

1959

State Road Commission of Utah v. Utah Power & Light Co. et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE ROAD COMMISSION
OF UTAH,

Plaintiff and Appellant,

— vs. —

UTAH POWER & LIGHT COM-
PANY, a corporation; MOUNTAIN
FUEL SUPPLY COMPANY, a
corporation, and MOUNTAIN
STATES TELEPHONE AND
TELGRAPH COMPANY, a cor-
poration,

Defendants and Respondents.

FILED

NOV 25 1959

Clerk, Supreme Court, Utah

Case
No. ~~9163~~

9136

BRIEF OF APPELLANT

UNIVERSITY OF UTAH

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STATEMENT OF FACTS

This action was commenced by the State Road Commission and challenges on constitutional grounds the validity of Chapter 53 of the 1957 Session Laws of Utah, now Section 27-2-7, Subsection (22), Utah Code Annotated, 1953. This section is commonly referred to as the utility relocation act and in substance provides that the appellant here will pay all of the costs incurred by a util-

ity incident to relocating its facilities when the same becomes necessary by reason of interstate highway construction. No distinction is made as to whether the existing facility is within or without the right-of-way of the existing highway, and the only condition to payment is that the state highway department be in a position to obtain proportionate reimbursement from federal funds.

The complaint of the State Road Commission alleged that the Mountain States Telephone and Telegraph Company had been granted a franchise by Davis County to erect and maintain telephone poles and wires within the right of way of a county road known as Howard Street. A portion of this county road will now become a part of the national system of interstate and defense highways and the poles and wires of the telephone company must be removed and relocated.

As to Mountain Fuel Supply Company, the complaint alleged that there were located certain facilities within the right-of-way boundaries of Seventh East Street in Salt Lake City, Utah, by virtue of a franchise granted by the city. This street from Thirteenth South Street to Simpson Avenue has been designed as a federal aid secondary highway and the present widening of this street will require the relocation of the fuel company's facilities.

Utah Power and Light Company is also the recipient of a franchise from Salt Lake City that permits the erection of poles and electric light and power lines within the right-of-way of the city streets. Interstate highway

construction along Sixth West Street between North Temple and Fifth North Streets necessitate the relocation of these facilities.

In all three instances the utility has demanded of the State Road Commission that it pay the costs incurred in the relocation of the facilities of the utility. The Commission contends that it cannot legally make such payment and this action is brought under the provisions of the Declaratory Judgments Act, Chapter 33 of Title 78, Utah Code Annotated, 1953, to determine the controversy.

After the complaint was filed, the three defendant utilities answered effectively admitting the factual allegations but denying that the act in question was unconstitutional. Both parties thereupon filed separate motions for judgment on the pleadings. The court below denied the motion of the plaintiff, granted that of the defendants, held the Utility Relocation Act to be constitutional and ordered the State Road Commission to reimburse the defendant utilities for their relocation costs. This appeal is taken from that judgment.

STATEMENT OF POINTS

POINT I.

SECTION 27-2-7(22), UTAH CODE ANNOTATED, 1953, AS AMENDED BY CHAPTER 53, LAWS OF UTAH, 1957, VIOLATES SECTION 27 OF ARTICLE VI OF THE CONSTITUTION OF UTAH.

POINT II.

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ARGUMENT

POINT I.

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SECTION 27-2-7(22), UTAH CODE ANNOTATED, 1953, AS AMENDED BY CHAPTER 53, LAWS OF UTAH, 1957, VIOLATES SECTION 31 OF ARTICLE VI OF THE CONSTITUTION OF UTAH.

The arguments to be hereinafter advanced in support of the position of the State Road Commission can be best combined as to both points in order to avoid needless repetition.

We commence with the assertion, that we believe to be unassailable, that it is a proper exercise of the police power of the state in requiring public utilities to relocate at their own expense facilities placed on public land whenever that relocation is justified by the need of the state to make a greater use of its lands and of its streets and highways. This principle is sustained in the case of

Owensboro v. Cumberland Telephone & Telegraph Co., 230 U. S. 58, and in *New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831.

The 1957 Utah State Legislature now seeks to change this established rule and to require that the state assume this entire cost of relocation. We maintain that this operates to release and extinguish an obligation and liability presently existing in favor of the state and that it operates to lend the credit of the state to these utilities that benefit thereunder.

The Federal Highway Act of 1956 first permitted reimbursement to the state of the payment of relocation costs of utilities but provided that “federal funds shall not be used to reimburse the state under this section when the payment to the utility violates the law of the state or violates a legal contract between the utility and the state.” 23 U. S. C. A., Sec. 123.

The United States Department of Commerce, Bureau of Public Roads, has issued a policy and procedure memorandum No. 30-4 and Section 3(2) contains a requirement “that the state certifies that payment for the utility relocation is not in violation of the laws of the state or any legal contract between the utility and the state. If there should be any question as to the state’s authority to pay for such relocation, the state may be required to cite or establish its authority to pay for such relocation.”

Since the enactment of the quoted provision by the Federal Highway Act of 1956, a number of states have passed amendments to their state highway codes in order to enable their highway commissions to pay utility relocation costs and secure proportionate reimbursement with federal funds. The legislative action in this respect has had judicial review in seven states in which a statute similar to the Utah statute was involved. In addition, the general question of the costs of relocating utilities has been before the courts of five other states. We believe it proper in the present instance to comment on each of these cases.

The five states, whose courts have reviewed the utility relocation problem, but without benefit of a specific statute, are Maryland, New Jersey, Pennsylvania, New York and Kentucky.

In the case of *Baltimore Gas & Electric Co. v. State Roads Commission*, 214 Md. 266, 134 A. 2d 312, a petition for a declaratory judgment was filed by the Commission seeking an interpretation of a statute passed by the Maryland legislature. This legislation directed the Commission to build a tunnel under the Patapsco River in Baltimore Harbor as a revenue bond project and the portion of the statute under dispute read that "all private property damaged or destroyed in carrying out the powers granted by this sub-title shall be restored or repaired and placed in its original condition as nearly as practicable or adequate compensation made therefor * * *."

The Court stated the problem as follows :

“Unless the legislature directs to the contrary, the rule is that a public utility must, at its own expense, remove and relocate its service facilities, in, on or under a public road or other land owned by the state if this is made necessary by improvement or extension of the road system. The question before us is whether the legislature, in authorizing the State Roads Commission to build toll bridges, tunnels and motorways * * * changed this common law rule as to relocations required by the construction of revenue projects.”

The Court proceeded to hold that the section of the statute quoted above did change the common law rule in Maryland as to the relocation of utility facilities on revenue bond projects.

In connection with this Maryland case, we would direct attention to the fact that it dealt with a revenue bond project and did not involve either the release of an obligation to the state nor a pledge of the credit of the state. No constitutional questions were submitted to or decided by the Court.

In the case of *Wilson v. City of Long Branch*, 27 N. J. 360, 142 A. 2d 837, a taxpayers' suit sought to prevent the city and its planning board from proceeding under the Blighted Area Act on grounds that the act was unconstitutional. The Blighted Area Act provided in general terms for community redevelopment by municipalities after following certain required procedures and the act itself made provision for the payment of the costs of utility relocation. This was attacked only on the grounds that

it was discriminatory and that no similar provision was made for the homeowner or the businessman.

The Court found that the act was not discriminatory, that utilities are necessary adjuncts of the public welfare and may be treated as a class, and that “the requirement of equal protection is satisfied if all persons within a class reasonably selected are treated alike.” Again we submit that there is no constitutional provision similar to that in the Utah Constitution involved here.

In *Delaware River Port Authority v. Pennsylvania Public Utility Commission*, 393 Pa. 639, 145 A. 2d 172, the Commission had entered an order requiring the Authority to pay the entire cost of relocating certain facilities of an electric company in connection with the construction of the Walt Whitman bridge across the Delaware River. On appeal the Supreme Court of Pennsylvania held that the Commission had exceeded its authority in that the statute gave it the power to direct such payment only to utilities engaged in the transportation of passengers or property. The Court referred to the common law rule requiring that utilities pay the entire cost of relocation where their facilities were on the public right-of-way and stated that “a legislative intent to effect any departure from a firmly established policy of the law must be expressed in clear and unequivocal language.” Again no constitutional problem was presented or decided.

Of interest is the following quotation from the case of *Department of Highways v. Pennsylvania Public Utility Commission*, 185 Pa. Super. 1, 136 A. 2d 473:

“This situation encouraged the introduction of bills in various state legislatures to require the state (and thus the federal government) to pay for the relocation of utilities located within the highway rights-of-way. Opposition to this proposed legislation arose among automobile clubs, and others, who saw in it a substantial reduction of available funds for desperately needed highway construction. For this and other reasons the proposals in most states were not enacted into law.

“In Pennsylvania House Bill No. 984 (Session of 1957) passed the House and Senate, but was vetoed by the Governor July 16, 1957. The bill provided that whenever the Secretary of Highways should determine that any utility located in, on, or above, any highway should be relocated to accommodate a reimbursable federal-aid highway project the cost of relocation should be paid by the Commonwealth out of the Motor License Fund.”

The New York courts have dealt with this problem as a statutory one only and have reached different conclusions depending upon the statute involved. An early case, *Oswego & Syracuse Railroad Co. v. State*, 226 N. Y. 351, 124 N. E. 8, involved the required destruction and rebuilding of a railroad bridge across a barge canal in order to accommodate increased traffic and larger vessels. The court determined that the statute in question required the State of New York to pay the cost of rebuilding the larger structure.

Again, in *Westchester Electric Railroad Co. v. Westchester County Park Commission*, 255 N. Y. 297, 174 N. E. 660, and based upon the statute authorizing the county to build the Hutchinson River Parkway, the Court held

that the Commission had the power to agree with a railroad and a gas company to reimburse them for necessary expenses in relocating their facilities.

But, in *Transit Commission v. Long Island Railroad Company*, 253 N. Y. 345, 171 N. E. 565, and in *New York Tunnel Authority v. Consolidated Edison Co.*, 295 N. Y. 467, 68 N. E. 2d 445, contrary results were reached. In the latter case, the Authority was created as a public corporation to construct the Queens Midtown Tunnel and the project was to be financed through the issuance of revenue bonds. Nonetheless, the Court construed the statute as requiring that the utility pay its relocation costs. In the first case cited in this paragraph a gas company was required to pay its relocation costs in connection with the elimination of a grade crossing by the use of a highway overpass. The Court cited *New Orleans Gas-light Co. v. Drainage Commission of New Orleans, supra.*, and quoted from this case as follows:

“ ‘It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be at some future time, disturbed, when the state might require for a necessary public use that changes in location be made. * * * We see no reason why the same principle should not apply to the subsurface of the streets, which, no less than the surface, is primarily under public control. The need of

occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage; and every reason of public policy requires that grants of rights in such sub-surface shall be held subject to such reasonable regulation as the public health and safety may require.' ”

And, finally the case of *Southern Bell Telephone & Telegraph Co. v. Commonwealth of Kentucky*, 266 S. W. 2d 308, shows the following fact situation as taken from the Court's opinion:

“The Watterson Expressway is a new limited access Federal-aid highway. It has been planned and is being constructed to connect U. S. highways 42, 60, 31E, and 31W in such a way as to enable traffic to proceed from either of said highways to the other without going through the business section of the city of Louisville. One-third of the right of way cost and one-half of the construction cost are to be paid by the Federal government. The new highway crosses, at various points, numerous established highways upon which Southern Bell has for many years maintained its poles, wires, and conduits. At certain points, it includes for a short distance portions of previously established public highways. At such points, it is necessary that the telephone company's facilities be removed and relocated in order to construct the new Expressway.”

Based upon this fact situation, the Court ruled as follows:

“We take judicial notice of the fact that most of the highway construction in Kentucky has occurred during the past thirty years. If we accept appellant's narrow construction of its legislative

franchise, the state would have been required to locate or relocate its principal roads built within that time with the primary object of avoiding interference with appellant's facilities rather than conforming to the convenience and safety of the traveling public. The necessary alternative to location of its roads so as not to affect appellant's facilities would have been that the state should pay for the removal and location of the poles and lines which interfered with construction of new highways or improvement or reconstruction of existing roads. If construed as requiring removal and relocation at the expense of the state, the franchise was in violation of Article II, §33, of our Third Constitution, which was carried over into Section 177 of our present constitution, and provided:

“ ‘The credit of this Commonwealth shall not be given or loaned in aid of any person, association, municipality, or corporation.’ ”

In addition to the five states noted above, seven state legislatures adopted statutes similar to or identical with Chapter 53 of the 1957 Session Laws of Utah; and the courts of each of these seven states have had occasion to rule upon the validity and effect of such a statute. Again, we feel it necessary to cite these cases and comment upon them and, in the order in which we propose to discuss them, the cases cited are from the states of Texas, Maine, New Hampshire, Minnesota, Tennessee, New Mexico and Idaho.

In *State of Texas v. City of Dallas*, 319 S.W. 2d 767, the state sought a declaratory judgment as to the constitutionality of a statute similar to the Utah statute in question here. Joined as defendants, in addition to the

City of Dallas, were the City of Austin, Southern Union Gas Company, Lone Star Gas Company, Dallas Power and Light Company and Southwestern Bell Telephone Company. In addition to other grounds not material to the present controversy, it was urged that the statute was invalid and in violation of the Texas Constitution as a gift or loan of the credit of the state and as a release of the obligations of corporations and individuals. In sustaining the constitutionality of the statute, the intermediate Texas appellate court indulges in many citations and we are not impressed with the reasoning advanced in support of the ruling. We are advised that this case is on appeal to the Supreme Court of Texas and we are not informed that a decision has been rendered as of the date of this writing.

Both of the cases from Maine and New Hampshire are cited as Opinion of the Justices, the former at 132 A. 2d 440, and the latter at 132 A. 2d 613. Both cases arose from a request by the state legislature to the State Supreme Court requesting an advisory opinion as to the constitutionality of pending legislation similar to that enacted in Utah as Chapter 53 of the 1957 Session Laws. In the Maine case, the court found the statute to be constitutional as long as the funds for the payment of relocation costs did not come from that fund reserved by the Maine Constitution for the construction and reconstruction of highways. The court did not construe that language to include the relocation of a utility facility. The New Hampshire decision held that the legislature may declare the reloca-

tion of utility facilities to be a part of highway construction and to be paid out of highway funds.

May we note that in neither case was any inquiry directed to any constitutional provision similar to those in our Utah Constitution; and may we call the Court's attention to the fact that, under the practice in Maine and New Hampshire, an opinion of the justices is not an opinion of the Court. It is construed as the giving of advice by the individual members of the Court and is not binding in an adversary proceeding. See *Martin v. Maine Saving Bank* (Maine), 147 A. 2d 137, and Opinion of Justices, 76 N. H. 597, 74A. 490.

In the Minnesota case of *Minneapolis Gas Co. v. Zimmerman*, 91 N. W. 2d 642, the company under agreement with the Commissioner of Highways undertook the relocation of its utilities and thereafter sought reimbursement for the cost of such relocation. A summary judgment was entered in favor of the company and an appeal was taken by the Highway Commissioner. Minnesota in 1957 had enacted a statute similar to Chapter 53 of the 1957 Session Laws of Utah and reimbursement was sought under that statute. The defense to reimbursement was based upon the contention that the statute in question was violative of the Minnesota Constitution on five grounds, namely: (1) That it diverted funds for a nonhighway purpose; (2) That it authorized the expenditure of funds for a private purpose and that it constituted a loan or gift of the credit of the state; (3) That it constituted the contracting of debts for works of internal improvement; (4)

That it granted a special or exclusive privilege, immunity or franchise to a corporaion ; and (5) That it impaired the obligation of a contract.

Although the Minnesota Court resolved all five questions in favor of the constitutionality of the statute, only the discussion as to subdivision (2) above is of importance to the matter before this Court. In finding that there was no loan of the state's credit, the Court examined the public nature of utilities and the express purpose of the statute and then made the following observation :

“* * * The realities of the situation are that the people of Minnesota would suffer economically if the state failed to take advantage of Federal aid made available to the privately and municipally owned utilities of this state under the Federal-Aid Highway Act of 1956, in 70 Stat. 383, 23 U. S. C. A. § 162. The Federal-aid program is to be financed out of Federal funds, presumably resulting from Federal taxes contributed in part by the people of this state. If the utilities located in this state must undertake relocation of their facilities without a right to reimbursement, their costs will be substantially increased and this in turn will be reflected in higher utility rates in Minnesota communities. Furthermore, to the extent that other states effectuate Federal aid to their utilities and Minnesota does not, the people of Minnesota will be paying Federal taxes which will benefit the people of the other states but which will not benefit the people of Minnesota. The resulting economic benefit to the people of Minnesota from an authorization of these expenditures is a benefit to the community as a whole.”

We find it difficult to accept the reasoning that a statute should be found constitutional because it will operate to the benefit of the citizens of the state and because a contrary ruling would cause the citizens of that state to suffer tax-wise. We believe it proper to consider that wherever moneys are to be made available through federal sources if one state gains financially another state must suffer some financial loss. The argument advanced in the Minnesota case would have the effect of holding the statute in question constitutional where a benefit is derived and unconstitutional if a financial loss were to ensue. It is difficult for us to conceive that the same statute will be declared constitutional or unconstitutional depending entirely upon whether or not a particular state will or will not reap a financial advantage therefrom.

The Minnesota Constitution, Article 9, Section 10, provides:

“The credit of the state shall never be given or loaned in aid of any individual, association or corporation * * *.”

The case of *Minneapolis Gas Co. v. Zimmerman*, supra, holds that this provision does not prevent “the legislature from, by prospective action (that is by an enactment prior to the ordering of a relocation of utility facilities or prior to the commencement of a great public work requiring such relocation), fixing the conditions of performance and making provisions for the future recognition of claims for damages founded on equity and justice, although such claims would otherwise be *damnum absque injuria* and unenforceable against the state.”

We submit that the Utah Constitution is not susceptible of the same interpretation and that the use of the language "the Legislature shall not authorize the state * * * to lend its credit * * *" does not permit of legislative action to the contrary even if it be on a prospective basis.

The remaining three cases have found the reimbursement provision of the relocation statutes to be invalid based upon the Constitution of the state involved. The first case is *State of Tennessee v. Southern Bell Telephone Co.*, 319 S. W. 2d 90. This action was brought in the name of the state on the relation of the Commissioner of Highways for a declaratory judgment seeking a declaration as to the constitutionality of a utility relocation statute substantially the same as the one passed by the Utah Legislature. The court discussed the purpose sought to be accomplished, found it to be neither a state or a public purpose and said:

"If the Legislature is without authority under the Constitution to enact a law, the situation is the same as though there were no attempted enactment. Since the Constitution forbids the State from giving, or lending its credit '* * * to or in aid of any person, association, company, corporation or municipality,' it is immaterial whether there is an attempt to have public monies paid out under the guise of legislative sanction.

"We think that the basic test under this Section of our Constitution is whether the expenditure is for a State purpose. In the present case the primary purpose served by the expenditure is for the

convenience and benefit of the utilities, the purpose cannot be public. * * *”

It may be noted that this case was the subject of a rehearing granted by the Tennessee court and the opinion on rehearing reasserted the invalidity of the statute. A concurring opinion offered the observation that “if by its fiat the legislature can authorize the expenditure of these large sums on properties in which the state has no financial interest and no control other than the regulatory powers over any corporation ‘affected with a public interest,’ then I see no way to restrain the legislature within the limits of Article II, Section 31 of our State Constitution, whenever it may decide to do equity according to its own conception.”

May we offer the further observation and urge upon the Court that, if the state legislature may declare it to be a public purpose and require that the state pay the costs of the relocation of the utility facilities, it may in the first instance require the state to pay all of the initial cost of locating the utility on the public highway. We submit that such a construction would wholly negative the constitutional limitation without a constitutional amendment.

The second case is *State Highway Commission v. Southern Union Gas Co.*, 65 N. M. 84, 332 P. 2d 1007. In this case the declaratory judgment procedure was again used to determine the constitutionality of the utility relocation statute passed by the New Mexico legislature. The act is again substantially the same as the one under

attack in the instant case. The New Mexico Constitution prohibits a donation of state funds in aid of a private corporation and also prohibits the release of an existing obligation. In determining the relocation statute to be repugnant to these sections of the Constitution, the New Mexico Supreme Court quoted from the recent case of *Mulkey v. Quillian*, 213 Ga. 507, 100 S. E. 2d 268, as follows:

“The removal and relocation of utility facilities is not a necessary or usual adjunct to the construction of highways. State-aid highways can be and are constructed and maintained without any utility facilities being located on their rights-of-way. Utility facilities are placed thereon purely for the convenience of the political subdivisions or authorities controlling the utility and serve no useful or desirable purpose in the construction and maintenance of the highway itself and serve no convenience of the highway or the highway department.

Continuing the New Mexico Court said:

“In conclusion, we would answer the main argument of the appellee that relocation of these utilities is a public governmental function by stating that the construction of highways is unquestionably a public governmental function but that we disagree as to relocation of utility facilities. Highways are constructed by the state on state-owned rights-of-way for the use of the public. The Southern Union Gas Company, in laying its gas lines, is acting solely for the benefit of the utility. The line is the property of the utility and to be used solely by it, neither the state nor the public having any right to use these lines. The Southern Union Gas Company is not a subordinate governmental

agency nor is it fulfilling a governmental function although it is serving a highly useful purpose in the great American free enterprise tradition by furnishing for profit an essential commodity to the people of this state.”

And the New Mexico Court concluded as follows:

“Much has been said concerning the power of the legislature to reimburse the utility on the basis of equity and justice. That the legislature has the power to be equitable and just we may admit, but that power is restricted by the Constitution. Otherwise the prohibition against a donation would have no meaning or effect. As stated in *State ex rel. Sena v. Trujillo*, (46 N.M. 361, 129 P. 2d 333) ‘the constitution makes no distinction as between “donations,” whether they be for a good cause or a questionable one. It prohibits them all * * *.’”

The third case in this group was decided by the Idaho Supreme Court on October 2, 1958, and has not yet been reported. It is entitled *State of Idaho v. Idaho Power Company and Mountain States Telephone and Telegraph Company*. The same declaratory judgment action was brought on behalf of the state to test the same type of utility relocation statute. The Idaho Constitution, Article 8, Section 2, is almost identical with its Utah counterpart and reads as follows:

“The credit of the state shall not, in any manner, be given, or loaned to, or in aid of, any individual, association, municipality or corporation.”

In holding the relocation statute invalid, the Idaho Court said:

“Clearly, the legislature at all times has recognized, and continues to recognize that all roads,

streets and highways are held in trust by the state and its political subdivisions for use by the public; also, that the granting by the state or political subdivision of a vested or permanent property right or interest in any public street or highway would not only be violative of such public trust, but would result in diminution of the quantum of ownership of the public in its public thoroughfares; and that so to do would constitute the giving or loaning of the credit of the state to or in aid of an individual, municipality or corporation, violative of Idaho Constitution, Article 8, Section 2, or a gift of the public property in violation of the implied limitations of the Constitution.”

The decision of the Idaho Court is lengthy and contains a good resume of most of the cases dealing with the subject, and of more than passing interest is the reference to the famous case of *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60, and to the following statement from Chief Justice Marshall:

“The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.”

And may we refer to this Court’s recent decision in the case of *Moon Lake Electric Association and Uintah Basin Telephone Association v. Utah State Tax Commission*, decided on October 29, 1959, and not yet reported. In

holding that certain acts dealing with the taxation of cooperative nonprofit corporations were unconstitutional, this Court said:

“The petitioners assert that the Sections 16-6-16 and 17 are just and wise legislation. They feel that the public will benefit from the effect of such statutes. Undoubtedly the majority of the legislators concurred in this view. As interesting as petitioners’ views thereon are, this court cannot properly consider them here. The analogy to the situation presented in *State v. Armstrong* (17 Utah 166, 53 Pac. 98), is noted. There the section under consideration provided, so far as material, that a board of equalization ‘may remit or abate the taxes of any insane, idiot, infirm or indigent person to an amount not exceeding \$10.00 for the current year.’ The court there said: ‘In arriving at the conclusions that the provision of the statute in controversy is null and void, we were not unmindful of the fact that the question whether an enactment of the legislature is void because of its repugnancy to the constitution is always one of much delicacy, and in a doubtful case should seldom, if ever, be decided in the affirmative. Where, however, the mind is convinced of the unconstitutionality of the law, the duty which devolves upon the court to declare it so is imperative, even where, as in this case, the statute appears to be in consonance with justice and humanity. That the law itself would be beneficent can be of no avail in this case, because its effect and operation would be to exempt property, against the mandate of the fundamental law.’ ”

CONCLUSION

It is respectfully submitted that Chapter 53 of the 1957 Session Laws of Utah is repugnant to both Sections

27 and 31 of Article VI of the Constitution of the State of Utah to the extent that the chapter directs the reimbursement of utilities for their costs of relocating facilities presently on public rights-of-way.

Respectfully submitted,

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