possible compensating factors, and indeed it ignored the positive evidence before it that there definitely were compensating factors which, if anything, made the existing rate system unfair to the city consumers. It made no attempt to inquire as to possible other compensating factors such as variations in labor cost, in ad valorem taxes, in building rentals or in easements for pole lines ad 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.

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.

Finally the Commission assumed that there was no reasonable basis for the assumed difference in burden. 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 *Mountain States Telephone and Telegraph Company vs. Public Service Commission*, supra. Unless there is evidence to

show that a difference in burden is unreasonable, the Commission has no authority to attempt a correction. Here there was absolutely no evidence to show that the difference, if any exists, was unreasonable, but on the contrary the only evidence before the Commission showed clearly that the handling of the franchise fees and license taxes as a general expense of the company payable out of its general revenues was a fair, just and reasonable practice which did substantial justice as among all of the rate payers. As the order here is not based on any evidence showing that the present practices are unreasonable, it must fall under the authority of the *Mountain States Telephone and Telegraph Company case*, supra.

It is clear from a consideration of the principles considered in the Missouri case, supra, and of the evidence in this case that the Commission cannot fairly and justly 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. If rate structure must be re-examined on a local basis, as the Commission has here attempted, then the only fair and just method, and we submit the only legal method, is to re-examine all structures of rate making on a local basis upon the same principles as the same are now examined upon a system-wide basis. We do not advocate this, but as we say, it is impossible to make local differentials that will be fair unless all factors affecting the costs of power to the consumer are considered in establishing such differentials.,

At any rate the Commission's present order directing these municipal charges to be passed on to consumers within the municipalities is not based on any evidence and it must be vacated.

POINT 3. *The report and findings of the Commission do not support its order.*

As hereinbefore indicated, under the provisions of Section 54-4-4, Utah Code Annotated, 1953, (formerly 76-4-4, Utah Code Annotated, 1943), the Commission has no authority or jurisdiction to order a change in an existing rate practice unless it shall first find that the practice is "unjust, unreasonable, discriminatory or preferential," or in violation of law. The only finding made in this regard was that "the Commission is of the 'opinion' that such method of charging the tax is 'unfair' to the rate payer residing outside the cities imposing such taxes, and would encourage all cities served by applicant to levy as high a franchise tax as possible" The Commission has nowhere found as a fact that the existing practice is unjust, unreasonable, discriminatory, preferential or in violation of law. It has only stated an arbitrary opinion that the practice is unfair.

It is obvious that this opinion as to the unfairness is not a finding as a fact that the rates are unjust within the meaning and intent of the statute. If such "Unfairness" were to be held "unjust" as a matter of law, then it must follow that the payment as a general expense of local office rentals, ad valorem city taxes levied on property located within the cities, and the cost of obtaining private easements for power lines

would also be unjust, and it would be necessary in order to establish a lawful rate, to pass on all of these expenses pro rata to the persons residing within the particular area. This is obviously not what the Legislature had in mind, for expenses of all kinds inevitably vary from place to place and the Legislature had in mind only equal rates for equal service and did not intend to grant the Commission power to order local expenses passed on as a separate item to local consumers and this create a veritable chaos in the already complicated matter of fixing rates for public utilities.

There are in law many inequalities which must be countenanced because their correction would so complicate society that society could not bear the burden of the bureaucratic regulation of every item. It is submitted that the finding made by the Commission does not bring this case within the perview of the statute and the order is unsupported by any finding required by the statute and must be vacated.

POINT 4. *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.*

It is apparent from what has been said 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.

We apprehend that here as in the telephone case now pending before this Court the Commission will raise two points in attempted answer:

First, that the obligation of the franchise contract 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 obvious that the city's inhabitants are the real parties in interest; the contract for the payment of a franchise fee was for their benefit. The franchise fees are intended to be expended by their representatives in furnishing them those municipal services for which cities are organized. Let us consider whether or not the order has impaired this obligation or has deprived them of benefits.

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 own 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 and which indeed is part and parcel of the new public policy which the Commission is sponsoring, is implicit in the opinion of the Commission (R. 25) "that it is better public policy to have the citizens and rate payers conscious of all taxes being levied by the local municipalities. The Commission finds therefore that such taxes should be billed separately and charged against the rate payers of the municipalities which levy such taxes." Obviously the citizens will not be "conscious of all taxes" unless they bear the burden thereof, and it is, of course, the express purpose and intent of the Commission that these citizens, formerly the beneficiaries of the tax, should now bear the burden thereof. It is utterly idle to contend that when a beneficiary has been converted into a burden carrier that there is no impairment of an obligation to furnish him with a benefit.

If it be argued that the obligation runs to the municipal corporation, and not to the citizen—inhabitant stockholders, and that the obligation to the corporation has not been impaired, the answer is three-fold. *First*, it is obvious that the corporation and its officers (the “public servants”) 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. vs. 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 member 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 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 power consuming inhabitants of Ogden, in whose behalf the City here appears. They are under no such disability. When the corporate fiction of the city is disregarded, as it must be here in the interest of justice, and the representative function of the city is recognized, the citizens of the city stand before the court unencumbered to claim their constitutional rights. The city claims these rights in their behalf, and with their support. Off the record, it is interesting to note that a number of rate payers in Ogden City have refused to pay the tax, thus putting the company in a most embarrassing position. It is also interesting to note, off the record, that Ogden City is now being billed as a consumer for a part of the franchise fee which the company is to pay to the City. Such is the anomalous position into which the Commission's order has forced the company against its will. And who with reason could say that when the city itself is billed for the franchise fee, that the obligation of the company to pay that fee to the city has not been impaired? Here is an exact and direct setoff and cancellation of the debt.

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 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 power company 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 Company*, 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, or 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.

43 Am. Jur. "Pub. Util."
Section 83, p. 624-625.

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 5. *The order of the Commission, by authorizing a specific and arbitrary setoff, 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 personto 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 obligation to the city and to impose in lieu thereof a new obligation upon Ogden City electric power consumers—including the city, for it uses more electric power than the “free service” affords.

The case of

St. George v. Public Utilities Commission
63 Utah 43, 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 a 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 6. *The order of the Commission unlawfully attempts to exercise power to supervise and interfere with municipal money and property and to levy municipal functions which cannot lawfully be granted 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 rewrites the franchise contract in its substance and effect. It changes the nature of the obligation from that of debtor to that of collection agent. It effects a novation by which the city’s inhabitants who use electric power 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 power use tax is quite a differet thing from a contract to grant a franchise in return for an annual payment *by the Company* of 2% of its gross receipts from local sales of electricity. There are obvious and cogent reasons why the latter is much more beneficial to the city and to its inhabitants, and much to be preferred when negotiating a contract. The change is a very material change in the contract.

Clearly the determination of the consideration for and the conditions under which a franchise is to be granted are matteers of municipal policy. Clearly the determination of the amount of a city occupation tax and of the person upon whom the burden thereof shall be imposed, is a matter of municipal policy. Under the provisions of Section 5, Article XIII of the Constitution it can be exercised only by the municipal authorities. Neither function can under the Constitution be exercised either by the Legislature or by its creature, the Commission. The provisions of the Constitution of Utah, Article XII, Section 8, Article XIII, Section 5 and Article VI, Section 29, forbid the Legislature or its Commission to meddle in these local affairs. The people framed our Constitution with unusual and far-sighted wisdom apparently anticipated the growth of state as well as Federal bureaucracies and took precautions to protect local government of the people against its encroachments.

As above demonstrated under Point 1 of this brief matters of public policy and particularly matters of municipal policy are not for the Commission.

The fixing of the City's franchise terms and conditions, as has been attempted by the Commission here, is purely and solely a municipal function entirely beyond the scope of the Commission's power. It is a function which the Legislature under the constitutional provisions referred to could not, even if it would, delegate to the Commission. We submit that the Legislature has not attempted so to do.

Again this "rewriting" of the franchise contracts, and this release of the company's obligation to the city and its inhabitants is an obvious and intolerable interference with the city's "municipal money, property and effects." It is a void attempt to exercise a power which the Legislature has not and could not delegate to the Commission and it is 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.

Again we must refer to the case of

Union Pacific Railroad Company vs. Public
Service Commission
103 Utah 186, 134 Pac. 2nd 469,

in which this Court held that under the provisions of Article XII, Section 8 of the Constitution the granting of a franchise and the imposition of condition precedent to the making of such grant are municipal functions

with which the Commission has and can have no concern. This decision clearly brings the case at Bar squarely within the prohibition of Article VI, Section 29. The Commission in this case is assuming to exercise authority which the Constitution forbids it to have.

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

POINT 7. *The order of the Commission unlawfully transforms a lawful and proper franchise fee exacted from the company into an unlawful tax on the purchase or use of electrical power 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 order of the Commission. The Commission directed that the Company "shall state on customer's bill and collect as a *separate item from its customers* in any municipality wherein is imposed any municipal franchise or license tax." It must also be noted that the Commission's findings (R. 25) are,

"That *such taxes* should be billed separately and *charged against the rate payers of the municipalities* which levy such taxes."

This is made ever more abundantly clear by the Commission's findings (R. 27) with respect to adjustments in which it made the adjustment for franchise taxes by *eliminating them as an expense item*. If more was needed to make the intention of the Commission absolutely clear, we need only to refer to Exhibit 40

(R. 838 to 896) approved by the Commission (R. 32) in which no provision is made for the collection of these taxes *as revenues from the sale of power*.

Thus the Commission has made it clear that the tax money to be collected by the Company under its order is neither revenue nor expense and that it is not and cannot be considered as a charge for power service rendered. The new schedules prescribe all of the charges to be made for power furnished and they do not include any part of the tax. On the contrary the tax is collected—as a tax—as a separate item. It is clear then that the Commission here has not even attempted to disguise its action under the pretense of rate fixing, but has baldly ordered into effect its theory of public policy with respect to municipal franchise fees and license taxes. It will be remembered that the Missouri Commission at least had the grace to make a pretense that it was fixing rates, but our own Commission has not thought it necessary to make even a pretense of confining itself within the limits of its authority. It has levied the Power Company license taxes and franchise fees directly upon the consumers as taxes and as franchise fees.

It is noteworthy that the Commission is concerned with mechanisms to control city taxes and franchise fees and not with rate making. It will be recalled that the Commission declared that the present method “would encourage all cities served by applicant to levy as high a franchise tax as is possible” Note also that the Commission states that it is of the opinion “that

it is better public policy to have the citizens and rate payers conscious of all taxes being levied by the local municipalities.”

Obviously and clearly the Commission is concerning itself not with rates which are its province, but with municipal taxes which are forbidden to it by the Constitution.

The effect of the order is that it cancels the franchise and license taxes and levies in lieu thereof a city electric power sales or use 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 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.

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 appear from that decision that there the Order in question "passed on" the tax as tax, as was attempted here. On the contrary that Order merely increased rates for service in an amount sufficient to compensate the Company for its cost in municipal taxes in each city. The case is therefore 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* requires 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 is not in point on the question of the effect of "passing on" the tax as an exercise of tax power by the Commission.

No matter what may have been the fact as to the nature of the action taken by the Washington State Commission which was the subject of the decision of the Washington Court, in this case it is very clear that the Utah Commission has here attempted to levy a tax, as a tax upon the consumers of electrical power, and this it cannot do.

In this connection, off the record, it is interesting to note that the Federal Government has refused to pay this 2% tax on power delivered for its use within the cities in question upon the ground that the Federal Government is not subject to any tax by any state or local authority. Again it must be observed that the Commission has saddled the Company with an unwanted and impossible task.

Inasmuch as the order of the Commission is an unauthorized and unlawful attempt to exercise taxing power and unlawful attempt to exercise taxing power and to interfere with the exercise of the taxing power by the authorities vested therewith it is void and must be set aside.

POINT 8. *The only case approving the passing on of a franchise fee is distinguishable. The other cases support the city's position.*

As we have before stated, there are only three cases by courts of last resort which consider the problem created by an order of a public service commission requiring a utility to "pass on" municipal franchise fees and license taxes.

The first case to be decided was the Illinois case of

City of Elmhurst vs. Western United Gas
Company (Ill., 1936)
1 Northwestern 2nd 144.

That case involved a schedule of rates filed by the defendant utility which had general application throughout the utility's northern district except as to five municipalities. In those cities the company was authorized to add to its uniform charges for gas service a "percentage differential sufficient to meet the annual payments which the Company is required to pay each of the five municipalities" by virtue of the franchise ordinances. The City of Elmhurst asked to have this differential eliminated. The Illinois Statute generally prohibited unreasonable differences as to rates as between localities and forbids discrimination. It further empowered the commission *to consider one or more municipalities as a regional unit, either with or without the adjacent or intervening rural territory* and in such unit to prescribe uniform rates for customers of the same class. The Illinois Court held that under this statute, the commission did not act unlawfully in classifying the franchise municipalities as separate units

and making differentials equal to the differences in franchise fees. This is a situation quite different from the situation in the case at Bar, for here we have no statute authorizing the isolation of a single city as a rate unit, but our statute requires rates to be fair and uniform throughout the state for equal service.

Moreover, in the Illinois case the court observed that "no question is raised as to the fairness or uniformity of the basic rate in the territory served." In this case the only evidence before the commission, which is certainly in accord with reason and general knowledge, is that the expenses incident to serving the franchise cities are less, and if any rate differential is to be established, the inhabitants of these cities are entitled to the benefit of this lower cost. In this case the positive testimony is that if various areas are to be segregated and considered separately, the company's customers outside the franchise and taxing cities benefit at the expense of the customers within those cities. Thus it is apparent that the facts before this court differ materially from the facts before the Illinois Court, and arguments based upon these factual differences are pressed here which were not pressed upon the Illinois Court.

Again, in the Illinois case the Court remarks that the city alone receives the advantage of the annual payment of a franchise fees. That is a fact entirely contrary to the evidence in the case at Bar, for here the evidence is that the privilege of doing business in the franchise and taxing cities results in a material financial benefit to the customers of the company outside the city limits.

The Illinois case is for these reasons distinguishable from the case at Bar and does not support the ruling of the Utah Commission. If it were not distinguishable, it is submitted that it is wrong on reason and should not be followed.

It should also be commented that the Illinois Court states badly, without any analysis or consideration of the problem, that the order of the Illinois Commission did not interfere with the franchise contract, and that the order of the commission did not contravene the constitutional inhibition against the impairment of contracts. We are not advised upon what arguments and considerations the Illinois Court based this conclusion. Certainly the court's failure to carefully consider the problem and outline the basis for its conclusion lessens the respect to which the opinion would otherwise be entitled. However, here again the Illinois case is distinguishable on this point, because as the court will have observed, the Illinois Commission merely authorized an increase in some of the city consumers rates sufficient to raise the amount necessary to pay the franchise tax. It did not pass on the tax as a tax to the consumer and thus relieve the utility of any obligation to pay the tax. Under the Illinois ruling the commission would still have to receive the differential as income from charges for service and would have to show the payment of the tax as an expense. Under the Utah Commission's order that is not the case. The Company in Utah will no longer pay the tax itself but will act as a collecting agent from the consumers. This is obviously a difference in substance and not merely in

form. Here again it is submitted that if the Illinois case is not distinguishable on the facts, then it would be wrong in principle and should not be followed.

The second case in which this problem was considered is

State vs. Department of Public Service
(Washington, 1943,) 142 Pac. 2nd 498, 532, 536 (Syllabi 42 to 45'.

In that case the Supreme Court of Washington had under consideration an order of the Washington Department of Public Service approving rate schedules for a telephone utility by which the rates in municipalities were made to vary sufficiently to permit the company to recover within each municipality the amount of franchise fees charged by each city for the use of its streets and the amount of license or occupation taxes. The court there held that the Department of Public service lacked legal authority to direct or permit the telephone company to pass franchise fee payments along to rate payers within the respective franchise granting cities. It pointed out that franchise fees were payments made for benefits received and that a franchise is in the nature of a contract. It pointed out that taxes on the other hand are exactions made by the government under governmental authority for the purpose of defraying governmental costs and expenses. The Washington Court concluded that the Department of Public Service there, insofar as occupation taxes were concerned, had the power to fix special exchange rates applicable to the different communities, which would in effect require the

rate payers in each community "to absorb a sum equal to the amount of the tax which respondent is required to pay to that municipality. More than this the department cannot do." This ruling was based upon an assumption apparently made by the Washington Court and Department for the court said,

"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."

The evidence in this case negatives this point made by the Washington Court, because the evidence here is that urban areas are cheaper to serve and give a financial benefit to the rural areas which franchise fees or business license taxes tend to equalize. In the case at Bar the franchise taxes are then an equalizing factor rather than a factor creating unjust discrimination. The case at Bar, as to license taxes, is distinguishable on the facts from the Washington case.

The Washington case then clearly is authority in support of the position of plaintiff in the case at Bar as to franchise fees, and is distinguishable with respect to the license tax levied by South Salt Lake. It is interesting to note that the Washington Court both criticized and distinguished the Elmhurst case insofar as it applied to franchise fees.

We have already distinguished the Washington case insofar as it bears on the question of interfer-

ence by the Commission with the taxing and franchise granting powers and prerogatives of the municipal authorities.

The third case which has been previously decided by courts of last resort is, of course, the Missouri case of

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

This case we have previously discussed in detail. It is plainly exactly in point here and in favor of the position of the plaintiff city both as to franchise fees and as to license taxes.

It thus appears that as to the authorities considering this question the only cases which have reached a result, contrary to the one here contended for, are distinguishable and other authority supports the plaintiff's position. On the authorities considered the order of the commission should be vacated and set aside.

CONCLUSION

This case and the companion case of Ogden City vs. Public Service Commission, No. 7884, recently argued and submitted to the court are, we believe, of great and paramount importance. The issues involved are much larger than the mere question of who shall ultimately bear the burden of a franchise fee or license tax. Indeed that minor question is one which never can be solved ultimately, because as a matter of fact each person who pays that tax must in turn pass it on in his charges for goods or labor to the persons he served who in turn must pass it on again. And the circle in a civilized community is endless.

The paramount question at stake here is the question of local self-government. In this case the Commission has challenged the very constitutional foundations of local self-government which is so characteristic of our American civilization. This challenge should be thrown back.

It is respectfully submitted that on reason and on authority the Commission below acted illegally, arbitrarily and capriciously, and in excess of its jurisdiction in entering the order requiring the company to pass on the tax to its consumers within the franchise and taxing cities, and that order should be vacated.

Respectfully submitted,

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