

1960

State Road Commission of Utah v. Utah Power & Light Co. et al : Petition for Rehearing

Utah Supreme Court

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Walter L. Budge; Robert S. Campbell, Jr.; Franklyn B. Matheson; Attorneys for Petitioner;

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In the Supreme Court of the State of Utah

STATE ROAD COMMISSION OF UTAH,
Petitioner,

-VS-

UTAH POWER & LIGHT CO., a corpora-
tion; MOUNTAIN FUEL SUPPLY
CO., a corporation; and MOUNTAIN
STATES TELEPHONE & TELE-
GRAPH CO., a corporation,
Respondents.

FILED

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Clerk, Supreme Court, Utah

Case No. 9136

UNIVERSITY OF UTAH**PETITION FOR REHEARING**

JUL 10 1967

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In the Supreme Court of the State of Utah

STATE ROAD COMMISSION OF UTAH,
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-VS-

UTAH POWER & LIGHT CO., a corporation;
MOUNTAIN FUEL SUPPLY CO., a corporation; and MOUNTAIN
STATES TELEPHONE & TELEGRAPH CO., a corporation,
Respondents.

Case No. 9136

PETITION FOR REHEARING

PRELIMINARY STATEMENT

On May 26, 1960, the Supreme Court of the State of Utah affirmed a Summary Judgment rendered in the Third Judicial District Court in favor of Respondents and declared as constitutional Chapter 53, Laws of Utah 1957, commonly referred to hereinafter as the Utility Relocation Act, codified as Section 27-2-7(22) (a), U.C.A. 1953, as amended.

It is submitted and alleged that, in respect to the constitutional issues raised, the Court was in error. Further, even were such statute assumed constitutional, problems

in the interpretation and construction of said Act persist, making application thereof impossible without further clarification and amplification of the Supreme Court decision as written.

For these reasons and because of the far reaching consequences of the decision as rendered, the State Road Commission of Utah herewith petitions the Court to rehear the immediate matter based on the facts and points set forth hereinafter.

STATEMENT OF FACTS

The Federal Highway Act of 1956 provides as follows:

“When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. *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.* * * *” (Emphasis added). (23 U.S.C. 123).

Subsequent to the Federal Act, the Utah Legislature by Laws of Utah 1957, Chapter 53, passed the following act to take effect May 14, 1957:

“The Commission [State Road Commission] shall have the following powers and duties:

* * *

(22) (a) To make reasonable regulations for the installation, construction, maintenance, repair, renewal and relocation of all facilities and drainage

and irrigation systems (herein called 'facilities') of any utility in, on, along, over, across, through, or under any project on the federal-aid primary or secondary systems of highways as the same now are or may hereafter be defined by Act of Congress, or on the interstate system, as herein defined, including extensions thereof within urban areas. Whenever the commission shall determine that it is necessary that any such facilities which now are, or hereafter may be, located in, on, along, over, across, through or under any such federal-aid primary or secondary system or on the interstate system, including extensions thereof within urban areas, should be relocated, the utility or political subdivision owning or operating such facilities shall relocate the same in accordance with the order of the commission; *provided, however, that the cost of relocation in connection with the highway systems as defined in this paragraph, shall be paid by the commission in all cases where proportionate reimbursement of such cost may be obtained by the state of Utah from the United States pursuant to the Federal-Aid Highway Act of 1956.* In case of any such relocation of facilities, as aforesaid, the utility or political subdivision owning or operating the same, its successors or assigns, may maintain and operate such facilities, with the necessary appurtenances, in the new location or locations."

(Emphasis added).

(Section 27-2-7 (22) (a), U.C.A. 1953, as amended).

In approximately June, 1957, the State Road Commission requested each of the respondents herein to relocate certain facilities situated within public right of way to facilitate highway construction in connection with federal aid road building projects. In each case the utility demanded that the State Road Commission pay the relocation costs incurred. In each case the utility occupied the right-of-way

by virtue of a franchise agreement with the political subdivision involved.

The Mountain States Telephone and Telegraph Company had been given a fifty year franchise from December 29, 1947, by Davis County to occupy certain portions of a county road known as Howard Street. Though the franchise agreement stipulated that the Company would be subject to all lawful exercise of the police power by the county, nothing was said therein as to relocation costs. (See Exhibit A.)

The Mountain Fuel Supply Company had been granted a fifty year franchise from October 27, 1953, by Salt Lake City to occupy certain portions of 7th East Street. Though this franchise agreement likewise stipulated that the Company would at all times during the life of the franchise be subject to all lawful exercise of the police power by the City, nothing was said therein as to relocation costs. (See Exhibit B.)

The Utah Power and Light Company had been given a fifty year franchise from January 1, 1951, by Salt Lake City to occupy certain portions of Sixth West Street. Though this franchise agreement stipulated that all lines, poles, towers, conduits and other structures constructed under the grant should be located as to cause minimum interference with the proper use of such streets, alleys and public places, nothing was said as to relocation costs. (See Exhibit C.)

On advice of the Attorney General, the Road Commission refused to pay the relocation costs demanded by the respondents, and this action was brought by the Com-

mission under the provisions of the Declaratory Judgments Act, Chapter 33, Title 78, U.C.A. 1953, to determine the constitutionality of the Utility Relocation Act and the obligation of the State Road Commission thereunder. The District Court held the Utility Relocation Act to be constitutional and ordered the State Road Commission to reimburse the respondent utilities for their relocation costs. This Court then affirmed by its decision of May 26, 1960.

STATEMENT OF POINTS

POINT I

THE USE BY THE RESPONDENTS OF PUBLIC HIGHWAY RIGHT-OF-WAY IN THE EMPLACEMENT OF THEIR FACILITIES DOES NOT CONSTITUTE A USE PUBLIC IN NATURE SO AS TO VOID THE OPERATION OF ARTICLE VI, SECTION 31 OF THE UTAH CONSTITUTION.

POINT II

THE PERMISSIVE USE OF THE PUBLIC HIGHWAY RIGHT-OF-WAY BY THE UTILITY IN EMPLACING ITS FACILITIES THEREON DOES NOT VEST IN IT A PROPERTY RIGHT OF ANY NATURE.

POINT III

NEITHER THE UTILITY RELOCATION ACT NOR THE DECISION AS RENDERED IMPOSES AN OBLIGATION UPON THE STATE ROAD COMMISSION TO REIMBURSE RELOCATION COSTS IN CONTRAVENTION OF THE SPECIFIC TERMS OF A WRITTEN CONTRACT BETWEEN THE UTILITY AND THE STATE ROAD COMMISSION.

POINT IV

TO THE CONTRARY THE UTILITY RELOCATION ACT SPECIFICALLY PROTECTS THE OBLIGATION OF CONTRACT AND ABSOLVES THE STATE ROAD COMMISSION FROM RELOCATION COSTS WHERE BY WRITING, SUCH OBLIGATION HAS PREVIOUSLY BEEN ASSUMED BY THE UTILITY.

POINT V

THE UTILITY RELOCATION ACT IS, BY ITS VERY TERMS, DEVISABLE AND THE PROVISO REGARDING RELOCATION COSTS DOES NOT QUALIFY OR EFFECT THE PLENARY POWER GRANTED TO THE STATE ROAD COMMISSION TO REGULATE, CONTROL AND RELOCATE FACILITIES LOCATED ON A PUBLIC RIGHT-OF-WAY.

POINT VI

THE PERMISSIVE USE GRANTED TO A UTILITY OF THE PUBLIC HIGHWAYS DOES NOT CONSTITUTE A USE AS NECESSARY AND INDISPENSABLE AS THE USE OF SUCH HIGHWAY AS A MEDIUM FOR VEHICULAR TRAFFIC.

ARGUMENT

POINT I

THE USE BY THE RESPONDENTS OF PUBLIC HIGHWAY RIGHT-OF-WAY IN THE EMPLACEMENT OF THEIR FACILITIES DOES NOT CONSTITUTE A USE PUBLIC IN NATURE SO AS TO VOID THE OPERATION OF ARTICLE VI, SECTION 31 OF THE UTAH CONSTITUTION.

It was the contention of the State of Utah heretofore, and it shall continue to be the State's contention herein, that to allow the specific statute, 27-2-7(22), U.C.A. 1953, as amended, to finance the cost of placing and relocating the facilities of privately owned utilities on the highway right-of-way of the State of Utah and the cost, to a large extent, of the facilities themselves at public expense, is to fly into the face of the constitutional mandate prohibiting the lending of public credit to a private instrumentality. If it be admitted, and we believe that it has so been and is, that the respondents are engaged in private enterprise, that their assets are acquired through the medium of capital subscription and contribution from private sources, that a primary purpose thereof is to realize a net return on invested capital, that private individuals receive payments in the form of dividends from the respondents based on net profits and in proportion to representative interests, that to some extent the respondents compete among themselves for customers and new business, and that they are private and independent instrumentalities devoted to profit-making ventures while performing their services, then without reservation it may be said that a contribution of public moneys for the respondents' use in the furtherance of their businesses, absent a basis in contractual obligation or legal indebtedness, contravenes the import of the Constitution.

It is agreed without exception by all parties hereto that a utility, exclusive of legislation to the contrary, placing its facilities on the public streets and highways, gains no property right thereby, and upon demand of the public authority, pursuant to lawful and reasonable exercise of the police power, it must remove the facility at its own expense and cost. *New Orleans Gaslight Co. v. Drainage Commission*, 197 U.S. 453, 25 S. Ct. 471, 49 L.Ed. 831; *State*

of *Idaho v. Idaho Power Co. and the Mountain States Telephone and Telegraph Co.*, —Ida.—, 346 P.2d 596 (1959); *New York City Tunnel Authority v. Consolidated Edison Co. of New York*, 295 N.Y. 467, 68 N.E.2d 445; *State Highway Commission of New Mexico v. Southern Union Gas Co.*, 65 N.Mex. 84, 332 P.2d 1007; *State of Tennessee v. Southern Bell Telephone Co.*, 319 S.W.2d 90 (Tenn.); *Bell Telephone Co. v. Pennsylvania Public Utilities Commission*, 12 A.2d 479 (Pa.). The majority opinion in the instant case accepts this observation as accurate. Nothing by way of a vested property interest accrues to the utility by reason of the franchise voluntarily given it by the state, nor does the state suffer any obligation or indebtedness to the company in permitting it to utilize the public right-of-way. The risk of removing and relocating the facilities rests at the feet of the company under the classic rule recognized in virtually all jurisdictions of “damnum absque injuria.” *New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, supra; *State of Idaho v. Idaho Power Co. and Mountain States Telephone and Telegraph Co.*, supra. By this fact that the utility acquires no property interest in and to the public right-of-way, the requirement by the state government to remove and relocate the facilities does not constitute or qualify as a taking within the eminent domain clause of the Constitution, Art. I, Sec. 22, or statutes, 78-34-1- et seq, but rather remains constant as a proper police power regulation. *Atlantic Coast Line Railroad Co. v. The City of Goldsboro*, 232 U.S. 548, 34 S. Ct. 364, 58 L.Ed. 721. It is safe to say that the common law may be modified, altered or changed by the Legislature, and with this proposition we have no quarrel; we would but add thereto, that as a condition precedent to such alteration, modification

or change, the statute comply with the elements of constitutional law in all respects and that a failure to adhere to such must result in it being stricken as invalid.

This Court, in its opinion, set forth a list of cases allegedly to have dealt with or passed on the constitutionality of similar legislation under similar constitutional provisions. With due respect, we would argue that the weight of authority is by no means in favor of the respondents' contentions, and further, we would allege that several of the cases cited by the Court have no application or relevancy to the case at bar.

To begin with, the Court cites the *Opinion of the Justices*, 132 A.2d 440 (Me. 1957). The rule is well recognized in those jurisdictions wherein the Justices of a court may be called upon to advise as to the constitutionality of proposed legislation, that any opinion delivered in such advisory capacity does not constitute an official judicial decision of the highest court and any question brought forth or considered under such an opinion may be litigated at a subsequent time without being barred by the doctrine of res adjudicata. In no sense does the proceeding partake of an adversary nature and opposing arguments are not formally presented. *Martin v. Maine Saving Bank*, 147 A.2d 137 (Me.); *Opinion of Justices*, 76 N.H. 597, 74 A. 490.

The appropriateness of this decision is well taken in connection with the interpretation of Section (e) of the statute under consideration, which reads in part:

“The cost of relocating utility facilities in connection with any project on the Federal-Aid primary or secondary systems or on the Interstate System

is hereby declared to be a cost of *highway construction*." (Emphasis added).

The Justices, in commenting upon the section above quoted, stated:

"We do not commonly consider that a power company in erecting a pole line or a water district in laying a pipe in a highway is constructing a highway. To an even lesser degree would we consider the construction of a pole or a water pipe across country to be the construction or reconstruction of a highway, although the reason for the relocation was occasioned solely by changes in the highway."

It cannot be refuted, therefore, that in analyzing Section (e) of 27-2-7(22), U.C.A. 1953, as amended, that the Maine opinion is authority for the principles advocated herein by the State of Utah.

The case of *Baltimore Gas and Electric Co. v. the State Road Commission of Maryland*, 214 Md. 266, 134 A.2d 312, cited by this Court, did not involve the constitutionality of any statute nor were any constitutional questions raised by either party therein. Since the immediate case under consideration is directed solely to the constitutionality of legislation, we deem and do allege the Maryland decision not deserving of consideration.

The majority opinion further cites the *Opinion of the Justices of New Hampshire*, 132 A.2d 613 (N.H. 1957), as authority on the subject. We respectfully submit that it takes little time to reveal that the Justices of New Hampshire, in their opinion, considered constitutional problems quite unlike that which exist in Utah, for *the New Hampshire Constitution is absent of any directive prohibiting the*

sovereign state from lending its credit to private instrumentalities or to finance private undertakings. The Justices therein held that if the Legislature decided to alter the common law, it would not be in violation of its constitution, Part 2, Art. 5th, or Part 1, Art. 10th.

The respondents herein cited these sections of the New Hampshire Constitution in their original brief submitted. It is interesting to view the contents of said sections in comparison with the clear mandate of Article VI, Section 31 of the Utah Constitution:

“Pt. 2, Art. 5th. And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defense of the government thereof, * * * provided that the general court shall not authorize any *town* to loan or give its money or credit directly or indirectly for the benefit of any corporation having for its object a dividend of profits or in any way aid the same by taking its stock or bonds. For the purpose of encouraging conservation of the forest resources of the state, the general court may provide for special assessments, rates and taxes on growing wood and timber.” (Emphasis added).

“Pt. 1, Art. 10th. Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government

are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.”

(New Hampshire State Constitution)

Part 2, Art. 5th prohibits a town from loaning its money or credit to any corporation issuing dividends based on profits, but it exempts from its operation the sovereign state or any other political subdivision, and under the well settled and accepted rule of construction, *expressio unius est exclusio alterius* (*Ex Parte McCardle*, 74 U.S. 506, 19 L.Ed. 1868), the State or the State Road Commission would be specifically excluded from its operation. The fact that the Justices of New Hampshire had not a constitutional provision parallel to that of Art. VI, Sec. 31 of the Utah Constitution before them for construction renders this opinion valueless in the present determination.

The same objection is found in the case of *Wilson v. Longbranch*, 142 A.2d 837 (New Jersey), which not only failed to consider the statute similar in scope to 27-2-7(22), but also lacked a ruling as to the constitutionality of any legislation; authorities need hardly be cited to buttress the statement that a court will not pass upon the constitutionality of specific legislation unless the question is brought directly before it and unless it is necessary for the determination of the litigant's right in the matter pending. *State v. Kallas*, 97 Utah 492, 94 P.2d 414; *Wright v. Lee*, 101 Utah 76, 118 P.2d 132; *Arkansas-Louisiana Gas Co. v. The Arkansas Department of Public Utilities*, 58 S. Ct. 770,

304 U.S. 61, 82 L.Ed. 1149; *Spector Motor Service v. McLaughlin*, 65 S. Ct. 152, 323 U.S. 101, 89 L.Ed. 101.

Additional cases mentioned in the main opinion of this Court, *New York Tunnel Authority v. Consolidated Edison Co.*, 295 N.Y. 467, 68 N.E.2d 445 (N.Y. 1946); *Transit Commission v. Long Island Railroad Co.*, 253 N.Y. 345, 171 N.E. 565, while seemingly supporting the theory that the universal common law may be modified by a properly drawn statute, do not mention or pass upon the validity of such legislation in the light of constitutional provisions analogous to Art. VI, Sec. 31 of the Utah Constitution. Consequently they are of no precedent in the case at bar.

Further, the New York Court in *Westchester Electric Railroad Co. v. Westchester County Park Commission*, 255 N.Y. 297, 174 N.E. 660 (cited in the majority opinion), devotes no attention to the validity of a statute authorizing reimbursement to utilities when subject to constitutional attack; stretched to the farthest point the decision stands for nothing more than the fact that a statute was enacted prescribing payment for relocation costs.

It is thus seen beyond doubt that the cases mentioned in the preceding paragraphs when scrutinized for the questions of law raised therein and the conclusions of law resulting therefrom, stand in the darkness of inapplicability, and if it be the conclusion of this Court that the determination of the instant case is predicated upon the counting of decisions, as evidenced by the language of the main opinion, then we respectfully submit and petition that the court exclude those decisions which fall short of any constitutional issues and those in which the constitution of the respective jurisdiction fails to contain a prohi-

bition on a comparable basis with Art. VI, Sec. 31. The decisions in Tennessee (*State of Tennessee v. Southern Bell Telephone Co.*, *supra*), Texas (*State of Texas v. The City of Austin and the City of Dallas*, —S.W.2d—), New Mexico (*State Highway Commission of New Mexico v. Southern Union Gas Company*, *supra*), Minnesota (*Minneapolis Gas Co. v. Zimmerman*, 91 N.W.2d 642), and Idaho (*State of Idaho v. Idaho Power Co. and Mountain States Telephone and Telegraph Co.*, *supra*), which test statutes similar in scope to 27-2-7(22) under constitutional provisions analagous with the pertinent sections of the Utah Constitution, are to be considered. The case of *Northwestern Bell Telephone Co. v. The State Highway Commissioner of North Dakota*, Supreme Court No. 7856, —N.W.2d— (March 1960) merits special comment, however, for the holding is unlike its companion cases in the five other jurisdictions. The Constitution of North Dakota, Section 185, provides in part:

“The state, any county or city may make *internal improvements* and may engage in any industry, enterprise, or business, not prohibited by Article 30 of the Constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid to any individual, association or corporation
* * *.”

The North Dakota Court held that the State may make internal improvements, that public financing of a privately owned corporation in relocating its facilities on the public right-of-way qualified as an internal improvement, that the subsequent clause prohibiting the State or any political subdivision from loaning or giving its credits in aid of any

individual or corporation acted by way of limitation and did not restrict the capacity of the State to make internal improvements even though such improvements might otherwise be classed as a gift of public funds. The effect of the North Dakota decision is to *admit* that the payment of relocation costs by the Highway Department might be considered a gift of public funds, the question being of no concern, because Section 185 permits of such disbursement. The Court declared:

“For the reasons set forth it is of no concern to this court whether Section 24-0141 of the 1957 supplement to N.D.R.C. 1943 [Utility Relocation Act] does or does not provide for a donation or an extension of credit.”

The language of the North Dakota decision, therefore, excludes itself from presently being considered.

The Tennessee, New Mexico and Idaho decisions, *supra*, leave nothing unturned in their interpretation of the “lending of credit” section of the Constitution and definition of public use. To come within the confines of the Constitution, the Tennessee court had this to say:

“The expenditure [to pass the test of public use] must be for a state purpose, which function the state performs for its general public, agencies and instrumentalities of the state for the accomplishment of a state purpose under state control; and the state must have the * * * right of use * * * of the property upon which the fund its expended.

* * *

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."

We petition and urge upon the Court that the expenditures contemplated by Section 27-2-7(22) serve no public purpose; once the disbursement has been effectuated, control and use of the donation thereafter rests solely with the utility and is next represented in the annual profit and loss statement of the company. It is well to exercise the great equitable powers of the Court in a situation where equity is justified, but this is not such a situation. The use of the public right-of-way by the respondents was and is permissive in the first and initial instance; they placed the facilities on the highway knowing full well that the obligation to remove and relocate was on their shoulders, notwithstanding the financial consequences of so doing; if resort to equitable powers be proper in this instance, then it would be correct to say that the Legislature may properly aid and finance all individuals who are required to expend funds to establish business facilities. We would urge that the facts of the immediate case are not within the purview of *Oswego v. Syracuse Railroad Co.*, 226 N.Y. 351, 124 N.E. 8 (quoted in the main opinion) for the use therein by the railroad of its bridge spanning the canal was not *consensual* or *permissive* in nature, the structure having abutted on railroad right-of-way on each side of the canal. The process of enlarging the width of the canal necessitated the relocation of the bridge facility and it was on this sole basis that *Oswego* was decided. The present case is allied neither factually nor legally with *Oswego v. Syracuse Railroad Co.*, *supra*, and for this reason we would

urge that the principles of equity expounded therein are inappropriate here.

The fact that the purpose behind the gift is in some respects commendable cannot of itself invoke the powers of equity. As was proclaimed in *State Highway Commission of New Mexico v. Southern Union Gas Company*, supra.

“* * * 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 P2d 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 New Mexico Supreme Court provided a ready answer to the question of whether a utility, in placing its facilities on public right of way, acts in the public interest. It stated:

“* * * 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 New Mexico Court made, what we respectfully urge to be the correct analysis of the utilities’ position and function in society, in saying:

“* * * 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.” (Emphasis added.)

In *State of Idaho v. The Idaho Power Co. and Mountain States Telephone and Telegraph Co.*, supra, the court, after having made what may be the most exhaustive analysis thus far rendered by any judiciary passing on the question, distinguished the profit-making purposes of a utility, its ultimate aim, from the type of service rendered:

“The fact that respondents’ activities, in furnishing services to the public, are public in nature and may be devoted to public use is insufficient to remove payment of the relocation costs from the constitutional prohibitions. The state has not acquired and cannot acquire the property of any privately owned utility, as are respondents, or any interest therein; nor any control over respondents or their officers, except in certain limited aspects through the public utilities commission; nor does the state direct the acquisition and disposition of properties, or control the financial transactions of privately owned utilities; nor is the property owned by such utilities, public property exempt from taxation as provided by Idaho Const., Art. 7, Sec. 4; and whereas, such utilities may, and do, use their moneys and properties for profit, the state and its political subdivisions are prohibited from making a profit directly or indirectly by the use of public moneys, Idaho Const., Art. 7, Sec. 10. Nor is any grant authorized in favor of any utility, of a vested or permanent interest in any public thoroughfare, the right to the use being permissive and as not to incommode the public use thereof.”

If the respondents may be reimbursed for removing their facilities from a locale formerly utilized only with the consent of the State of Utah, would it not also then be constitutionally proper to pay and finance P.I.E. Freightways and other commercial hauling companies for costs that

might be incurred in being forced to use a detour of several hundred miles during the construction or reconstruction of a state arterial highway. Commercial trucking is most certainly one of the purposes for which modern highways are utilized, although such use is permissive in nature and subject to the reasonable exercise of the police power; or it might be persuasively argued hereinafter that the state should finance and pay for the cost of laying transmission gas lines and pipe into an area previously unserved on the theory that this would be beneficial to the populace in such area. The possible ramifications of such a holding are untold in nature and number.

Realities of the Situation. It has been suggested by respondents and noted by this Court in the major opinion that refusal to recognize constitutional validity would impose unjustified burdens on utility consumers in those jurisdictions wherein relocation costs were not satisfied by the Bureau of Public Roads—that, in effect, it would force the utility user to pay twice (once at the gas pumps and again at the utility office). From the viewpoint of applying the mandate of the Constitution, the argument is hardly worth comment. The conclusion is obvious that a customer of the respondents has no interest in the properties of the utilities and the fact that relocation costs are requisite does no affect his position. (The record in this case is silent in respect to one instance where utility costs have increased by reason of relocation expenditures.) Then too, in the United States, only thirteen of fifty states possess legislation providing for subsidization of utilities for relocation expenses, so that residents of Utah find themselves in a

status no different than the utility customers in thirty-seven other jurisdictions.

One "reality" which faces residents of Utah is that this state is allocated a proportion of the amount of allotted federal funds for highway purposes and the reduction in the amount of funds available for right-of-way acquisition and road construction simply means that fewer miles of freeways and highways will be built. We would submit that of the two "realities" mentioned, the latter is **in the more critical class.**

Wallberg v. The Utah Public Welfare Commission, 115 Utah 242, 203 P.2d 935, has been cited as authority that a moral obligation of the state may be recognized. This petitioner would allege that *Wallberg* involved not a donation or gift of public moneys, for the statute under consideration created a lien on the recipient's real property, and a receipt of any public disbursements was conditioned upon the pledge of all real property interests as security for later reimbursement by the pledgor. Justice Wade in his concurring opinion, hit the mark when he said:

"* * * in my opinion the Public Assistance Act of 1947, as amended in 1948, creates an obligation against the estate of every recipient to *repay* the total amount of public assistance received by him during his lifetime.

* * *

"The above quoted paragraph, definitely requires the *repayment* of all assistance received, the same as other claims in the course of administration of the estate of every recipient. * * *

* * *

“I therefore conclude that the intention of the legislature in enacting that paragraph was to make all assistance given to any recipient *payable* after his death under the provisions of subdivision (5), of Section 102-9-22, U.C.A. 1943, the same as other claims in the course of the administration of the estate.” (Emphasis added)

The Constitution of this state stands supreme in the final accounting of our social order and is not subject to the wavering tides of local opinion. As declared in *Judd v. Board of Education*, 15 N.E.2d 576, 118 ALR 789 (N.Y. App.):

“A written constitution is not only the direct and basic expression of the sovereign will, but it is the absolute rule of action and decision for all departments and offices of government in respect to all matters covered by it, and must control as it is written until it shall be changed by the authority that established it. * * * When that sovereign will has been clearly expressed, it is the duty of the courts rigidly to enforce it. It is not the province of the courts to circumvent it because of private notions of justice or because of personal inclinations. * * *”

This Court, in *Moon Lake Electric Association and Uintah Basin Telephone Association v. Utah State Tax Commission*, 9 U.2d 384, 345 P.2d 612, stated the law to be:

“* * * 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.”

It is the fond desire of this petitioner not to burden the Court with materials discussed on original appeal. It is our feeling, however, that the gravity of this question merits reconsideration, and we respectfully urge and petition this Court to rehear argument on the constitutionality of 27-2-7(22). The Highway Fund of this State can ill afford the loss of moneys desperately needed for construction and completion of the highway system throughout the State of Utah.

POINT II

THE PERMISSIVE USE OF THE PUBLIC HIGHWAY RIGHT-OF-WAY BY THE UTILITY IN EMPLACING ITS FACILITIES THEREON DOES NOT VEST IN IT A PROPERTY RIGHT OF ANY NATURE.

The respondents in this case have maintained their facilities in the past on public right-of-way solely on the basis of franchise agreements entered into by and between them, respectively, and the State of Utah. The utilities' presence on the highway exists not as of right but as the result of the consent of the State or other political subdivision thereof. If the State of Utah deems it in the public interest to exclude utility facilities from the public right-of-way in order to facilitate the safe flow of vehicular traffic, it may do so as a proper adjunct of the police power. The broad and sweeping language of the major opinion in the instant case might indicate a contrary result, wherein it was said:

“* * * We subscribe to the doctrine that the utilities are at *home on the public highways*; * * * public welfare demands that the people be served with water, sewer systems, electricity, gas, telephone and

telegraph, as well as transportation and means of travel. * * * It is impossible to meet these urgent requirements without making use of the public property." Emphasis Added.

While it may be observed that this statement of the court constitutes dicta of sorts, the consequences of such, from the viewpoint of the State Road Commission, are far reaching, with the probability of future litigation resulting therefrom. If the premise derived from this language is to give the respondents a property interest in the public highway and, further, a right to be on the public right-of-way, then we would respectfully urge this statement to be in error and we hereby petition the Court to modify and/or clarify its intended meaning.

The law has been consistent that a utility acquires no property right in the public right-of-way by its utilization for the operation of its facilities. Thus it was said in *Delaware River v. The Pennsylvania Public Utilities Commission*, 145 A.2d 172:

"Historically in Pennsylvania non-transportation public utilities have been permitted to occupy highway rights-of-way free of cost, subject to the police power to control and regulate the highways for public benefit. Such utilities obtain no property rights in the highway. * * *"

See also *Delaware River Port Authority v. Pennsylvania Public Utilities Commission*, 199 A.2d 855; *Transit Commission v. Long Island Railroad Co.*, 253 N.Y. 345, 171 N.E. 565; *New York Tunnel Authority v. Consolidated Edison Co.*, 295 N.Y. 467, 68 N.E.2d 445; *New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 197 U.S. 453, 25

S. Ct. 471, 49 L.Ed. 831; *State of Idaho v. Idaho Power Co. and Mountain States Telephone and Telegraph Co.*, —Ida.—, 346 P.2d 596; *State Highway Commission of New Mexico v. The Southern Union Gas Co.*, 65 N. Mex. 84, 332 P.2d 1007.

The United States Supreme Court in the New Orleans Gaslight Co. case put it this way:

“* * * In the very terms of the grant there is a recognition that the use of the streets by the gas company was to be in such manner as to least inconvenience the city in the use thereof. Except that the *privilege* was conferred to use the streets * * * there was nothing in the terms of the grant to indicate the intention of the state to give up its control of the public streets, * * *.” (Emphasis added)

The franchises submitted into evidence and before this Court indicate and specifically set forth that each of the respondents occupy the right-of-way as a privilege and license, the natural implication therefrom being that no right is existent to occupy and possess any part of such right-of-way.

The statement of the Court, as quoted above, on its face, would seem to lend credit to the assertion in Respondents' original brief that their use of the public right-of-way is by way of an easement and qualifies as a vested property right. If such use was classified as an easement or other vested property interest, then quite naturally, the State of Utah, in order to acquire the interest in furtherance of its road building program, would be dependent upon the inherent power of eminent domain, 78-34-1 et seq, UCA 1953. The quick answer to this problem is, of course,

that the exercise of the State's power to condemn is not necessary, for the sovereign's request of the utilities to relocate their facilities does not involve a *taking* within the scope of the statutes. *New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 197 U.S. 453, 25 S. Ct. 471, 49 L.Ed. 831; *Atlantic Coast Line R. Co. v. City of Goldsboro*, 232 U.S. 548, 34 S. Ct. 364, 58 L.Ed. 721; *State of Idaho v. Idaho Power Co. and Mountain States Telephone and Telegraph Co.*, —Ida.—, 346 P.2d 596. The use of the police power rather than the power of eminent domain separates permissive and revocable uses of property from vested property interests.

In order that this Petitioner might avoid future litigation and administrative indecision in the control and operation of the state highway system, we earnestly and respectfully request this Court to clarify the remark that the utility is at "home on the public highways."

POINT III

NEITHER THE UTILITY RELOCATION ACT NOR THE DECISION AS RENDERED IMPOSES AN OBLIGATION UPON THE STATE ROAD COMMISSION TO REIMBURSE RELOCATION COSTS IN CONTRAVENTION OF THE SPECIFIC TERMS OF A WRITTEN CONTRACT BETWEEN THE UTILITY AND THE STATE ROAD COMMISSION.

It is conceded that the common law required utilities to pay the entire cost of removing and relocating any facilities located within the right-of-way of a public highway whenever the necessities of highway improvement so de-

manded. (See Decision, Advance Green Sheet, p. 2.) This Court now takes the position that the Legislature may change this common law rule prospectively, lift the cost burden from the utilities and impose it upon the State. (Decision, *supra*, p. 2.) This court is not impressed with the theory that the common law as it exists when a franchise is granted becomes an integral part of the franchise, impervious to future modification by the Legislature. (Decision, *supra*, p. 7.)

Though we insist there is good and sufficient authority of historical sanction to the contrary (see *Sturges v. Crowninshield*, 4 Whet 122, L.Ed. 529; *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398, 88 A.L.R. 1481), it is not our purpose here to argue the clear ruling of the Court regarding integration of the common law and abrogation of same. We do wish to urge the discussion, however, of certain issues which have survived the Court's decision and certain issues which have arisen since the Court's decision.

It appears obvious that the Court's decision deals only with the question: May the Legislature abrogate the common law? The Court says nothing as to whether or not the Legislature may shift the relocation burden to the State where by written agreement the utility has previously agreed to assume the burden. The Court specifically acknowledges and calls attention to the fact that the franchises involved in the instant lawsuit are silent as to any removal or relocation of facilities. (Decision, *supra*, p. 1.)

As the Court states:

“* * * the question to be answered is whether or not the Legislature has the power to modify the common law, prospectively * * *.” Decision, p. 2.)

After answering this question in the affirmative the Court then states:

“The theory that the common law rule as it existed when the franchises were granted became an integral part of the franchises *as if expressly written therein* * * * is not supported by the authorities.”
(Emphasis added) (Decision, p. 7.)

Thus the Court clearly distinguishes the instant case and its holding from a situation where the relocation obligation is expressly written in the franchise.

The Court is careful to explain that in the case of unwritten provisions the obligation of same does not come into existence until some circumstance prompts the imposition of same. For example, in the instant case, even though the unwritten or common law imposed relocation costs on the utility, since nothing was specifically said concerning the same in the franchise agreement, there was no relocation obligation or liability until relocation was requested. Therefore, as stated by the Court, the Utility Relocation Act does not nullify any existing obligation in connection with the franchises involved because no obligation existed at the time the Act was passed.

Obviously if the parties had expressly agreed as to relocation in the franchise this would create an existing obligation or liability at the time the franchise was executed regardless of when the relocation was actually ordered. Whether the obligation of a written agreement is executed or executory does not effect the binding nature of the obligation. In the landmark case of *Fletcher v. Peck*, 6 Cranch 87, 3 L.Ed. 162, 1810, Chief Justice Marshall, after defining a land grant as a contract, went on to discuss this point as follows:

“A contract is a compact between two or more parties, and is either executory or executed. * * * A contract executed, as well as one which is executory, contains obligations binding on the parties. * * * Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former.”

Chief Justice Marshall then went on to conclude that the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law impairing the obligation of a previous land contract.

To the argument that the State could impair contract when the State itself was one of the contracting parties, Chief Justice Marshall had this to say:

“If, under a fair construction of the Constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. * * * What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter. * * * The court can perceive no sufficient grounds for making that distinction.”

The protection due "executory" interests was further defined in the case of *Piqua Branch of State Bank of Ohio v. Knoop*, 16 How. 369, 14 L.Ed. 977, (1853). In this case the State of Ohio attempted to impair tax advantage, granted to certain banks in previous legislation, by a subsequent statute. The Supreme Court held that the State of Ohio, "Having power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature, than a grant for land." Text-book writers classify that type of statute which attempts to impair a previously existing obligation as a retroactive law and the general rule in relation thereto is stated by Willis as follows:

"Retroactive laws may not violate obligation of contract." (Willis, Constitutional Law, 1936, p. 377.)

Stated in another way:

"Generally a retrospective statute affecting vested rights is invalid, and all retrospective statutes are strictly construed for courts have assumed that they generally operate unfairly."

(Sutherland, Statutory Construction, 3rd Ed. Sec. 3102.)

It is true that the courts have carved out an exception to the retrospective rule where the State is reasonably exercising its police power:

"* * * the state power may be addressed directly to the prevention of the enforcement of contracts only when these are of a sort which the Legislature in its discretion may denounce as being in themselves hostile to public morals, or public health, safety, or welfare, or where the prohibition is merely of injurious practices; * * * interference with

the enforcement of other and valid contracts according to appropriate legal procedure, although the interference is temporary and for a public purpose, is not permissable."

(Home Building & Loan Assn. v. Blaisdell, supra.)

It is difficult to find in the instant case, however, that a statute providing for the payment of relocation costs is in the interest of public morals, health, safety or welfare. An order of relocation is an obvious exercise of the police power—payment of an invoice for the cost of relocation is obviously not an exercise of the police power. When the State pays a relocation invoice in contravention of a written agreement by the utility, it does more than exercise the police power to regulate without compensation—it commits an ultra virus, unconstitutional act by retroactively impairing the obligation of a legal contract.

We submit the instant decision stands only for the proposition that in any case of a relocation from public right-of-way ordered by the State Road Commission on or after May 14, 1957, the Road Commission, so long as the Federal Government by law will participate and so long as the parties have said nothing in writing to the contrary, must pay the relocation costs.

POINT IV

THE UTILITY RELOCATION ACT SPECIFICALLY PROTECTS THE OBLIGATION OF CONTRACT AND ABSOLVES THE STATE ROAD COMMISSION FROM RELOCATION COSTS WHERE BY WRITING, SUCH OBLIGATION HAS PREVIOUSLY BEEN ASSUMED BY THE UTILITY.

Actually, this Court had no other alternative under the statutes involved than to recognize a distinction be-

tween written and unwritten provisions in the application of the Utility Relocation Act to existing obligations.

Under the Utility Relocation Act the Road Commission to pay relocation costs only,

“* * * in all cases where proportionate reimbursement of such costs may be obtained by the State of Utah from the United States pursuant to the Federal Aid Highway Act of 1956.”

(Section 27-2-7(22) (a), U.C.A. 1953, *supra*.)

The Road Commission's obligation to pay relocation costs applies, therefore, only to those situations where the Federal Government will participate. Under the Federal Highway Act:

“* * * 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., Section 123, *supra*.)

If the utility occupies the public right-of-way under franchise or other written agreement executed by competent parties without fraud or duress, there exists a legal contract. The Federal Government will not reimburse relocation costs if to do so would violate such a contract. Our State Legislature has intended and so stated that the Road Commission must not pay relocation costs where the Federal Government will not reimburse. Both the Federal Act and the State Act must be read in *pari materia* and when so read the conclusion is inescapable: Where a legal contract exists between the utility and the State under which

the utility has specifically assumed relocation costs the Federal Government will not reimburse, and the Road Commission cannot pay.

Our Legislature did not intend nor did it say that henceforth and forever in all situations the State must pay relocation costs. It did not intend to create a new rule of substantive law nor did it intend to abrogate existing written contracts. To the contrary, the Federal and State Acts combine to specifically protect the obligation of written agreements between the utility and the State. Our Legislature merely carved out an exception to the common law rule regarding relocation costs and provided that so long as the Federal Government will participate the State will pay such costs. This Court then limits the application of the Act to prospective requests for relocation where the parties have been silent concerning the relocation obligation.

It has been assumed that the respondents likewise understood the distinction in this matter between situations involving a previously executed written agreement and situations where the parties had been silent. It is the statement of the respondents that:

“The question before this Court thus concerns the validity of provisions of the substantive law, enacted by the Legislature in the exercise of the police power of the State. Its effect is clearly limited to relocations ordered by the Commission *after* the effective date of the Act. It does not purport to release any obligations which utilities may have had in connection with past relocations of facilities.” (Brief of Respondents, p. 9.)

However, since the Court's decision herein, the respondents have demanded reimbursement for all relocations ordered after May 14, 1957, regardless of the terms of the writing under which the utility occupied the premises. For this reason petitioner requests clarification and restatement of the Court's position.

POINT V

THE UTILITY RELOCATION ACT IS, BY ITS VERY TERMS, DEVISABLE AND THE PROVISIO REGARDING RELOCATION COSTS DOES NOT QUALIFY OR EFFECT THE PLENARY POWER GRANTED TO THE ROAD COMMISSION TO REGULATE, CONTROL AND RELOCATE FACILITIES LOCATED ON A PUBLIC RIGHT-OF-WAY.

It must be remembered that the cost of relocation phrase of the Utility Relocation Act was inserted by way of proviso. The general enactment was for the purpose of granting to the Road Commission the power “* * * to make reasonable regulations for the * * * relocation of all facilities * * * of any utility. Whenever the Commission shall determine that any such facilities * * * should be relocated, the utility * * * owning or operating such facilities shall relocate the same in accordance with the order of the Commission; * * *.”

(27-2-7(22) (a), U.C.A. 1953, supra.)

Respondent would have us believe that the sole purpose of the Utility Relocation Act is to rectify an allegedly unfair situation and provide for the payment of relocation costs. We would suggest to the contrary that the primary purpose of the Act was to indicate, without equivocation,

the right of the Road Commission on Federal Aid projects to regulate and relocate utilities. The cost proviso was, we think, misused by the Legislature to introduce independent legislation. In any event it is clear that the cost proviso is separable and devisable from the general enactment and in application does no more than burden the general power of relocation with a cost obligation under certain circumstances.

The cost proviso must be strictly construed and closely guarded in its application.

“As in all other cases, a proviso should be interpreted consistently with the legislative intent. Where the proviso itself must be considered in an attempt to determine the intent of the legislature, it should be strictly construed. This is true because the legislative purpose set forth in the general enactment expresses the legislative policy and only those subjects expressly exempted by the proviso should be freed from the operation of the statute.”

(Sutherland, *supra*, Section 4933.)

Not only is the cost proviso limited as to application, it is by its terms limited as to duration. Its life span is limited to the life span of the Federal Highway Act of 1956 and is coextensive therewith. When the Federal Highway Act expires or is sooner terminated, any relocation cost obligation on Federal aid projects will cease. By contrast the relocation power granted by the State statute is to apply to:

“* * * any project on the federal aid primary or secondary system of highways as the same now are or may hereafter be defined by Act of Congress, or on the interstate system, as herein defined, including extension thereof within urban areas.”

(Section 27-2-7(22) (a), U.C.A., *supra*.)

The petitioner envisions that long after the Federal Highway Act of 1956 expires relocations in connection with federal aid projects will continue.

By no stretch of imagination did the cost proviso of the Utility Relocation Act suddenly grant new property or contractual rights to the utilities in connection with federal aid highways. The obligation to relocate from the path of federal aid projects on order of the Commission is mandatory. The cost proviso is directory. The power of the Road Commission to regulate the use of its rights of way by a utility is plenary and complete. Since the decision of this Court has apparently suggested a different conclusion to the utilities, and an issue in this regard persists, clarification and restatement of the Court's position is appropriate.

POINT VI

THE PERMISSIVE USE GRANTED TO A UTILITY OF THE PUBLIC HIGHWAYS DOES NOT CONSTITUTE A USE AS NECESSARY AND INDISPENSABLE AS THE USE OF SUCH HIGHWAY AS A MEDIUM FOR VEHICULAR TRAFFIC.

We call the Court's attention to the statement found in the main opinion herein:

“* * * the presence of the utility facilities on the streets constitutes a use as indispensable as the use for travel, * * *.”

This observation is both unique and surprising to the extent that not even the respondents herein have contended

that Congress, under the Federal Highway Act of 1956, and the Utah Legislature, under present and projected road building programs, laid as their primary basis for the construction of highways, freeways and expressways the housing of privately owned utility facilities. It takes not an expert to realize the real need and necessity for highly designed road beds in order to take care of present and future day vehicular traffic, intrastate and interstate.

The Legislature of the State of Utah defines public highway at 27-1-1, U.C.A. 1953. The plain meaning of this statute suggests that the primary purpose of a highway is to facilitate the movement of vehicles from one point to another.

A permissive occupation of the respondents and of privately owned utilities in general in no measure provoked the passage of the 1956 Federal Highway Act; rather, it was the forecast of the Congress for the requirement of transportation facilities to accommodate the great influx of vehicular traffic within the next 13 years that brought about the legislation.

This fact is pointedly illustrated by the Declaration of Policy of the United States Congress found in Section 101(b), Title 23, U.S.C.:

“It is hereby declared to be in the national interest to accelerate the construction of the Federal Aid Highway Systems, including the National System of Interstate and Defense Highways, since many of such *highways* or portions thereof, are in fact *inadequate to meet the needs of local and interstate commerce*, for the national and civil defense.

“It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of *its primary importance* to the *national defense* and hereafter referred to as the ‘Interstate System’ is essential to the national interest and is one of the most important objectives of this Act. It is the intent of Congress that the Interstate System shall be completed as nearly as practicable over the period of availability of the 13 years appropriations authorized for the purpose of expediting its construction, reconstruction or improvement, * * *”
Public Law, 85-767, August 27, 1958, 72 Stat. 885.
(Emphasis added)

It is sufficient to say that in the present age when the expeditious transfer of motor vehicle traffic is at a premium and the movement of goods, individuals and commerce in general is a foremost public concern, the usage of property for such traffic and travel has no parallel when compared with incidental usage by the respondents.

The above quoted statement of the Court, although not essential to its decision on the merits of the questions before it, has placed the State Road Commission in a position where the future projection of highway construction and reconstruction is in serious jeopardy, due to the continuing and increasing necessity to negotiate with the respondents and other privately owned utilities to locate and place their facilities on the public highway; on this ground, we would therefore urge and respectfully petition this Court to reconsider the above mentioned sentence in the light of the obvious, and to alter it by way of clarification or by striking it in its entirety from the majority opinion.

CONCLUSION

The Petition for Rehearing submitted by this petitioner should, based on the points and issues of law raised herein, be accepted and granted by this Court and the Court should reconsider its former opinion and specific parts thereof and rehear arguments on the merits of the constitutionality of Section 27-2-7(22), U.C.A. 1953, as amended, in light of the constitutional questions of law raised.

Additionally, or in the alternative, this Court should clarify and explain the meaning it attributes to the language used in the main opinion with specific reference to the questions and argument raised by this petitioner in Points II, III, IV, V, and VI herein.

Respectfully submitted,

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