

1960

State Road Commission of Utah v. Utah Power & Light Co. et al : Brief of Amicus Curiae Bear River Telephone Co. and Millard County Telegraph and Telephone Co.

Utah Supreme Court

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Calvin L. Rampton; Sam Cline;

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In the Supreme Court of the State of Utah

FILED

STATE ROAD COMMISSION OF UTAH, JAN 12 1960

Plaintiff and Appellant,

Clerk, Supreme Court, Utah

vs.

UTAH POWER & LIGHT COMPANY,
a corporation; MOUNTAIN FUEL
SUPPLY COMPANY, a corporation;
and the MOUNTAIN STATES TELE-
PHONE AND TELEGRAPH COM-
PANY, a corporation,

Case No. 9136

Defendants and Respondents.

BRIEF OF AMICUS CURIAE, BEAR RIVER TELEPHONE
COMPANY and MILLARD COUNTY TELEGRAPH AND
TELEPHONE COMPANY

UNIVERSITY OF UTAH

JUL 10 1967

CALVIN L. RAMPTON
SAM CLINE

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*Attorneys for Bear River Telephone
Company and Millard County Tele-
graph and Telephone Company,*

Amicus Curiae

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INTRODUCTION

The undersigned wish to express appreciation to the Court for the permission granted to them to appear in this case amicus curiae. Although the form of their appearance is amicus curiae in reality they have an interest in this case much deeper than as "friends of the court." Each of them has an

economic stake in the outcome of this proceeding which is, proportionate to its size, greater than that of any of the parties respondent. In fact, the ability of Bear River Telephone Company and Millard County Telegraph and Telephone Company and other small utility companies to continue to render service to their customers at rates which are not prohibitive may well turn on the outcome of this proceeding.

Counsel have had an opportunity to examine in rough draft the Brief of Counsel for the respondents. We believe that they have discussed the matter fully from a strictly legal standpoint and we endorse without reservation their presentation to this Court. This short amicus curiae brief will be devoted solely to the practical economic considerations involved in this case.

IN INTERPRETING CONSTITUTIONAL PROVISIONS
THE COURT SHOULD GIVE CONSIDERATION TO
CURRENT DEVELOPMENTS IN GOVERNMENTAL
AND ECONOMIC MATTERS.

Counsel would not presume to urge upon this court that practical economic expediency should be the controlling factor in the interpretation of any constitutional provision. If constitutional provisions were interpreted solely upon the basis of economic or political expediency, of course constitutions would lose their value as a framework of our governmental system. However, this much is certainly true, constitutional provisions for the most part are not to be considered hard, unyielding principles which bind governmental procedures in a straight-jacket. Rather, they are basic principles to guide

the courts and the legislature. The provisions of constitutions are at all times to be construed liberally and not strictly.

Only by a liberal interpretation of constitutional provisions can a constitution continue to meet the demands of a society whose economic and governmental problems are continually changing. In the case of *People v. Western Airlines*, 268 P (2d) 723, the Supreme Court of California quoted with approval the language of the Nebraska Supreme Court as follows:

“A constitution is intended to meet and be applied to any conditions and circumstances as they arise in the course of the progress of the community. The terms and provisions of constitutions are constantly expanded and enlarged by construction to meet the advancing affairs of men. While the powers granted thereby do not change, they do apply in different periods to all things to which they are in their nature applicable.”

In the case of *Brown v. Board of Education of Topeka*, 347 U.S. 483, 98 L. Ed., 873, the Supreme Court of the United States stated:

“In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.”

Although the ultimate result from the *Brown* case has been highly controversial, this principle enunciated by the court that the constitution must be interpreted in light of present day social conditions finds little criticism anywhere.

This court in the case of *Washington County v. State Tax Commission*, 133 P. 2d 564, stated:

"Before we hold any statute unconstitutional, every doubt as to its constitutionality should first be resolved in favor of its validity. *Stillman v. Lynch*, 56 Utah 540, 192 P. 272, 12 A.L.R. 552; *State v. Packer Corporation*, 77 Utah 500, 297 P. 1013. The Legislature enacted these statutes in 1931. Since that date the Tax Commission has proceeded under these statutes to apply the formula set out in Section 80-2-7 to all the property in the Washington-Iron County unit.

"It is a general rule that contemporaneous construction by the department of government specially delegated to carry out a provision of the Constitution raises a strong presumption that such construction, if uniform and long acquiesced in, rightly interprets the provision. * * * * While such construction is not conclusive upon the courts, it is entitled to the most respectful consideration. *Wells Fargo & Co. v. Harrington*, 54 Mont. 235, 169 P. 463, 466."

THE UNITED STATES CONGRESS AND THE UTAH LEGISLATURE CONSIDERED THE PAYMENT OF UTILITIES RELOCATION COSTS IN CONNECTION WITH THE CONSTRUCTION OF PUBLIC ROADS A PROPER USE OF PUBLIC FUNDS.

The common law rule that relocation costs of a utility plant occasioned by highway construction must be borne by the utility itself offered no serious problem until recent years. Such relocation generally was on a small scale and the utilities were able to absorb the cost. A different condition, however, existed with the accelerated highway program promoted by the federal government under the Federal Highway Act of 1956, 23 U.S.C.A., 101 and following sections. A small utility whose service area happened to be in the path of a major highway improve-

ment program might well have placed upon it a financial burden from relocation of facilities which it could not meet. The federal Congress recognized the responsibility of the government to reimburse utilities for such a financial burden. In speaking in support of the Conference-Report on the Federal Aid Highway Bill (102 Cong. Rec. 9930, June 26, 1956), Congressman McGregor of Ohio stated:

“Mr. Speaker, this Section will be of great assistance to small utilities, both public and private, especially including the REA, small telephone companies and small villages through which highway systems run and now have storm sewers, water sewage, and lighting utilities which do not bring in the revenue necessary to relocate if compelled to do so by new highway alignment.”

The Conference Report itself states:

“Section 113 of the Bill as passed by the House and recommended and accepted by the conferees recognizes the equity of reimbursing utilities for the cost of relocating facilities when required for Federal-Aid highway projects. Further, this Section makes it clear that it is the intention of the federal government to assume its proportionate share of utility relocation cost whenever a state allows such costs.”

Pursuant to this Report the Congress adopted the Act which authorized the federal government to share in the costs of reimbursing utilities for relocation of facilities in the same proportion that it shared in other highway costs in those cases where the laws of the state involved permitted the state to make payment of such costs.

In order to assure the people of the state of Utah of the

advantages of the act of the federal Congress, the Legislature of Utah in its 1957 Session, enacted Chapter 53, now codified as Section 27-2-7 (22). Without this Section the benefits available to most of the citizens of the United States as a result of the act of the National Congress would have been unavailable to the citizens of the state of Utah. Whereas, the citizens of most states would be relieved of the necessity of paying for relocation of utility facilities in the form of increased utility bills, the citizens of Utah would have been subject to a dual burden. First, they would have been paying for all relocation costs incurred within the state of Utah by increased utility bills and would be helping to pay for the relocation costs in other states when they paid the federal tax on their gasoline purchases. The enactment of Chapter 53, Laws of Utah, 1957, placed the citizens of Utah on the same economic basis in regard to this matter as the citizens of other states whose legislature had adopted acts authorizing the payment of relocation costs, and whose courts or administrative officers had upheld the validity of such acts.

That such an economic advantage to the citizens of the state is a proper matter to be considered by the courts in passing upon the constitutional validity of the attack statute is quite clear. The Supreme Courts of the states of Pennsylvania and Minnesota frankly discussed this economic problem in opinions concerned with the similar statutes in their states.

The Pennsylvania court in *Department of Highways v. Pennsylvania Public Utilities Commission*, 136 Atl. (2) 477, stated:

“Thus, if state ‘A’ receives from the federal government 90% of the cost of utility relocations on inter-

state highways because the policy of that state is to bear this cost, while state 'B' receives nothing from the federal government for utility relocations because its policy is not to bear this cost, the citizens of state 'B' will pay on their utility bills for relocation in their state, and will also pay in their federal gasoline tax for a part of the cost of relocating utilities in state 'A'."

In the case of *Minneapolis Gas Co. v. Zimmerman*, 91 N.W. 2d at page 652, the Minnesota court stated:

"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., Sec. 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."

THE MAINTENANCE OF PUBLIC UTILITY SERVICES TO CITIZENS OF THE STATE IS A PROPER GOVERNMENTAL FUNCTION.

While public utility services are generally rendered by a

private corporation, their function is a vital concern of the governmental agencies. A public utility is vested with a public interest far beyond that of private business concerns. This is apparent from the very definition of the term "public utility." The following statement is found in 43 *Am. Jur.* 571:

"As its name indicates, the term 'public utility' implies a public use and service to the public; and indeed, the principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public (or portion of the public as such) which has a legal right to demand and receive its services or commodities. The term precludes the idea of service which is private in its nature and is not to be obtained by the public, * * * ."

The courts in their decisions commonly refer to the quasi public character of public utility corporations. See *Wilson v. City of Long Branch*, 27 N.J. 360; 142 A. 2d 837, referred to in the brief of the appellant. Especially does the rendering of a public utility become a public concern in rural or sparsely populated areas where utility service is furnished on a marginal basis.

The two companies which appear as amicus curiae are engaged in furnishing telephone utility service in sparsely settled areas. Many of the customers served are being served on a marginal basis so that they could not be served at a price which they could afford to pay if the cost of rendering service were increased in any material manner.

Because of the nature of their operations, Bear River Telephone Company and Millard County Telegraph and Telephone Company are particularly vulnerable to the problem of

relocation of transmission facilities. Because their customers are widely settled, long transmission lines are necessary. For this reason a proportionately high percentage of their plant investment is in transmission facilities. These transmission facilities almost invariably run along county, state or federal highways. If these companies are confronted with the necessity of relocating, at their own costs, substantial portions of these long transmission lines, they will be faced with a serious problem in financing. They have not the facilities to attract either equity or debt capital that are possessed by the larger companies. They do not have a sufficient income in the populated areas to enable them to render service in the fringe areas at a loss. The inevitable answer will be that if construction of roads require moving of utility facilities, these companies will be forced to abandon rather than relocate many of their long lines. This will deny the utility service to individuals who are sorely in need of it.

The Millard County Telegraph and Telephone Company has 315 miles of pole line within its system in Millard and Juab County. Of this amount 140 miles, or approximately 43.4% of the whole parallel federal highways numbers 91 and 6, and are subject to relocation. Of this 140 miles, less than 15 miles are located within the limits of cities and towns where the large concentration of telephones can be found. This leaves about 125 miles of pole line in the rural areas which serve about 95 subscribers. Of these 95 subscribers, approximately 90 have resident phones, paying only \$2.25 per month per phone, and 5 have business phones, paying \$3.25 per month. The long distance calls originated on these phones are negligible. It is apparent that the company cannot, at its own

expense, relocate any substantial part of this 125 miles of pole line and still render the badly needed service to these rural areas.

In our developing economic system, we are recognizing more and more the fact that it is a governmental function to encourage the development of utility facilities in the fringe areas. This is evidenced by the fact that governmental units—municipalities and special improvement districts—are themselves engaging in the utility business where it cannot be done economically by private enterprise. Furthermore, the federal government has made available through the Rural Electrification Administration public funds for the purpose of expanding utility plants to serve sparsely settled sections of the country. Most of the capital of Bear River Telephone Company was obtained through loans from the R.E.A. The fact that the R.E.A. makes loans available for this purpose indicates clearly the growing tendency to regard the furnishing of utility service as a proper governmental function.

While the federal government does not have a specific constitutional provision similar to Section 31 of Article VI of the Constitution of Utah, still the federal Congress is bound by the general proposition that public funds shall not be used for purely private purposes. It would be a strange construction indeed to say that it serves a public purpose for a governmental unit to loan money to a public utility, but that it does not serve a public purpose for them to reimburse a public utility for the cost of relocating utility facilities located on a public highway.

CONCLUSION

The undersigned as amicus curiae and as vitally affected parties, urge upon the court that the constitutionality of the Relocation Act of the Utah Legislature to be upheld. To do otherwise would be to ignore the present economic and social trends which regard the maintenance of utility service as a proper governmental function. To do otherwise would be to require the citizens of Utah to pay through higher utility rates the cost of relocation in Utah and to contribute through payment of federal gasoline taxes to the relocation costs in other states. To do otherwise might well render the smaller utility companies operating in the state of Utah unable to render their service to many citizens of the state of Utah vitally in need of such service.

Respectfully submitted,

CALVIN L. RAMPTON
SAM CLINE

*Attorneys for Bear River Telephone
Company and Millard County Tele-
graph and Telephone Company,*

Amicus Curiae