

1991

Justin C. Stewart, George L. Gigi, A. Earl Cox,
Barbra Toomer, Ronald Turpin, and Pat Coryell v.
Utah Public Service Commission and U.S. West
Communications, Inc. : Amicus Brief

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

910405

IN THE UTAH SUPREME COURT

Justin C. Stewart, George L.
Gigi, A. Earl Cox, Barbara
Toomer, Ronald Turpin and
Pat Coryell

Petitioners

Utah Public Service Commission
and US West Communication, Inc.

Respondents

Case No. 910405

Argument Priority: 10

ON PETITION FOR REVIEW FROM THE
UTAH PUBLIC SERVICE COMMISSION

BRIEF OF AMERICAN ASSOCIATION OF
RETIRED PERSONS AS AMICUS CURIAE

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TABLE OF CONTENTS

Table of Authorities.....	(i)
Statement of Interest of Amicus Curiae.....	2
Argument.....	3
I. Utah Code Annot. § 54-4-4.1(2) (Cum. Supp. 1991) Vesting Power In a Regulated Utility to Veto A Method Of Rate Regulation Chosen By the Utah Public Service Commission Constitutes An Unconstitutional Delegation Of Legislative and Judicial Authority To A Private Party.....	3
A. Utah Code Annot. § 54-4-4.1(2) (Cum. Supp. 1991) Violates the Utah Constitution's Limitation That Judicial Power Be Vested in The Courts.....	3
B. The Legislature Cannot Constitutionally Delegate a Veto Power That It Does Not Possess.....	5
II. Because No Legislative Intent Exists Independently Of the Unconstitutional Portion of § 54-4-4.1 The Court Must Invalidate the Entire Statute.....	9
III. "Incentive Ratemaking" As Considered Within Utah Code Annot. § 54-4-4.1 (Cum. Supp. 1991) Is Inherently Inconsistent With Utah Code Annot. § 54-3-1. (1990).....	11
IV. Approving An Incentive Regulation Package Including A Freeze on Rates During a Period of Declining Utility Costs Constitutes An Unconstitutional Confiscation of Property And Is Inimical to Ratepayers Interests.....	14
V. CONCLUSION.....	18

TABLE OF AUTHORITIES

CASES

Page

Mountain States Tel. & Tel. Co. v. Public Service Comm'n., 107 Utah 502, 155 P.2d 184 (1945).....	3
Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).....	6
Revne v. Trade Commission, 192 P.2d 563 (Utah 1948).....	9
Utah Technology Finance Corp. v. Wilkinson, 732 P.2d 406, 414 (Utah 1986).....	10
Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786, 91 (Utah 1977).....	10
Union Trust v. Simmons, 116 Utah 422, 211 P.2d 190, 193 (1949).....	10
Utah Department of Business Regulation v. P.S.C., 614 P.2d 1242 (1980).....	12
New England Telephone and Telegraph Co., et al v. Federal Communications Commission, 836 F 2d 1101 (DC Circuit 1987).....	13

PUBLIC SERVICE COMMISSION DECISIONS - UTAH

Dockets No. 90-049-03, 90-049-06, <u>Report and Order</u> , issued June 19, 1991.....	12
--	----

UTAH CONSTITUTION

Article VIII § 1.....	4
Article VI, § 1.....	7
Article VII, § 8.....	8
Article I, § 7.....	13

PUBLIC SERVICE COMMISSION DECISIONS - other states

Case No. 28961 - Proceeding on Motion of the Commission as to the Rate Changes, Rules and Regulations of New York Telephone Company, Before the Public Service Commission of New York, 1990.....	15
---	----

OTHER AUTHORITIES

Black's Law Dictionary, 1403 (5th ed. 1979).....	6
Kahn, Alfred, The Economics of Regulation: Principles and Institutions, 2d (1989).....	12
The Telecommunication Needs of Older Low-Income and General Consumers in the Post-Divestiture Era, AARP, Washington, D.C., 1987).....	16
Current Population Reports, Series P-23 No. 171, Computer Use in the United States: 1989, U.S. Department of Commerce, Bureau of the Census.....	16

Statement of Interest of Amicus Curiae

The American Association of Retired Persons is a not-for-profit membership organization of persons age 50 and over comprised of approximately 33 million members nationwide. More than 148,000 members of the organization reside in Utah. AARP represents the interests of older persons through legislative, judicial, and administrative advocacy. In representing these interests, AARP seeks to enhance the quality of life for older persons; promote independence, dignity and purpose for older persons; lead in determining the role and place of older persons in society; and sponsor research on physical, psychological, social, economic and other aspects of aging.

Through its programs and policies, AARP also supports effective consumer protection at the federal, state and local level. AARP has taken a specific interest in and has been an effective advocate for its members, and other residential consumers, specifically low income persons, in assuring responsible and equitable rate making for utilities regulated by public service commissions. AARP has intervened as a party in utility cases in other states and in appeals to appellate Courts of some utility commission decisions, and has developed and demonstrated expertise in representing interests of utility customers. Issues concerning telephone rates are of particular concern because older persons, many of whom live alone, rely on the telephone as a link to emergency services, medical care, family and friends.

ARGUMENT

I

UTAH CODE ANNOT. § 54-4-4.1(2) (CUM. SUPP. 1991)
VESTING POWER IN A REGULATED UTILITY TO VETO A METHOD
OF RATE REGULATION CHOSEN BY THE UTAH PUBLIC SERVICE
COMMISSION CONSTITUTES AN UNCONSTITUTIONAL DELEGATION
OF LEGISLATIVE AND JUDICIAL AUTHORITY TO A PRIVATE
PARTY.

A. UTAH CODE ANNOT. § 54-4-4.1(2)
(CUM. SUPP. 1991) VIOLATES THE
UTAH CONSTITUTION'S LIMITATION
THAT JUDICIAL POWER BE VESTED IN
THE COURTS.

The judiciary's role in the regulation of public utilities is clearly defined in Utah Code Annot. § 54-7-15, in that the Court is responsible for judicial review overseeing the determinations of the Public Service Commission (hereinafter "the Commission"). The Commission is required to assure that "all charges made...by any public utility...for any service rendered or to be rendered, shall be just and reasonable" Utah Code Annot. § 54-3-1 (1990). It follows then that all charges that would be unjust or unreasonable would be unlawful. Id. The Commission is an independent agency charged with supervising and regulating every public utility in Utah. Id. §54-1-1, 54-4-1.

The function of the judiciary is to review agency action on an appeal from an aggrieved party. This responsibility requires Courts to review agency action to ensure that the agency properly acted within its delegated authority. Mountain States Tel. & Tel. Co. v. Public Serv. Comm'n., 107 Utah 502, 155 P.2d 184 (1945); rehearing denied, 107 Utah 530, 158 P.2d 935 (1945). It

is the judiciary's role to make certain that agencies abide by the standards established in their enabling legislation. When a body possesses the authority to review determinations of an administrative agency and possesses authority to reject that agency's decisions, that body is in essence acting as a reviewing court, and exercising judicial powers.

Utah Code Annot. § 54-4-4.1(2) (Cumm. Supp. 1991) states:

Not later than 60 days from the entry of an order or adoption of a rule adopting a method of rate regulation whereby revenues or earnings of a public utility above a specified level are equitably shared between the public utility and its customers, the public utility may elect not to proceed with the method of rate regulation by filing with the Commission a notice that it does not intend to proceed with the method of rate regulation.

The central issue of this appeal is that the application of Utah Code Annot. § 54-4-4.1(2) (Cum. Supp. 1991) transforms the regulated utility into a judicial body by allowing the utility to reject agency decisions. Such a wholesale granting of judicial power to a private party is clearly in contravention of the Utah Constitution, Article VIII § 1, wherein it states that

The judicial power of the state shall be vested in a supreme court, a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish... Id.

If a utility is dissatisfied with a regulatory decision, it may appeal said decision, if it is a final order, to the judiciary. Utah Code Annot. § 54-7-15. (1990) The veto authority granted to a regulated utility company in Utah Code

Annot. § 54-4-4.1(2) (Cum. Supp. 1991) circumvents these procedures by taking the judiciary out of the process and replacing it with the utility itself, a classic case of giving the hen house keys to the fox.

**B. THE LEGISLATURE CANNOT CONSTITUTIONALLY
DELEGATE A VETO POWER THAT IT DOES NOT
POSSESS**

The Utah Public Service Commission exercises authority to regulate utilities within the state as delegated to it by the legislature. The Commission exercises limited judicial powers in that it is authorized to hold hearings and adjudicate matters within its sphere of enforcement. The Commission possesses executive powers because decisions regarding matters of enforcement are left to the Commission's discretion. In short, the Commission is charged with the legislative mandate to assure that all rates charged by utilities are "just and reasonable." There is no doubt that the legislature has lawfully delegated some legislative authority to the Commission to be exercised consistent with specific criteria and standards.

In Utah Code Annot. § 54-4-4.1(2) (Cum. Supp. 1991) the legislature attempts to delegate another portion of its powers. This delegation of authority goes to the very public utility that would be the subject of a shared earnings plan of the Commission. In relevant part, the provision states

The public utility may elect not to proceed
with the method of [shared earnings] rate

regulation by filing with the Commission a notice that it does not intend to proceed with the method of rate regulation. Id.

This provision authorizes a utility to nullify an order of the Commission by exercise of a veto.

All orders of the Commission have the force and effect of law. If a utility charges a rate that is higher than the rate established by Commission order, the Commission is authorized to bring suit to compel compliance. Utah Code Ann. § 54-7-21 (1990). Until the enactment of Utah Code Annot. § 54-4-4.1(2) (Cum. Supp. 1991) an aggrieved utility sought relief from what it thought to be an unjust Commission order from the Courts by way of judicial review. Now, however, when the Commission establishes a shared earnings rate plan, the utility may unilaterally, and without hearing or other public process, elect not to be bound by an order of the administrative agency that is authorized by the legislature to regulate the utility. If the utility did not have this purported authority the Commission's established shared earnings rate plan would be binding upon the utility.

The legislature, in effect, has conveyed the power to decide upon a shared earnings rate plan to the utility itself. A veto, in the American framework of government, based upon separation of powers, is "the refusal of assent by the executive officer whose assent is necessary to perfect a law which has been passed by the legislative body" Black's Law Dictionary 1403 (5th ed. 1979). The United States Supreme Court in Immigration and

Naturalization Service v. Chadha 462 U.S. 919 (1983) held that Congress does not have the power to veto administrative action. Congress entrusted the enforcement of its will, as expressed in a statutory framework passed by both houses of Congress and signed by the President into law, to the agency's discretion.

In Chadha, the Court determined that a veto exercised by the House of Representatives is in effect legislative in character. The Attorney General determined that Chadha should not be deported. In attempting to override the Attorney General's decision, "the House took action that had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch." Chadha, 462 U.S. at 952. The House tried to force the deportation of Chadha, who up to that point could legally remain in the United States. The House by its actions made a law forcing Chadha's deportation. Id. The Court declared this action unconstitutional and held that when Congress legislates it must act in accordance with the procedures for legislative action established in the Constitution. Congress does not possess the authority to veto action of the executive branch.

Chadha's reasoning compels the same result here. "The legislative power of the State [of Utah is] vested ... [i]n a Senate and House of Representatives " Utah Const. Art. VI, § 1. The prescription for legislative action in article VI requires every bill to be passed by a majority of both houses of

the legislature. Id. Art. VI, § 22. "Every bill passed by the Legislature, before it becomes a law, shall be presented to the Governor; if approved, the Governor shall sign it, and thereupon it shall become a law; but if disapproved, the bill shall be returned with the Governor's objections to the house in which it originated" Id. Art VII, § 8. The legislative process in Utah is indistinguishable from the legislative process at the federal level. This procedure is an "integral part[] of the constitutional design for the separation of powers." Chadha, 462 U.S. at 946. The Utah state legislature made a deliberate choice to delegate to the Public Service Commission the authority to establish rates that utilities may charge. This choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Articles VI and VII of the Utah Constitution. See Chadha, 462 U.S. at 954. The legislature "must abide by its delegation of authority until that delegation is legislatively altered or revoked." Id. at 955. In this case, the delegation of a veto power over the Commission is to a private party, not even to a branch of government. If the state legislature does not itself retain a veto over agency action, then it cannot constitutionally delegate a veto to a public utility. The legislature can delegate only those powers that it possesses.

When a utility employs Utah Code Annot. § 54-4-4.1(2) (Cum. Supp. 1991) to invalidate a shared earnings rate plan established by the Commission, the utility is acting to veto Commission

action. Absent a utility's attempted veto the rate would become law. Therefore, the legislature has attempted to delegate authority, a veto, that it does not possess. The state legislature is bound by limitations established in the constitution. The purported delegation of a veto to a utility of a shared earnings rate is unconstitutional and is a nullity.

Utah has already addressed this issue in other contexts and found similar delegations of authority to be unconstitutional. For example, in Revne v. Trade Commission, 192 P.2d 563 (Utah 1948) the Court ruled unconstitutional a provision which authorized seventy percent (70%) of the barbers in a specific area to adopt prices and other business practices and submit these regulations to a State Board of Barbers. In Revne, Judge Latimer, concurring with the majority, said the statute "vests the operation and control of the law in a group of individuals who are directly interested in the economical feature of the act." Id., at 570. The delegation here is even more focused and inappropriate, providing a veto power to the singular entity which would otherwise be subject to a singular Order of the Commission.

II
BECAUSE NO LEGISLATIVE INTENT EXISTS INDEPENDENTLY
OF THE UNCONSTITUTIONAL PORTION OF § 54-4-4.1 THE COURT
MUST INVALIDATE THE ENTIRE STATUTE

Should this Court invalidate Utah Code Annot. § 54-4-4.1(2) (Cum. Supp. 1991) on constitutional grounds, "[t]he question then

arises whether the unconstitutional part of the Act is severable from the remainder of the Act." Utah Technology Finance Corp. v. Wilkinson, 723 P.2d 406, 414 (Utah 1986). When a Court holds a portion of a statute to be unconstitutional, severability of the invalid part "is primarily a matter of legislative intent." Id. (quoting Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786, 91 (Utah 1977)). Resolution of the legislature's intent is aided if what remains after severance "can stand alone and serve a legitimate purpose." State v. Green, 793 P.2d 912, 917 (Utah 1990); Chadha, 462 U.S. at 934. The legislature sometimes aids Courts' decisions by including a "savings clause" within a statute. Union Trust v. Simmons, 116 Utah 422, 211 P.2d 190, 193 (1949).

This Court should infer a legislative intent that the two subsections are not severable because the two subsections are predicated upon identical concepts, and cover identical situations. See Union Trust, 211 P.2d at 193. This conclusion can readily be drawn because the legislature employed the same language in the two subsections. See id. The legislature added Utah Code Annot. § 54-4-4.1(1) and (2) (Cum. Supp. 1991) to a well-established regulatory regime. Severing the challenged statute as a whole does not directly affect the Commission's remaining powers. Since these provisions were enacted concurrently, the legislature must have had the veto provision in mind when it passed the remainder of the statute and might not have passed Utah Code Annot. § 54-4-4.1(1), had it not planned

on passing 54-4-4.1(2) as part thereof.

III

**"INCENTIVE RATEMAKING" AS CONSIDERED WITHIN UTAH CODE
ANNOT. § 54-4-4.1 (CUM. SUPP. 1991) IS INHERENTLY
INCONSISTENT WITH UTAH CODE ANNOT. § 54-3-1. (1990)**

The Utah Public Service Commission is required to provide
a system of regulation which assures that

all charges made, demanded, or received by
any public utility, or by any two or more
public utilities, for any product or
commodity furnished or to be furnished, or
for any service rendered or to be rendered
shall be just and reasonable (emphasis
added) Utah Code Annot. § 54-3-1.

The Public Service Commission has appropriately termed that
section of the Utah Code Annot. 54-4-4.1 (Cum. Supp. 1991) which
allows the Commission...to adopt a method of rate
regulation...whereby revenue or earnings of a public utility are
shared with the utility and its customers" as authority for
"incentive ratemaking."

The Commission has defined incentive ratemaking as
"regulation that allows the utility to earn in excess of the
authorized rate of return on equity with the hope that such
overearnings will provide a greater incentive to management and
employees to undertake additional efficiencies." Commission
Report and Order, Docket Nos. 90-049-03 and 90-049-06, at p. 83,
(issued June 19, 1991) (hereafter "the Order"). There are no
definitions, standards, criteria, or other words of limitation
within the statute itself.

Incentive regulation has taken several forms around the country in the last several years. Almost universally such measures have been instituted consistent with clearly described criteria dictating the parameters of such programs including a requirement that the respective Commission first finds such plan to be in the public interest, or that such alternate plan is proposed to do a better job at serving the public interest or produce lower rates than existing regulation. The legislature here has not only given the Commission a blank check without guidance, but has provided the regulated utility the authority to regulate itself.

Cost of service regulation preceded the Commission's incentive regulation plan, giving rise to this appeal. Under this process, public hearings involving public participation, cross-examination of witnesses, and expert testimony was conducted. The net result was a rate design structured to yield sufficient revenues to cover the company's cost of providing the service and providing investors with a reasonable return on their investment compared to similar investments consistent with accepted principles of regulation. See Kahn, The Economics of Regulation: Principles and Institutions, 2d (1989), and see Utah Department of Business Regulation v. P.S.C., 614 P.2d 1242 (1980).

The rate of return arrived at by the Commission following this process has always been designated as the authorized rate of return, or a maximum which the Commission will allow the

utility to earn if it operates efficiently. It has never been a guaranteed rate of return, and never been viewed as a floor rate of return. In fact, in most states and the federal government, utilities exceeding the authorized rate of return have been required to refund these excess profits to customers. See New England Telephone and Telegraph Co., et al. v. Federal Communications Commission 836 F. 2d 1101 (DC Circuit 1987).

Under the Commission's definition of incentive regulation as translated in the proposed incentive plan contained in the Order, p. 99, the rate of return which it determines for the utility is no longer to be treated as a maximum authorized rate of return but, rather, a starting point. In this plan, the utility could generate a rate of return of up to 480 basis points above the determined rate of return and still be within its prescribed sphere of regulation. On its face, such an extreme range does more than provide an incentive for efficiency; it provides a mechanism to make a farce of regulation itself. For if rates are "just and reasonable" based on a rate of return of 12.2% (AARP accepts this finding only arguendo) and the rates, in practice generate a rate of return of up to 17%, by definition and logic such rates would have to be unjust and unreasonable and would be unlawful as inconsistent with Utah Code Annot. § 54-3-1, and with the Utah Constitution Article I, § 7 which states that "no person shall be deprived of life liberty or property, without due process of law." Id.

IV
APPROVING AN INCENTIVE REGULATION PACKAGE INCLUDING A
FREEZE ON RATES DURING A PERIOD OF DECLINING UTILITY
COSTS CONSTITUTES AN UNCONSTITUTIONAL CONFISCATION OF
PROPERTY AND IS INIMICAL TO RATEPAYERS INTERESTS.

The Commission has recognized that the telecommunications industry has been a declining cost industry for several years, due to lower inflation and the relative efficiency of its newer technology. In fact, since 1987 the Commission has lowered US West's rate of return and reduced rates by \$35 million (1987 and 1988) by \$21 million (Docket #88-049-07) (1989), and by \$10.7 million (Docket #90-049-06) (1990). In the case which gave rise to this action, the Commission ordered further rate reductions because of overearnings of \$19.8 million (Order, p. 34), and found that the appropriate allowed rate of return on equity should be 12.20 percent. (Id., at 34)

Virtually all "incentive regulation" plans submitted before the Utah Commission and implemented around the United States commence with a rate moratorium on basic service of some duration. In Utah, the proposed freeze is four years, (Order, p. 90). The Company had proposed four years, (Order, p. 84) and the Division of Public Utilities proposed five years (Order, p. 84). The moratorium has no economic basis, but rather is an attempt to please regulators with a respite from the intensity of rate cases, and to provide what would appear to be a benefit for consumers.

However, the moratorium is not a real benefit to ratepayers.

The Commission, under cost of service regulation, would be ordering additional rate reductions following the hearings process to reflect declining costs. Since rates should continue downward, the imposition of a rate freeze acts to deprive consumers of their property without the due process of law required by Utah Constitution Article I, § 7.

AARP generally opposes the transition from cost of service regulation to incentive regulation as not being in the interests of residential ratepayers. Incentive regulation plans have not been shown to create efficiencies or reduce prices. In one of the clearest examples, New York Telephone just completed an experiment in incentive regulation including a five-year moratorium. Setting aside preliminary rate increases that were sought by the company (consistent with its understanding of the moratorium on rate increases) New York Telephone sought an increase of \$900 million at the moratorium's conclusion, (see Case 28961, Proceeding on Motion of the Commission as to the Rate Changes, Rules and Regulations of New York Telephone Co., New York Public Service Commission) which, if approved, would more than double residential rates.

AARP believes that pricing flexibility proposals which usually accompany these proposals (sometimes after a short-lived moratorium) provide vast opportunities for telephone companies to cross-subsidize entry into other, potentially more competitive ventures with funds derived from captive customers using only basic telephone service offerings.

AARP's major concern in this area is assuring universally affordable telephone service, which AARP fears may be at risk if the incentive regulation plan is allowed to go into effect. Higher basic rates are a particular concern of older persons. Older persons generally have a greater need for telephone service because of their limited mobility, limited income and declining health. Because older people have incomes lower than the national average they are particularly vulnerable to regulatory changes which may raise the price of telephone service. They may be constrained to stretch their budgets to maintain telephone service (see The Telecommunication Needs of Older Low Income and General Consumers in the Post-Divestiture Era, AARP, Washington, D.C. (1987)).

Oftentimes, incentive regulation plans are posited to be necessary in order to accelerate modernization of the network and provide for the advent of new technologies and services, including data transmission, information services, and video transmission. However, only 6.6 percent of households headed by a person 55 or older owned a computer in 1989, compared to 19.5 percent for households younger than 55. Similarly, 5 percent of households with annual incomes under \$15,000 owned computers compared to 21 percent of households with incomes \$15,000 or greater, and 46 percent with incomes \$75,000 or greater. (See Current Population Reports, Series P-23 No. 171, Computer Use in the United States: 1989, US Department of Commerce, Bureau of the Census.

As the Commission itself noted in the Order, p. 90,

We are being asked to make a significant departure from the current scheme of regulation in the State of Utah. As noted by Committee witness Dunkel, traditional regulation is performing relatively well in this jurisdiction. Ratepayers have received a series of rate reductions over the past four years, the Company continues to earn in excess of its authorized rate of return and the telephone network appears to have met the basic needs of its customers. In addition, telephone subscribership in the state is at an all time high level (96.5 percent as of March, 1990) and is well above the national average of 93.3 percent. No one argues that the system is perfect, but concrete evidence that it is failing in any major respect is absent from this record. On the other hand, the record in this case shows that the promised benefits of the incentive regulation proposals before the Commission are speculative and the possibility exists that unless a specific incentive regulation plan is carefully crafted, there is risk of harm to the ratepayers. That could occur in the form of higher rates than ratepayers would have otherwise paid, or a windfall to shareholders in the form of higher earnings than their investment risk would otherwise justify, as will be discussed in more detail later. In light of this, the Commission must approach the abandonment of traditional regulation and current methods of balancing ratepayer and shareholder interests very carefully. Accordingly, the Commission finds that there must be evidence that a specific incentive regulation plan will be of benefit to ratepayers and in the public interest before the Commission will adopt such plan.

AARP believes the record does not support such a finding.

V
CONCLUSION

AARP strongly believes that the veto provision Utah Code Annot. § 54-4-4.1(2) (Cum. Supp. 1991) is an unconstitutional delegation of judicial and legislative authority to a private party with an economic interest. Further, since the impact of such veto must have been in the mind of the legislature when it enacted Utah Code Annot. § 54-4-4.1, the veto provision cannot alone be severed.

Assuming arguendo that the veto provision could be severed, the Court must still overturn the Public Service Commission's order in that the incentive regulation approved by the Commission constitutes an unconstitutional taking of property without due process of law and is inimical to the interests of residential ratepayers.

Respectfully submitted, this 25th day of October 1991.

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