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Leo A. Walker v. Brigham City, Peter C. Knudsen,  
Beth W. Currister, David G. Hacking, Dee J.  
Hammon, Robert B. Shelton : Brief of Appellant

Utah Supreme Court

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Robert R. Wallace; Hanson, Epperson & Smith P.C. Attorneys for appellant.

Jody K. Burnett; Williams & Hunt. Ben Hadfield; Jeff Thorne; Mann, Hadfield & Thorne. Attorneys for appellees.

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LEO A. WALKER,

Plaintiff/Appellant

No. 910240

vs.

BRIGHAM CITY, PETER C.  
KNUDSON, BETH W. CURRISTER  
DAVID G. HACKING, DEE J.  
HAMMON, ROBERT B. SHELTON,

Defendants/Respondents.

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BRIEF OF PLAINTIFF/APPELLANT

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Robert R. Wallace #3366  
HANSON, EPPERSON & SMITH, P.C.  
4 Triad Center, Suite 500  
P.O. Box 2970  
Salt Lake City, Utah 84110-2970  
Telephone: (801) 363-7611

ATTORNEYS FOR PLAINTIFF/APPELLANT

Jody K. Burnett  
WILLIAMS & HUNT  
257 East 200 South, Suite 500  
P.O. Box 45678  
Salt Lake City, Utah 84145-5678

Jeff Thorne  
Ben Hadfield  
MANN, HADFIELD & THORNE  
P. O. Box F  
Brigham City, Utah 84302

ATTORNEYS FOR DEFENDANTS/RESPONDENTS

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## JURISDICTION

Jurisdiction is conferred by Utah Code Ann. § 78-2-2(3)(i), unless the definition of "local agency" under Utah Code Ann. § 78-2a-3(2)(a) is broad enough to include a city itself as opposed to its agencies.

## ISSUES PRESENTED

In short, may a city use fees for city-owned electric services as revenue raising tax substitutes?

In more detail, may a city which owns and operates an electric utility system, under Utah Code Ann. § 55-3-1 et seq., set rates for utility service such that large surpluses are anticipated and generated which are regularly transferred to the general fund and used for general city obligations, and which result in one-third of all general revenues of the city?

## CONTROLLING STATUTES AND CONSTITUTIONAL PROVISIONS

Constitution of Utah, Article I, Section 22 states:

Private property shall not be taken  
. . . for public use without just  
compensation.

Utah Code An. § 55-3-10 states:

Rates for services furnished by any project or service as described in Section 55-3-1 hereof shall be reasonable and uniform in respect to class at all times. They may be fixed precedent to the issuance of the bonds. Such rates shall be sufficient to provide for the payment of the interest upon and principal of all such bonds as and when the same become due and payable, to create a bond and interest sinking fund therefor, to provide for the payment of the expenses of administration and operation and such expenses for the maintenance of the project or service, necessary to preserve the same in good repair and working order, to build up a reserve for depreciation, to build up a reserve for improvements, betterments and extensions other than those necessary to maintain the same in good repair and working order, and to pay the interest on and principal of any other bonds or obligations outstanding and issued in connection with the purchase, construction, repair or improvement of the project or service. Such rates may be fixed and revised from time to time so as to produce these amounts and the governing body may covenant and agree in the ordinance or other legislative enactment authorizing the issuance of such bonds and on the face of each bond at all times to maintain such rates for services furnished by the project or service as shall be sufficient to provide for the foregoing, but not in excess of a reasonable rate for the service rendered.

(Emphasis added.)



### **STATEMENT OF THE CASE**

A citizen of Brigham City challenges overcharges for city-owned electric power which result in large, anticipated and realized surpluses which are regularly transferred to the city's general fund and used for general obligations of the city.

When it became undisputed that approximately \$1,500,000 yearly in electric utility surplus revenues were being transferred into the city's general fund, the citizen/plaintiff moved for partial summary judgment. It was "partial" because it related only to the surplus electric utility charges, and his complaint was broader. The lower court denied the motion.

The city then filed a motion for partial summary judgment which was granted.

The citizen/plaintiff appeals 1) the denial of his motion for partial summary judgment, and 2) the granting of the city/defendant's motion for partial summary judgment. See Facts, below.

### **SUMMARY OF ARGUMENT**

For years, Brigham City has regularly budgeted that the rates it charges the Appellant and others for its city-owned electric power will produce huge surpluses. Such surpluses, approximately \$1.5 million per year, are generated, transferred to the general fund, and used for general city obligations.

Electric utility charges are fees for a service. Taxes, not fees, may be used to generate revenues. Regularly anticipating and realizing large revenues from the charging of utility fees is illegal under statute and case law, and constitutes an unconstitutional taking without just compensation.

Use of utility fees to raise revenues alters the legislatively created scheme for spreading tax burdens.

The granting of the City's motion for summary judgment was therefore improper and appellant's motion for summary judgment should have been granted.

#### **FACTS**

1. Defendant/Respondent, Brigham City Corporation (hereafter "the City") is a municipal corporation. the remaining defendants were members of the city council and/or agents of the City in charge of collecting for electrical usage.

2. The City owns and operates the only electric utility within the city which provides power to Plaintiff/Appellant. R. at 286; 290, para. 2; 330, para. 7; 638-39; 641, para. 1; 654, para 7.

3. Plaintiff/Appellant (hereafter the "Citizen") is a resident of the City and a retired plumbing contractor living on limited means, owns real estate within the City, and subscribes to an pays for public utility service provided by the City owned

electric utility. R. at 057, para. 1; 178, para. 1; 290, para. 2; 405, para. 1.

4. Monies paid to the City for electrical power are held in a consolidated utility fund with separate accounting for electric utility revenues. R. at 290, para. 5; 329, para. 5; 641, para. 6; 653, para. 5.

5. The rates which the City charged and charges the Citizen and all other citizens of the City for electric power, were set by the City to yield, consistently, large surpluses over and above the costs of providing the utility service. R. at 059, paragraphs 16, 22; 181, paragraphs 16, 22; 286. See also, paragraphs 10 to 11, below.

6. The costs necessary to provide the service consist of the following, as set by statute: 1) the payment of interest and principal of all bonds, 2) a bond and interest sinking fund, 3) payment of the expenses of administration and operation and maintenance of the project or service, 4) creating a reserve for depreciation, and 5) creating a reserve for improvements, betterments and extensions other than those necessary to maintain the system. Utah Code Ann. § 55-3-10.

Thus the surpluses anticipated and received by the City were expected by the City to exceed, and exceeded all costs to provide the utility service.

7. The surpluses were transferred to the City's general fund, commingled with tax revenues received by the City

and used for general obligations of the City. R. at 061, para. 23; 181, para. 17; 182, para. 23; 286; 290, para. 6; 641, para. 7; 653, para 1.

8. The City regularly set rates for power usage high enough to yield large surpluses; budgets approved by the City specifically contemplated the generation of the following electric utility surpluses in the following fiscal years:

1986-87	\$1,275,859
---------	-------------

1988-89	\$1,275,858
---------	-------------

R. at 215, para. 45; 242, para. 45; 278, para. 2; R. at 251 (Facts not disputed by the City). Budgets for other years included similar anticipated surpluses, but the amounts are in dispute. R. at 228-246.

9. The City budgets contemplated that the anticipated electric utility surpluses would be transferred from the consolidated utility fund to the city's general fund and used for general city obligations. Id. and R. at 060, para. 17 & 18; 178, para. 1; 181, para. 18.

10. Anticipated surpluses were actually realized by the City. The City recovered the following surpluses in the following years:

1982-83	\$1,184,996
1983-84	1,193,931
1984-85	1,494,993
1985-86	1,770,678
1986-87	approx. 1,275,000
1987-88	1,275,858

R. at 212, para. 26; 236, para 26; 238, para. 31; 239, para. 36; 241, para. 41; 242, para. 45; 244, para. 53.

11. All anticipated or actual electric utility expenses for each fiscal year were:

	Budgeted	Actual
1982-83		
1983-84		1,194,796
1984-85		2,026,170
1985-86	2,286,893	
1986-87	2,706,559	
1987-88		
1988-89		

R. at 214, para. 39; 215, para. 44; 238, para. 31; 239, para. 36; 240, para. 39; 242, para. 44; 243, para. 48. Budgeted and actual expenses for other years where no figure is listed were similar, but the exact amount in dispute. R. at 228-246.

12. A simple comparison of paragraphs 10 and 11, above, indicates that the charges to rate-payers which resulted in the revenues to pay the electric utility expenses and to provide the surpluses in paragraph 10, were almost double that necessary to provide the services alone. In fiscal year 1983-84, the costs of providing the electrical services was almost the same as the surplus transferred to the general fund, therefore the charges to rate payers was almost double that which was necessary.

13. The fact that the surpluses, their anticipation and their use, were not in dispute is also illustrated by the

statement of the City's counsel at oral argument February 25,  
1991:

The charges for utility services have historically, in Brigham City, generated a surplus, . . . That surplus is transferred pursuant to the City's budget process to the general fund and is used for general municipal activities.

Transcript of hearing at 2.<sup>1</sup>

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<sup>1</sup> The transcription of the hearing was designated as part of the record but was not numbered by the district court clerk.

## ARGUMENT

### POINT I

BECAUSE SUMMARY JUDGMENT WAS GRANTED BELOW,  
THIS COURT WILL AFFIRM ONLY WHEN NO GENUINE  
ISSUE OF FACT EXISTS AND THE MOVING PARTY IS  
ENTITLED TO JUDGMENT AS A MATTER OF LAW.  
FACTS WILL BE REVIEWED IN A LIGHT MOST  
FAVORABLE TO THE CITIZEN.

It is well settled law that the standard for review is  
as stated in the point heading above:

A grant of summary judgment is appropriate  
only when no genuine issue of material fact  
exists and the moving party is entitled to  
judgment as a matter of law. In considering  
an appeal from a grant of summary judgment,  
we review the facts in a light most favorable  
to the losing party below.

Little America Hotel v. Salt Lake City, 785 P.2d 1106, 1107 (Utah  
1989), quoting Blue Cross and Blue Shield of Utah v. State, 779  
P.2d 634, 636 (Utah 1989). The trial court's conclusions are  
accorded no deference. Sacramento Baseball Club, Inc. v. The  
Great N. Baseball Co., 786, P.2d 763, 767 (Utah 1987). Citations  
to the quotation and Blue Cross and Blue Shield are omitted.

The lower court not only granted the City's motion for  
summary judgment, but denied summary judgment to the Citizen.  
Because the Citizen lost its motion for summary judgment, facts  
relating to that motion for summary judgment should also be  
considered in a light most favorable to the Citizen.

## POINT II

**BY STATUTE A MUNICIPAL CORPORATION MAY NOT CHARGE MORE THAN IS REASONABLE AND NECESSARY TO RECOVER CERTAIN COSTS OF PROVIDING ELECTRIC UTILITY SERVICES. EXCESS CHARGES ARE PROSCRIBED.**

Utah Code Ann. § 55-3-1, et seq. provides for public works programs. Utah Code Ann. § 55-3-1 authorizes any city to construct electric and other power plants and distribution systems.

Utah Code Ann. § 55-3-10 limits the fees which may be charged by such a public works program to those sufficient to provide for producing the power and operating the system in question, and not in excess thereof. See § 55-3-10, above at vi.

Utah Code Ann. § 55-3-10 states that: "Rates for services furnished by any project or service as described in Section 55-3-1 hereof shall be reasonable . . ." The statute continues by stating that such rates: "shall be sufficient to provide for" specified costs of doing business, including reserves: 1) paying interest and principal of all bonds, 2) creating a bond and interest sinking fund, 3) paying the expenses of administration and operation and maintenance of the project or service, 4) creating a reserve for depreciation, and 5) creating a reserve for improvements, betterments and extensions other than those necessary to maintain the system. Utah Code Ann. § 55-3-10. The above contemplate all costs necessary to operate the system.



The statute is clear that the rates which may be fixed may produce sufficient revenues to provide for those areas mentioned above, but not amounts in excess thereof:

Such rates may be fixed and revised . . . so as to produce these amounts, and . . . maintain such rates for services furnished by the project or service as shall be sufficient to provide for the foregoing, but not in excess of a reasonable rate for the service rendered.

(Emphasis added.)

Under the present circumstances, the City does not set the rates sufficient to provide only for costs of operation mentioned above and not in excess of a reasonable rate for the service rendered. The City sets rates for the specific, contemplated purpose of creating surpluses which the City specifically declares will be transferred to the general fund. The rates are set to produce revenue, not just provide a service. The City then diverts that revenue into the general fund as contemplated in the budget. Such a practice is unlawful and should not be countenanced.

The court below denied plaintiff's motion for summary judgment on the facts and law just recounted. The Citizen submits that the lower court should have granted the Citizen's motion for summary judgment on the undisputed facts and should have held that the excess charges, anticipated by the City in its budget, collected and diverted to the general fund, were improper. Instead of doing this, the court held to the contrary,

finding that no factual circumstance could be proved whereby the excess charges could be violative of the above-mentioned statute. That decision was error.

### POINT III

BY CASE LAW, CHARGES FOR UTILITY SERVICES ARE FEES NOT TAXES AND MUST NOT BE IN EXCESS OF A REASONABLE RATE FOR THE SERVICE RENDERED. TO THE EXTENT THEY ARE USED TO RAISE REVENUE THEY ARE ILLEGAL.

Courts in Utah have long made a distinction between fees and taxes. A fee is a charge imposed for a service rendered, and may not exceed the reasonable cost of rendering that service. If the fee is greater than the reasonable cost of rendering the service, resulting in revenue, it is considered a tax, and is inappropriate, beyond statutory authority, and even unconstitutional.

In Ponderosa One Limited Partnership v. Salt Lake City Suburban Sanitary Dist., 738 P.2d 635 (Utah 1987), this Court had before it the issue of "whether the payment of sewer service charges is the payment of a tax." Id. at 636. If the sewer service charges were a tax, then certain limitations on filing suits would apply.

This Court specifically held that sewer charges are fees not taxes:

"Sewer charges and fees are not taxes or special assessments, but are in the nature of tolls or rents paid for services furnished or

available." 11 E.McQuillin, Municipal Corporations § 31.30a (3d Rev.Ed. 1983). See also, Jennings v. Walsh, 214 Kan. 398, 521 P.2d 311 (1974).

Id. at 637. The court continued:

In Home Builders Association of Greater Salt Lake v. Provo City, 28 Utah.2d 402, 503 P.2d 451 (1972), and Murray City v. Board of Education, 16 Utah.2d 115, 396 P.2d 628 (1964), this Court denied the characterization of a sewer charge and a connection charge as a revenue measure and stated that such charges are neither taxes nor assessments but payments for services furnished. Home Builders Association, 503 P.2d at 452. That characterization is echoed in City of Stanfield v. Burnett, 222 Or. 427, 353 P.2d 242 (1960), overruled on other grounds, Aloha Sanitary Dist. v. Wilkins, 245 Or. 40, 420 P.2d 74, 77 (1966), where property owners not hooked up to the sewer system had challenged the city's imposition of a fee and where the court found that "a charge for the use of a sewer is not a tax or assessment, but a charge for a service rendered and is based on contract."

Id. at 637 (Emphasis added). The court finally concluded that the sewer charges were not a levy to raise revenues, therefore not a tax: "The fee therefore was a use charge and not a levy to raise revenues." Id. at 638.

In Mountain States Telephone v. Salt Lake County, 702 P.2d 113 (Utah 1985), this Court considered a county ordinance levying a utility tax on the sale of utility services in unincorporated areas of the county. The court found that local revenue measures are ultra vires where they are supported by nothing more than the power to regulate. The court then quoted

with approval, an Illinois case, City of Chicago Heights v. Public Service Company, infra, wherein the Illinois court:

"struck down an ordinance which imposed license fees greatly in excess of the reasonable cost of regulating the use of the City streets. See also 12 E McQuillin, supra, Paragraph 34.82 at 200 ("the fee is invalid if its amount is so much in excess of that necessary for supervision and inspection that it is clear the fee is one for revenue").

Id. at 118 (Emphasis added). The court cited other cases from other jurisdictions with approval, such as Chesapeake v. Potomac Telephone Company v. City of Morgantown, 143 W.VA. 800, 105 S.E.2d 260 (1958).

In Consolidation Coal Co. v. Emery County, 702 P.2d 121 (Utah 1985), several businesses sought declaratory judgment, injunctive relief, and a refund of fees paid, challenging the validity of portions of an Emery County business license ordinance. The district court declared the challenged portions unconstitutional and beyond Emery County's statutory authority, and enjoined any further efforts to enforce the provisions. The portions of the statute challenged required payment to the county of an additional business license fee of one-half of one percent of the fair market value of goods sold, where such value exceeded \$150,000 per year. In finding the fee inappropriate, the court specifically found that the money to be generated thereby (over \$800,000), as the money in the case at bar, "was to go into Emery County's general fund to be expended for general county

purposes." Id. at 123. The lower court also found that the fee bore no relationship to the cost of enforcing the ordinance, and the monies generated appeared to be general revenue.

This Court affirmed the district court, and discussed the distinction between a licensing fee, which must reasonably relate to the costs of the service, and a fee primarily to raise revenue under a municipality's taxing power:

Fees for services which were not under the taxing powers "must bear some reasonable relationship to the cost of regulating the business so licensed." Weber Basin Home Builders Association v. Roy, 26 Utah 2d 215, 217, 487 P.2d 466, 467 (1971).

Id. at 123. The court considered Utah Code Annotated § 17-5-27 which authorizes the county commission to "license for a purpose of regulation and revenue all and every kind of business not prohibited by law." Id. at 123 (Emphasis added). In spite of that statute which apparently authorized a county to charge a fee to obtain revenue as well as to recoup costs of service, this Court affirmed its prior holding in Cache Co. v. Jensen, 21 Utah 207, 61 P.303 (1900), and declared that the county could not charge a fee to "raise revenue through licensing except insofar as such revenue is necessary to, and therefore proportionate to, the cost of regulation of the licensed entities." Consolidated Coal at 127.

In Lafferty v. Payson City, 642 P.2d 376 (Utah 1982), this Court considered an "impact fee" of \$1,000.00 per family

dwelling unit prior to issuance of any building permit. The district court held that such a fee was not proper. This Court affirmed the district court's reliance on Weber Basin Home Builder's Association v. Roy City, 26 Utah.2d 215, 487 P.2d 866 (1971), where the lower court invalidated "an increase in a building permit fee on the basis that it was an illegal tax." Id. at 378. The district court invalidated the fee because it was in the nature of a tax to raise revenue:

The opinion notes that the purpose of the increase was to obtain additional money for the city's general fund, into which the proceeds were deposited.

Id. at 378 (Emphasis added). This Court affirmed the district court. This Court cited several cases where "fees were imposed to finance a specific municipal service or capital expenditure" which the court felt was proper. However, the fee in question and that in the Weber Basin Home Builders case was distinguishable, "on the basis that a reasonable charge for a specific service is permissible whereas a general fee that amounts to a revenue measure is not. Home Builders Association of Greater Salt Lake, 28 Utah.2d at 404, 503 P.2d at 452." Id. at 378 (Emphasis added). The court then affirmed, stating that impact fees deposited in the city's general fund were an illegal tax:

We affirm that distinction and agree with the district court's conclusion that the impact fee deposited in the city's general revenues

in this case is an illegal tax. Weber Basin Home Builders Association v. Roy City, supra.

Id. at 378.

In Banberry Development Corporation v. South Jordan City, 631 P.2d 899 (Utah 1981) (Hereafter "Banberry"), this Court upheld the validity of water connection and park improvement fees assessed against developers of real property. The court cited Home Builders Association v. Provo City, 28 Utah 2d 402, 503 P.2d 451 (1972), discussed below at Point IV, wherein this Court sustained the validity of a sewer connection fee which was imposed in order to improve and enlarge the sewer system. The court found that the improvement fee was not a revenue measure or an assessment, but a "reasonable charge for the use thereof," Banberry at 903, because the funds generated were to be used in reasonable relation to the service provided:

. . . the funds obtained were to be restricted to the enlargement, improvement, and operation of the sewer system and to the retirement of indebtedness incurred in its construction.

Id. at 309.

This Court also quoted a New Jersey case. The Court held that a connection fee could be more than the direct cost incident to hooking up the sewer, if the additional fees were only an equitable means of sharing earlier costs for such a facility:

Therefore, where the fee charged a new subdivision on a new property hook up exceeds

the direct cost incident thereto (as a means of sharing the costs of common facilities), the excess must survive measure against the standard that the total costs "fall equitably upon those who are similarly situated and in a just proportion to benefits conferred."

Id. at 903.

In Call v. The City of West Jordan, 614 P.2d 1257 (Utah 1980), developers attacked an ordinance requiring subdividers to dedicate seven percent of proposed subdivision land or pay equivalent of that value in cash. This Court upheld the required dedication of land, but only if the evidence reasonably established that the municipality will be required to provide more land for parks and playgrounds as a result of the subdivision. Again, the fee for the service must reasonably relate to the service.

See Smith v. Carbon County, 90 Utah.2d 560, 63 P.2d 259 (1953), wherein the court stated that fees may be charged for services rendered in probate proceedings, but they must bear some reasonable relation to the extent and nature of the services rendered, otherwise such fees are in contemplation of the law taxes. Cases from other jurisdictions are in accord.

In City of Chicago Heights v. Public Service Commission of Northern Illinois, 97 N.E.2d 807 (Ill. 1951), cited favorably by this Court in Mountain States Telephone v. Salt Lake County, above, the Supreme Court of Illinois considered a city's attempt to enforce an ordinance requiring the public utility to pay \$5.00



for every pole, and \$.025 for each wire crossing each street, and other charges. The court held that:

The license fees charged must bear some reasonable relation to the additional burdens and necessary expense involved in the regulation and supervision of the business affected, otherwise the ordinance imposing the license fees will be regarded as a revenue measure and being unauthorized deemed null and void. Ward Baking Company v. City of Chicago, 348 Ill. 212, 172 N.E.2d 171; Nature's Rival Company v. City of Chicago, 324 Ill. 566, 155 N.E.2d 356; Bauer v. City of Chicago, 321 Ill. 259, 151 N.E.2d 902.

Id. at 810 (Emphasis added). The court recognized that fees may be unreasonable as a matter of law:

A license fee may, however, be so grossly excessive as to be deemed arbitrary and unreasonable as a matter of law. City of Chicago Heights v. Western Union Telegraph Company, 406 Ill. 428, 94 N.E.2d 306; (other citations omitted) in the first Chicago Heights case, we specifically held that the fees imposed . . . were so grossly excessive as to be unreasonable as a matter of law.

Id. at 810. The court held that the fees in question were excessive and unreasonable as a matter of law.

The City of Chicago Heights case was cited with approval by the Utah Supreme Court in Mountain States Telephone v. Salt Lake County, 702 P.2d 113 (Utah 1985). See discussion of that case, above.

In Park Towne v. Pennsylvania Public Utility Commission, et al., 433 A.2d 610 (Pa. 1981), the issue before the court was whether or not rate payers should be charged for

imprudent management of the utility company. The Public Utility Commission of Pennsylvania held that the utility customers were not so responsible, and the Pennsylvania court agreed:

We agree with the Commission that PECO's (Philadelphia Electric Companies) customers are not required to reimburse the utility, through rate changes, for expenditures imprudently made as the Supreme Court wrote in Pennsylvania Public Utility Commission v. Pennsylvania Gas & Water Company (citation omitted): "The original cost of the property is not to be taken as controlling (in the ascertainment of the fair value of a utilities property for rate making purposes), for there may have been extravagance in purchasing, or bad management . . ."

In Williams v. Hawkins, 372 S.2d 1010 (Fla. 1979). The court of appeals cited the Florida Supreme Court for the proposition that "if a license fee was unconnected with the cost of regulating the utilities which would pay the fee, then it is a tax and illegal." Id. at 1010.

The City in the present case is in the same position as the public utilities mentioned above, and may not charge for more than reasonable expenses to create general revenues.

In the present case there is no factual dispute concerning the surpluses intended and generated by the City through its excessive charges. For the past several years the City has created budgets which anticipated and expected the reasonable costs of utility services to be far less than revenues generated by the City's rates. The budgets expected that almost 1.5 million dollars per year in overcharges would be transferred

from utility accounts into the general fund to be used for general obligations of the City.

Not only did the City expect and budget for the excess utility charges which would be transferred to the general fund, but transfers of almost 1.5 million dollars were made in each year at issue, at least from 1982. The percent of over-charging utility customers is gross and excessive, constituting almost double the amount reasonable and necessary to provide the service. Such charges are unlawful, and should not be allowed.

#### POINT IV

##### **TAKING OF PROPERTY BY CHARGING EXCESS FEES NOT REASONABLY RELATED TO THE SERVICES PROVIDED IS AN UNCONSTITUTIONAL TAKING IN VIOLATION OF THE PLAINTIFF'S STATE CONSTITUTIONAL RIGHTS.**

In Call v. The City of West Jordan, supra, this Court cited a Missouri case favorably which held that fees reasonably related to the services provided are permissible, but if they are not so reasonably related, payment of such fees "amounts to a confiscation of private property in contravention of the constitutional prohibitions . . ." Call at 1259 quoting Home Builders Association of Greater Kansas City v. City of Kansas City, 555 S.W.2d 832, 835 (Missouri 1977).

In Weber Basin Home Builders Association v. Roy City, supra, Roy raised its building permit fee from \$12.00 to \$112.00 and admitted that it had not experienced commensurate increases

in the cost of running its building department in issuing permits. The fee was simply additional revenue for the city. In that case, the court held that such excess charges were unconstitutional.

Cases from other jurisdictions concur with this Court.

In City of Chicago Heights, supra, the Illinois court affirmed a prior holding, City of Chicago Heights v. Western Union Telegraph Company, 94 N.E.2d 306 (Ill. 1950). In the earlier, 1950, City of Chicago Heights case, the Illinois Supreme Court found that fees required to be paid were unconstitutional because they merely went into the public treasury without the service being provided for which the fees were supposedly charged, just as the fees in the case at bar:

A closer scrutiny of the ordinance under attack discloses that there are no other essential features there ordained, except the collection and payment into the general treasury of the City of the fees therein provided for and consent to the erection and maintenance of any poles and wires by the City Council. No standards or specifications are prescribed, no inspection or supervision is required, no disposition is made of the fees to be paid thereunder except that they be paid to the City clerk and presumably into the general fund of the City.

Id. at 308 (Emphasis added).

In Conoco, Inc. v. Louisiana Public Service Commission, 520 So.2d 404 (La. 1988), the Supreme Court of Louisiana stated that the public service commission's power to fix rates was limited by the Constitution.

In State of North Carolina, ex rel Utilities Commission v. Edmisten, 263 S.E.2d 583 (N.C. 1980), the Supreme Court of North Carolina recognized that rates for utilities should be reasonable and must be consistent with state and federal constitutional provisions:

Chapter 62 of the General Statutes confers upon the Commission both the power and the duty to compel the public utility to render adequate service to its public customers in return for reasonable rates (citation omitted). These rates are to be fixed by the Commission as low as may be reasonably consistent with due process requirements of the State and Federal Constitutions. Utilities Commission v. Duke Power Company, 285 N.C. 377, 206 S.E.2d 269 (1974).

Id. at 587.

Even the statutes involved recognized that courts considering actions of the commission "may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are: (1) in violation of constitutional provisions, . . . Id. at 588, Note 3.

In the present case, the amount of overcharges are clear. Each year anticipated surpluses are taken from the utility funds and placed in the general fund for general City obligations. That is established as a matter of law.

Clearly the utility charges are excessive and merely a revenue device, a tax. That tax constitutes an unconstitutional

taking of property without just compensation and is unlawful.  
Constitution of Utah, Article I, Section 22.

#### POINT V

#### **RAISING REVENUES THROUGH UTILITY FEES IS ILLEGAL AND ALTERS THE STATUTORY BURDENS OF TAXES.**

The Legislature of Utah has set up a specific plan for taxation of citizens by the state and by municipalities. That system of taxation contemplates the spreading of the tax burden in a certain manner. Allowing a municipality to use service charges as revenue raising taxation is contrary to the legislative plan for spreading the tax burden, and is therefore illegal. One example, proffered to the court in the hearing of February 25, 1991, at p. 22<sup>2</sup>, illustrates how revenue raising fees alter the tax burden under the present circumstances. Volcraft is a large industry in Brigham city which owns real property on which it operates. The property is within, but at the edge of, the City. It does not receive power from the City-owned electric utility system. As a property owner, Volcraft would be assessed real property taxes which would become part of the general revenues of the City. If the City raised all monies in its general fund through real property taxes and not utility

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<sup>2</sup> The transcription of the hearing was designated as part of the record but was not numbered by the district court clerk.

surpluses, Volcraft would pay a certain number of dollars in taxes.

Because a significant portion of the general revenues is raised through excessive utility service charges, the amount of money needed to be raised by real property taxes is decreased by the amount of surplus utility fees transferred to the general fund. Thus the amount of money which Volcraft pays in real property taxes is decreased. The utility users, such as the Citizen, make up that decrease in real property tax through payment of the excess utility charges.

Another example, proffered to the court at page 23 of the transcript of the February 25, 1991 hearing, is renters who pay their own utilities. Such renters would pay no real property taxes, but the real property taxes for the rich are kept low because the renters pay excessive utility fees which go into the general fund.

The situations concerning Volcraft and utility paying renters illustrate the illegality in the City's actions in altering the legislatively created method of spreading the tax burden. In fact, the Volcraft example illustrates why the Citizen's motion for summary judgment should have been granted.

## POINT VI

### EVIDENCE SUPPORTED THE POSITION OF THE CITIZEN.

The City admitted to those facts set out under "Facts," above, that the City had budgeted for the surpluses indicated therein, and had regularly obtained anticipated surpluses, and had transferred the amounts stated therein to the general fund.

The Citizen's expert, a certified public accountant, economist, and, at the time, a senior manager in the accounting firm of Ernst & Young, reviewed financial records of the City which indicated the costs and expenses of providing electrical service within Brigham City, which comport with Utah Code Ann. § 55-3-10, quoted and discussed at length under Point II, above. He stated:

6. I have reviewed financial records which indicate the expenses and costs of providing electrical service within Brigham City, including but not limited to: the payment of interest upon the principal of bonds related to electric utilities; bond and interest sinking funds; payment of expenses for administration, operation and maintenance of the utility service; and reserves for depreciation.
7. From my review I have formed the conclusion that the amount of monies charged to electric utility users, for electric utility services in Brigham City, exceed the costs and expenses mentioned in paragraph 6, above; and result in



excess funds which are transferred by Brigham City to its general fund and used for public purposes other than for the provision of electric or other utility service.

R. at 722. Of course, his opinion is really unnecessary. The City's admitted consistent creation of approximately 1.5 million in surpluses year after year establishes that revenues exceed costs.

Not only did the expert conclude that the monies transferred to the general fund were used for general obligations of the City and not for provision of utility services, he also was of the opinion that the amounts paid by the Citizen were excessive for the services provided:

8. I have also concluded that the utility payments made by Mr. Leo Walker, are in excess of a pro rata rate for the cost to Brigham City of services rendered to Mr. Walker.

R. at 723.

#### POINT VII

**TRIAL WOULD BE APPROPRIATE IF CITIZEN'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED.**

The court denied the Citizen's motion for summary judgment even though there was no genuine issue of fact that excess utility charges were anticipated and charged to the Citizen and others similarly situated, and that the surpluses were regularly put in the general fund and used for general

obligations of the City. There was no dispute that the rates charged by the City for electrical utilities constituted a revenue measure. Summary judgment should have been granted in favor of the Citizen.

Even if such summary judgment should not have been granted, summary judgment was not proper for the City. In Lafferty v. Payson City, above, this Court recognized that trial was appropriate where the reasonableness of the fees was at issue:

The district court . . . put plaintiffs to trial on the reasonableness of those fees. That was the correct procedure. Banberry Development Corp. v. South Jordan City, supra; Home Builders Association of Greater Salt Lake v. Provo City, supra.

Id. at 378.

After the trial in Lafferty, the district court and this Court were able to see that the fees were reasonable because they, "represent the cost of creating, maintaining and using the aforesaid utilities." Id. at 378. The court continued that the municipality needed to disclose the basis for its calculations that the fees were reasonable: "The municipality has the burden of disclosing the basis of its calculations to whoever challenges the reasonableness of the fees." Id. at 379. Because the district court in Lafferty did not take into account all of the potential factors which the district court should have considered under a then recent Banberry case, the court remanded the case to

the district court for taking of additional evidence, if necessary, consistent with Banberry and the factors stated therein for determining whether or not the fees were reasonably related to the services provided.

This case also should have gone to trial even if, somehow, the undisputed fact of the excessiveness of the City's fees and the use thereof as a revenue measure should not have resulted in the grant of the Citizen's motion for summary judgment.

#### CONCLUSION

It is undisputed that the City regularly, consistently and intentionally overcharged the Citizen and others similarly situated for utility services in order to create large, yearly utility surpluses which were transferred regularly into the general fund and used for general City obligations. Such overcharges were revenue raising, illegal taxes outside the legislatively established method of taxing, and of allocating tax burdens.

The summary judgment in favor of the City should be reversed, the denial of the Citizen's summary judgment should also be reversed, and the case remanded to the district court for entry of orders halting the overcharging at issue and finding damages.

DATED this 24<sup>th</sup> day of August, 1992.

HANSON, EPPERSON & SMITH



ROBERT R. WALLACE  
ATTORNEY FOR PLAINTIFF/APPELLANT

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing BRIEF OF PLAINTIFF/APPELLANT was mailed, postage prepaid, this 24<sup>th</sup> day of August, 1992 to the following:

Jody K. Burnett  
WILLIAMS & HUNT  
257 East 200 South, Suite 500  
P.O. Box 45678  
Salt Lake City, Utah 84145-5678  
Co-Counsel for Brigham City  
Redevelopment Agency

Jeff Thorne  
Ben Hadfield  
MANN, HADFIELD & THORNE  
P. O. Box F  
Brigham City, Utah 84302  
Co-Counsel for Brigham City  
Redevelopment Agency



IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF BOX ELDER  
STATE OF UTAH

-----  
LEO A. WALKER,

Plaintiff

vs.

BRIGHAM CITY, PETER C.  
KNUDSON, BETH W. GURRISTER,  
DAVID G. HACKING, DEE J.  
HAMMON, ROBERT B. SHELTON, and  
MARK A. WALKER, REDEVELOPMENT  
AGENCY NO. 1 OF BRIGHAM CITY,  
REDEVELOPMENT AGENCY NO. 2 OF  
BRIGHAM CITY: MICHAEL T.  
COSGROVE, and JOHN OR JANE  
DOES I THROUGH X,

Defendants  
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APR 3 - 1991

HANSON EPPERSON & SMITH

MEMORANDUM DECISION

CASE NO. 870030069

THIS MATTER is before the Court upon the Defendant's Motion for Summary Judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure.

The Plaintiff bases his claim partially on the allegation that the action by the city of charging rates, which he argues are unreasonably high, is among other things an unconstitutional taking. For reasons set forth in the Defendant's Memorandum and Reply Memorandum this Court agrees that the issue here does not necessarily rise to the level of constitutional magnitude.

The city does not argue that the Plaintiff may challenge the rate making process, or more specifically the rate levels, and agrees that this Court has the power to review the rate making process to determine if it is free from arbitrary and capricious exercise of power and that rates are reasonable for

the service provided.

The two approaches are directly related. The Court has the power to review either the rates or the rate setting procedure where the rates are so unreasonable as to be the result of arbitrary and capricious action. Caution obviously has to be exercised in order not to intrude in an unwarranted fashion on the legislative function, nor to make the Court a rate making body.

This Court observed at the hearing, that if the legislature wanted to limit the municipality's power to charge rates in excess of those necessary to cover the costs, etc., it could readily have done so. The Legislature did provide that the rates charged are to be sufficient to provide for payment of the interest and principle, to create funds, pay for administration and operation, maintenance, depreciation reserve, impropriety, etc. It neither specifically allowed or precluded profit - over and above that necessary for the above mentioned purposes.

It is apparent from the language that the Legislature envisioned the municipality charging enough to provide the service in order that the service be not dependent on taxes or other revenues to support the same. What the statute however does not say is that, "such rates shall only be sufficient to provide such payments, etc.". Had it done so, the Plaintiff's argument would be easier to approach.

Moreover, both parties appear to agree that the municipality may, though not specifically authorized by the statute or prohibited therefrom, charge enough for a reasonable profit to be realized. The statute neither mentions nor

defines "reasonable profit", but does mention rather "reasonable rates", specifically, "reasonable rate for the service rendered". The issue then before us on this Motion for Summary Judgment is whether there are facts in dispute as to the allegation that Brigham City officials acted arbitrarily or capriciously in setting the rates for utility services and or are the rates unreasonably high.

Defendant would separate the actual consideration of the rates from the rate setting process. This Court is not so sure that that can be done. If the rates are unreasonably high then it may follow the process or acts of the Brigham City officials would therefore have to be likewise unreasonable, arbitrary or capricious. The task of the Court it seems then, is first to define "reasonable rates" by finding the legal standards to apply, then examine the rates charged to determine their reasonableness.

The parties introduced affidavits and portions of transcripts of depositions stating that the rates charged by Brigham City are related to those charged by investor owned utilities and utilities owned and operated by municipalities of a similar size. Plaintiffs Affidavit states that, among other things, the rates charged are higher than needed for payment and maintenance as provided by the statute and that the excess funds are transferred to a general fund used for other public purposes.

Though the Defendants argue that this is not the appropriate forum in which to question the wisdom of the legislative discretion on the part of the Brigham City council, the Defendant does admit that if in fact the Brigham City

council acted arbitrarily or unreasonably in establishing these rates or if the rates are unreasonably high then review by this review is proper.

No allegations are made or supported for the purpose of this Motion that the city's procedure of establishing the rates is improper, that it failed to comply with the statutory provisions or municipal ordinance in establishing the rates except that the rates are higher than needed to provide for the cost of production as envisioned by the statute and that the rates were established with the intent of producing a surplus to be transferred to the general fund. The actual procedure with which the city undertook to set the rates, other than above stated, is not challenged. (There was some argument by the Plaintiff that historically the city did not comply with the statutory requirements, but since this action is for injunctive relief that issue is not particularly material for this Motion for Summary Judgment.)

The Defendant has argued that reasonableness is a matter of fact and this Court stated earlier in a Memorandum Decision issued on August 11, 1988, that facts are necessary to determine whether the rates being charged are excessive or unreasonable. For cited authorities the Plaintiff has argued that in the Ventura case (Hansen vs. the City of San-Buenaventura, 729 P.2d 186 California 1986) involved only a 3% return on the rates wherein this case there is a 30% rate of return. Defendant has cited Triangle Oil, Inc. vs. North Salt Lake Corporation, 609 P.2d 1338 (1980) for the principle that the Court should exercise its powers of review only if it is shown that the exercise of municipal power is, "so wholly



discordant to reason and justice that its actions must be deemed capricious and arbitrary and thus in violation of the complainant's rights".

The problem lies in discussing rates of return as opposed to rates for services rendered. The statute does not preclude any certain rate of return or profit, what it does require is a reasonable rate for the service rendered. The question then is not one of percentage of profit; i.e., rate of return but rate charged for the value of the service rendered. That is what the Court suggested in the August 11, 1988, Memorandum Decision, that fees may not be in excess of the value of the service provided. The city is not precluded by that statute from obtaining a certain rate of return, even a high rate of return or profit, but it is precluded from charging a rate not reasonable for than the value of the service rendered. This is likely so because the city is the only provider of that service. If the city charged rates greatly in excess of the value of the service rendered, and since it is the only provider in Brigham City by state law, then that rate would be unreasonable and violative of the statute.

Contrary then to the Plaintiff's argument it would appear that the determination of the value of the service rendered must take into comparison the rates charged for similar services provided to other consumers. That would necessarily require an analysis of the rates charged by other municipal providers and by other non-municipal providers. The cost of producing the power by each individual provider is not the bench mark against which the rate charged is compared, but rather it is the value of the product provided or service

rendered.

Value is generally determined by what the consumer is willing to pay. Economics dictate that the higher the rate charged perhaps the less the consumer is willing to buy and the lower the rate charged the more the consumer is willing to buy. However, because the Plaintiff and other individuals in his position are a "captive consumer" it seems to this Court that the amount other consumers are paying here and elsewhere is a better criteria for determining reasonableness than the costs of production as the best analysis of the value of the service rendered. The term "reasonable", as used in the statute should be defined by comparison. Stated another way the city then is not restricted to a cost basis analysis to determine its reasonable rates, but the reasonable rates are to be determined by the value of the service rendered. The only way to reasonably determine the value of that service rendered is to compare like services and rates.

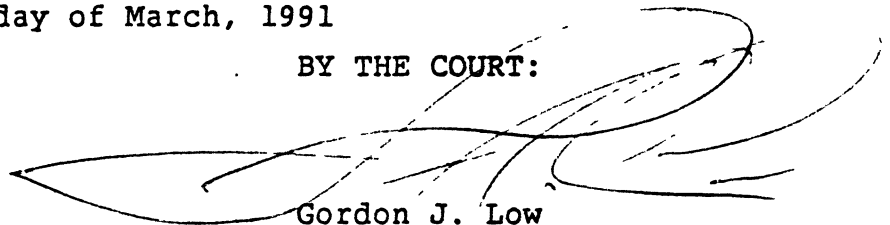
If the city were selling its power for substantially higher rates than like services provided by other providers or if the city were selling its power for rates considerably lower than sufficient to provide for maintenance of the costs as required by statute then the Plaintiff's argument would be well taken. But the uncontested fact that the city is charging rates reasonably comparable to those charged by other providers, even though higher than they need to in order to cover costs, does not demonstrate that the rates are unreasonably high or that the city acted unreasonably in exercise of its legislative power. If the city government wants to charge less than what it is charging now, but still sufficient to cover the costs, it

Walker vs. Brigham City  
#870030069  
Page 7

may do so under the statute but that is a legislative function that  
to be controlled by the City Council and is an area in which the  
the Court should not intervene. Defendant's Motion for Summary Inter-  
Judgment is therefore granted. Counsel for the Defendant is  
directed to prepare a formal Order in conformance herewith.

Dated the 27th day of March, 1991

BY THE COURT:



Gordon J. Low  
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, postage prepaid to the following: Robert R. Wallace, Attorney at Law, 4 Triad Center STE 500, P.O. Box 2970, Salt Lake City, UT 84110, Jody K. Burnett and Craig L. Barlow, Attorneys at Law, 10 Exchange Place, 11th Flr., P.O. Box 45000, Salt Lake City, UT 841110, Merrill G. Hansen and James I. Watts, Attorneys at Law, 1245 Brickyard Road Dr., STE 600, Salt Lake City, UT 84106 and Ben Hadfield and Jeff R. Thorne, Attorneys at Law, P.O. Box F, Brigham City, UT 84302.

DATED this 2nd day of April, 1991.

/s/ MARLA LILJENQUIST

---

Marla Liljenquist  
Deputy Clerk

JODY K BURNETT  
CRAIG L. BARLOW  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendants  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

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IN THE FIRST JUDICIAL DISTRICT COURT OF BOX ELDER COUNTY  
STATE OF UTAH

---

LEO A. WALKER,

Plaintiff,

vs.

ORDER

BRIGHAM CITY, PETER C. KNUDSON,  
BETH W. GURRISTER, DAVID G.  
HACKING, DEE J. HAMMON, ROBERT  
B. SHELTON, and MARK A WALKER  
REDEVELOPMENT AGENCY NO. 1 of  
BRIGHAM CITY, REDEVELOPMENT  
AGENCY NO. 2 of BRIGHAM CITY;  
MICHAEL T. COSGROVE, and JOHN  
or JANE DOES I through X,

Civil No. 870030069

Defendants.

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On March 21, 1989 the parties, through counsel, appeared before the Court for argument on several motions, including plaintiff's and defendants' Motions for Partial Summary Judgment. The plaintiff was represented by Robert R. Wallace and defendants were represented by Jeff Thorne, Merrill Hansen and Craig L. Barlow. The parties had submitted Memoranda in

support of their motions and opposing the motions. On August 11, 1988 this Court issued a Memorandum Decision on both Motions for Partial Summary Judgment. The plaintiff had not submitted a memorandum in response to the defendants' motion at the time the Memorandum Decision was issued despite the fact that counsel for defendants had agreed that the plaintiff could have additional time to file a responsive memorandum. The Court allowed the plaintiff to submit a reply memorandum and has now reviewed all of the memoranda submitted as well as the Court's file of the entire matter and considered the argument of counsel. Based on the Court's review and analysis its Memorandum Decision of August 11, 1988 granting defendants' Motion for Partial Summary Judgment on claims 1 through 6 of plaintiff's Amended Complaint remains the Court's decision in this case. The Court also grants the defendants' Motion to Strike the Affidavit of Leo Walker submitted in support of plaintiff's Memorandum Opposing defendants' Motion for Partial Summary Judgment. The Court finds there are no disputes of material issues of fact and the defendants are entitled to summary judgment on claims 1 through 6 of the plaintiff's Amended Complaint. Therefore, it is hereby

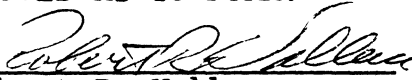
ORDERED, ADJUDGED AND DECREED that defendants' Motion  
for Partial Summary Judgment is granted, with prejudice  
and plaintiff's Motion for Summary Judgment is denied,  
parties to bear their own costs.

DATED this 12<sup>th</sup> day of April, 1989.

FIRST DISTRICT COURT

By \_\_\_\_\_  
Judge Gordon Low

APPROVED AS TO FORM:

By   
Robert R. Wallace  
Counsel for Plaintiff

U 1 E 1988

PERSON 2

IN THE FIRST DISTRICT COURT OF BOX ELDER COUNTY,  
STATE OF UTAH

-----  
LEO WALKER )  
Plaintiff, )  
VS. ) MEMORANDUM DECISION  
BRIGHAM CITY ET AL ) FILE NO. 870030069  
Defendants. )  
-----

In this matter Leo Walker has filed a motion for Summary Judgment, seeking therein a Declaratory Judgment, that the electrical utility fees charged by Brigham City, Corporation to its customers are excessive and unconstitutional and for an injunction enjoining Brigham City Corporation from collection of excess fees for utility services, an injunction preventing Brigham City from collecting the purposed \$2.00 per month additional fee for an electrical service and for attorney fees;

The relationship between the action for Summary Judgment and the specific causes of action in the complaint is unclear. The Plaintiff alleges the grounds for the motion are that the charges made by Brigham City for Utility Services are excessive and constitute a taking of Plaintiff's property without constitutional due process, therefore in violation of both Federal and State Constitutions and the excessive charges are violative of the Utah Code annotated, Section 55-3-3.

There appears to be no dispute that between the years 1983 and 1987, the Defendant, Brigham City collected funds in charges for utility services and transferred certain of those

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NUMBER 870030069

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funds into the City's general fund. The funds collected were in excess of the sums of moneys required to operate the electrical services provided by the city. Further allegations are that during 1988 the City will transfer \$1,275,858.00 from the Utility Funds to the General Fund, that those funds represent monies in excess of expenses relating to the providing of electrical utility services. In addition thereto the City is proposing a \$2.00 per month electrical hook-up fee for all persons using utilities during 1988-89. Neither of the cases cited under section 1 of the Plaintiff's brief are directly on point but are argued to be applicable by inference or by implication.

It appears to the Court that one focal point of this issue is what is meant under Section 55-3-10 of the Utah Code annotated where in the City is authorized to charge rates for services provided but not in excess of those "reasonable for service rendered". Plaintiff argues that because the City charges more for its electrical service than it needed to meet the expense of providing this the service, it is therefore in excess of a "reasonable rate for the service rendered". No evidence or facts are supplied relative to what is a "reasonable rate for the service rendered". In other words though the City may be charging more for the service than it costs the City to provide the same, that may not be dispositive of the question of whether the charge is in excess of "reasonable rate for service rendered".

The Court is left unaware of the facts as to whether the Plaintiff is receiving his moneys worth or if the rate is "reasonable for the service" he is provided or even how and if that could be calculated. But it seems overly simplistic to conclude that since the City receives more than it expends related to electrical service that therefore its rate is "in

excess of a reasonable rate for the service rendered". It seems to the Court that far more information and facts are needed before Summary Judgment can be granted on that issue. The Defendant further argues since that this is not a class action, Plaintiff must therefore be able to show that the service charges he pays individually are unreasonable. Again those are further facts which are not supplied and are of which the Court is unaware at this juncture. Whether the Plaintiff's claim is cognizable under the Federal Statute cited in the complaint cannot at this time be determined.

The Plaintiff's second point essentially is that the charging by the City of excessive fees not reasonably related to the services being provided is a taking of property in violation of Plaintiff's constitutional rights. The threshold problem in this section of the Plaintiff's argument is the same as the first, that is this Court is without sufficient facts to determine whether the fees being charged are excessive fees, unreasonably related to the service provided.

The fees obviously are in excess of the cost of providing the service but they may not be in excess of the value of the service received. Further facts must be provided the Court on that issue. The Court distinguishes the case of Weber Basin Hombuilder Association vs. Roy City as there was apparently no showing by Roy City, that it had experienced a commensurate increase in the cost of running the building department, therefore justifying the increase from \$10.00 to \$112.00 in building permits. The builder was receiving no real benefit from the issuance of the building permit and therefore it was easily determined that the increase to \$112.00 was not reasonably related to the service provided. In this case however the Plaintiff is apparently receiving electrical service and the question is whether or not what he pays for it

is "reasonably related to the service provided". The defendant further argues in response to point 2, that the exact nature of the property right which the Plaintiff alleges that he is being denied must at the on-set be determined and that the Plaintiff has failed to identify the same.

Obviously if the Plaintiff refused to pay what he considers to be an excessive rate, that the utility service will be discontinued, therefore depriving him of a property right which can only be done so legally if in fact the charges are not excessive; otherwise the termination may be illegal and an unconstitutional taking. Before we get to that issue, the question of excess charges and the questions of the charges and their reasonableness and the relationship to the service rendered must be determined.

The Plaintiff's request therefore under point 2, for Summary Judgment is denied and the claim under point 3, for Attorney Fees is premature and therefore also denied.

The Defendants have moved this Court to strike the affidavit of the Plaintiff. Where the motions are denied, there is no need to rule on motion to strike.

The Defendants have filed motion for Partial Summary Judgment on several portions of the complaint.

With respect to all claims against individual defendants, they relate entirely to legislative functions, even setting the budget, determining rates and expenses allocable to the operation of the electrical and sewer facilities in State, are legislative in nature and are protected by an umbrella of immunity.

The first six claims of the plaintiff's complaint are Federal Civil Rights Claims. Remaining issues are brought under State law with respect to claim 1, of the plaintiffs

complaint, the same alleges that the City is involved in a Civil Rights violation against defendant by taking property without just compensation, violative of the fifth amendment of the United States Consitution. This Court specifically finds that that allegation does not state a Federal Civil Rights claim. In the denial of the Plaintiff's Summary Judgment, this Court pointed out that the Plaintiff has not shown that the rates charged are unreasonable, as reasonableness must be determined on more factors than just an expense/rate basis. It further assumed that the action is being brought under the Civil Rights Acts, section 1983 of the Civil Rights Act. But even if the allegation were true, that does not constitute a valid claim under that act. Rather the nature of alleged protected property interest of which the Plaintiff is being deprived is not articulated, though the defendant argues that the Plaintiff's relationship to the City is contractual and therefore it does not fall within the ambit of Constitutional protection. The Court does not necessarily agree that that is dispositive of the question as the services are far more than a contractual relationship. The City is the only agency able to provide such services. However if Plaintiff's complaint is based on the breach of the 'implied' contract, through excessive charges, that does constitute a Federal Claim.

The Court fully agrees with the defendant however in that in this case, the Court ~~or~~ should restrain itself from interfering with the exercise with legislative functions of the City, unless the City is out-side of its authority, its actions capricious, arbitrary, and or in violation of Plaintiff's Constitutional Rights.

With respect to claim two of the Plaintiff's complaint the Plaintiff has failed to show how it is he is being

discriminated against and therefore being deprived of equal protection of the laws guaranteed by the United States and the Utah Constitution. Plaintiff here allege that the City has been involved in a violation of Plaintiff's procedural and substantret in due process rights. In support of the same the plaintiff has not shown that he has been deprived of other remedys available.

The claim under 1983 Civil Right Act cannot be substantiated by showing that the defendant has violated the State Statutes or State Constitutional law. The Plaintiff has argued that the Defendant has acted in violation of Utah Code Annotated above cited, but liability under the 1983 Civil Rights rests upon violations of the United States Constitution.

Plaintiff's claim 4, relative to denial of equal protection, is unsupported by any claim of discrimination or against a class to which the Plaintiff belongs. In fact no class to which he belongs is identified. Whether the law requires a showing of a purposeful discrimination or a specific intent on the behalf of the defendant, at this point is irrevelant. The Plaintiff has failed to show a denial of equal protection.

Under claim five and six of the Plaintiff's complaint the Court fails to see where the Plaintiff has pled a violation of a constitutional law, or an application of the Federal or Constitutional Standards. Further more it seems clear the claims made in one through six may be articulated and sought through other remedial processes i.e. adequate State remedies to redress a property damage claim may exist. It seem there can be no deprivation of due process of law since the due process has not been accessed. Another avenue aside from the seeking of a 1983 Civil Rights Claim have not been

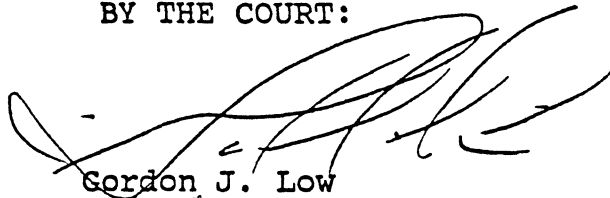
exhausted but here the Plaintiff has failed to show a deprivation of a Federal Constitutional protected Civil Right.

The reasons above stated the defendants motion for Summary Judgment with respect from claims one through six and all claims against individual defendants shall be dismissed and the Summary Judgment granted.

Counsel for the Defendant is directed to prepare a formal order.

Dated this 11th day of August, 1988.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Gordon J. Low', is written over the printed name.

Gordon J. Low  
District Court Judge