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# Robert L. McMullin et al v. Public Service Comm. Of Utah et al : Brief of Petitioners

Utah Supreme Court

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### Recommended Citation

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# In the Supreme Court of the State of Utah

**FILED**

SEP 4 - 1957

ROBERT L. McMULLIN, PHYLLIS B. McMULLIN, and McMULLIN CONSTRUCTION COMPANY, INC.,  
*Petitioners,*

Clerk, Supreme Court, Utah

vs.

Case

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, DONALD HACKING and JESSE R. S. BUDGE, Its Commissioners; and UNION AND JORDAN IRRIGATION COMPANY,  
*Respondents.*

No. 8688 8660

## BRIEF OF PETITIONERS

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## BRIEF OF PETITIONERS

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The petitioners made application to the Public Service Commission of Utah to require the Union and Jordan Irrigation Company to render water service to certain lands owned by the petitioners. After conducting a hearing thereon the application was denied by the Public Service Commission of Utah. This proceeding is brought to secure a review by this Court of the order or denial.

## STATEMENT OF FACT

Union and Jordan Irrigation Company is a corporation which was originally incorporated in 1895 as a mutual water company. Beginning about 1916 the company constructed a pipeline system for the purpose of serving culinary water and since that time has served culinary water to its stockholders and also to other persons desiring service. Since the enactment of the Public Utility Laws the company has submitted itself to the jurisdiction of the Public Service Commission of Utah and its predecessor, the Public Utilities Commission of Utah. It has maintained on file with the Commission its rates and regulations and has filed financial reports with the Commission and has generally conducted itself in accordance with the Commission Rules and Regulations. No formal Certificate of Convenience and Necessity has ever been issued by the company. However, in the year 1946, the company filed with the Commission a map showing its pipeline system. On this map it had shaded an area within which the company considered it was rendering service. A copy of this map is in evidence in this case as Exhibit I.

In January of 1955 Robert L. McMullin, on behalf of the petitioners here, negotiated for the purchase of certain property from Selma Olsen Malstrum and James Olsen. This property was located on the border of the shaded area as shown on Exhibit 1, part of the property lying within that shaded area and part of it lying north of the north boundary of such shaded area. However, because of the uncertainty as to the boundaries of the service area to the informality of the authority of the respondent company to serve, Mr. McMullin was

not aware of the location of the service area of the respondent company. He, therefore, contacted the Secretary-Treasurer of the respondent company and requested that the company furnish him with culinary water in the property which he proposed to buy and develop into a subdivision. On January 3, 1955 the Secretary of the company directed the following letter to the State Board of Health:

"State Board of Health  
Salt Lake City, Utah

Gentlemen:

Robert McMillan has applied for culinary water service for a proposed subdivision located East of 3rd East, at approximately 6900 South. This territory is within the boundaries of the area we have a franchise to serve. We feel that we can adequately serve this proposed area with the necessary culinary water service after the requirements for extensions and payments for them are made.

We hereby submit his application.

Respectfully yours,

Union & Jordan Irrigation Company  
Frank Pierson, Sec. & Treasurer"

Based upon such assurance, Mr. McMullin purchased the property in question and set about the planning of a subdivision thereon. He was subsequently notified by the company that they would render him no water service in that portion of the lands he had purchased which were north of the shaded area as shown on Exhibit 1. Accordingly, Mr. McMullin divided his property in two and developed two

subdivisions thereon. The first subdivision developed known as Selma #1 was located entirely within the boundaries of the shaded area as shown on Exhibit 1 and has been furnished culinary water by the respondent company. The remaining portion of the land which McMullin has been unable to develop because of the lack of culinary water consists of a strip of land running 272.40 feet north and south and 1123.75 feet east and west. The southernmost 50 feet of said property is within the shaded area as shown on Exhibit 1 while the northernmost 222.40 feet lies immediately north of the shaded area. No company renders culinary water service in the area lying immediately north of the shaded area as shown on Exhibit 1. Murray City lies a short distance further north but no service is available from that source because McMullin's property as well as some intervening property lying immediately north are outside the limits of Murray City. There is no other source from which it is economically feasible for McMullin to obtain culinary water service except from the respondent, Union and Jordan Irrigation Company. Without the culinary water service from that company, McMullin will be unable to develop this property for residential purposes—that being the purpose for which he purchased it, based upon the representation of the Secretary of the respondent company. Further facts in this case will be discussed in connection with points hereinafter raised as a basis for this petition for review.

As a basis for seeking a review and reversal of the Public Service Commission Order, the petitioners rely upon the following points:

## STATEMENT OF POINTS

1. The Public Service Commission of Utah erred in holding that for Union and Jordan Irrigation Company to extend service to the property here involved would imperil service to its existing customers.

2. The Union and Jordan Irrigation Company should be estopped from denying that the petitioners' land is within its service area.

3. The Union and Jordan Irrigation Company as a public utility has an obligation to furnish service to users reasonably within its service area.

## ARGUMENT

### POINT I

THE PUBLIC SERVICE COMMISSION OF UTAH ERRED IN HOLDING THAT FOR UNION AND JORDAN IRRIGATION COMPANY TO EXTEND SERVICE TO THE PROPERTY HERE INVOLVED WOULD IMPERIL SERVICE TO ITS EXISTING CUSTOMERS.

The Public Service Commission in its conclusion held that for the respondent company to render the service sought by the petitioners would imperil its service to its existing customers. This conclusion was reached upon the supposition that the respondent company had only 1.5 cfs of water available for culinary distribution. Such conclusion, however, is contrary to the evidence in this case.



The evidence is that the company has now approximately 1,000 users. It is true that if the evidence in the case be taken most strongly against these petitioners and if it further be held that one and a half cubic feet per second of water is all that is available for culinary distribution, then such thousand users during periods of peak consumption would consume substantially all the water available. This finding, however, proceeds upon a false basis—there is no more than 1.5 cfs of water available. The respondent as a public utility has an obligation to use all means necessary to obtain by purchase or otherwise sufficient water to meet the demands of its customers reasonably within its service area. This proposition is fundamental and the Public Service Commission of Utah itself has frequently required utilities to expend their facilities to meet added demand. In this case, however, it is not even necessary for the respondent company to go out and obtain additional water. They have the additional water according to the Commission's own finding. The smallest amount of water ever available from Little Cottonwood Creek to the respondent company was 2.06 cfs and this was during the months of December and January, a period of low consumption. The smallest amount ever available to the company during July and August, the period of maximum consumption, was 4.71 cubic feet per second. The balance of the water which the company receives from Little Cottonwood Creek over and above 1.5 cfs has been used by the company for irrigation purposes. The water available to the company as a public utility should be used by the company, when there is demand, for the highest and best use, namely domestic culinary use. Under the evidence in the case the company could,

by devoting to culinary use all of the water available to it from Little Cottonwood Creek service in excess of 3,000 customers at any time assuming a consumption of 1200 gallons per day per home during heavy summer use and 200 gallons per day during winter use which is the maximum useage testified to by anyone in this case. It is true that there was testimony in the record that if the property within the shaded area shown on Exhibit 1 were developed to its fullest, it might require 6,000 connections. However, that is idle speculation and something which certainly will not occur for many years in the future. If we speculate that this area might be developed into an apartment house area with congestion comparable to New York City, probably it could require 10,000 connections. However, we are here dealing with present conditions and with the foreseeable future. The fact remains that it has now only 1,000 connections and within the foreseeable future could not be expected to more than double that demand. The fact also remains that the company has available water for 3,000 connections. Certainly it is far fetched to say that approximately 30 additional connections, here being sought, offer any threat to the company's ability to continue rendering adequate service to its existing customers.

## POINT II

THE UNION AND JORDAN IRRIGATION COMPANY SHOULD BE ESTOPPED FROM DENYING THAT RESPONDENTS' LAND IS WITHIN ITS SERVICE AREA.

In its conclusion attached to the order in this case the Public Service Commission of Utah devotes a paragraph setting

forth its views as to why an estoppel does not lie in this case. It takes the position that the factor of estoppel should not be considered because of the fact that any contract entered into with a public utility by any person is subject to the right of the Public Service Commission to set such contract aside as being against the public interest. With this statement of law petitioners have no quarrel. If, in fact, the finding of the Public Service Commission to the effect that rendering service to this petitioner would imperil existing customers is well established by the record, then none of the arguments hereinafter made in this brief are of any validity. If, however, as petitioners argue in the immediately preceding section, such finding is not well founded and Union and Jordan Irrigation Company could well render service to these petitioners without endangering their service to their existing customers, then the matter of an estoppel and the matter of service area boundaries upon which the Public Service Commission declined to pass become very material.

It should be borne in mind in this case that the service area of the company in question is very ill-defined. There is no formal certificate defining these service areas. The only thing in the records of the Commission to indicate these service areas is the map, Exhibit 1.

An examination of Exhibit 1 will reveal that it is difficult, if not impossible, to determine from this Exhibit just where the exact boundaries of the shaded area are. For example, the map contains a notation that the north boundary is on a ditch on the quarter section line and yet the respondent company's officials admitted in the record that the ditch and

the quarter section line do not coincide (Tr. 10). Even after having gone through two previous hearings before the Public Service Commission regarding their service areas, the officials of the company were uncertain as to where the north boundary was at the time this case came to hearing (Tr. 10). With such uncertainty existing it is obvious that the actual boundaries of the service area were subject to considerable interpretation.

In previous cases the Public Service Commission had been liberal in its interpretation of the service areas of the company. The record in two of these cases was included by reference in this hearing. The first of these was Investigation Docket #61 entitled Brady, et al vs. Union and Jordan Irrigation Company, decided by the Commission on February 6, 1953. The Brady property lay entirely without the shaded area on Exhibit 1 and in that case there was no contract by estoppel or otherwise on the part of the company to serve. In spite of this fact, the Commission interpreted the boundaries of the company liberally as the Commission itself says on Page 5 of its Findings in this case:

“In this case (the Brady case) the Commission concluded that the involved property was reasonably within the areas which had been developed by the Union and Jordan Irrigation Company as its service area even though not specifically included by the company or the Commission in the company’s service area and the Commission directed the company to serve the property.”

It seems inconsistent for the Commission to hold in the Brady case that property which was adjacent to the shaded area on Exhibit 1 but entirely without the shaded area was

reasonably within the company's service area while the McMullin property which actually lay partly within the shaded area was not reasonably within such service area.

In the second case, Nowlan, et al vs. Union and Jordan Irrigation Company, Case #4179 decided by the Commission on the 6th day of December, 1955, the Commission was concerned with property that also lay outside the shaded area on Exhibit 1. In the Nowlan case the company denied service not because the Nowlan property was outside the reasonable service area but on the grounds that the company did not have sufficient water to service such property, which point the petitioners have attacked in the next preceding section.

With the point established as indeed it must be from the preceding cases, that the company's service area is indefinite and subject to Commission interpretation, then the question of estoppel becomes very important. It is impossible for anyone to tell by examining the files of the Public Service Commission just where the service area was, as the boundaries were subject to interpretation. McMullin, being uncertain as to the boundaries of this service area, went to the officials of the company and asked them whether or not they would serve him. They not only informed him that they would, but wrote a letter to that effect to the State Public Health Department. In reliance upon this representation, McMullin purchased the property. Certainly all of the elements of estoppel are present. These elements as set forth in 19 American Jurisprudence, Pages 642 and 643, are as follows:

“The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which

amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially."

Based upon the representation of the company, McMullin now finds himself the owner of certain property which he can use advantageously only for subdivision development. Without water he cannot develop it. He certainly would not have bought the property except on the belief induced by the company's action that he was within the service area and could receive service. The company, therefore, should be estopped to deny that the petitioners are reasonably within the service area and the Public Service Commission charged with the duty of protecting the interests of the public should so interpret the service area.

There is no doubt about the power of the Public Service Commission to make such a rule nor is there any doubt of the propriety of such a ruling. A similar matter was before this Court in the case of Utah Power & Light Company vs. Public Service Commission, 249 Pacific 2d 951. In that case Nephi City had its own electric power distributing system, but bought its electrical energy from others. The city is located on the boundary between the distribution area of Utah Power & Light

Company and Telluride Power Company, the southernmost point of distribution of the Utah Power & Light Company being Thermoid Rubber Company on the northern outskirts of Nephi City. The City had been purchasing its power requirements from Telluride Power Company. In 1950 it attempted to negotiate a contract with the Utah Power & Light Company to serve its need but the Utah Power & Light Company declined to render such service on the ground that Nephi City was within the service area of Telluride Power Company. Nephi City petitioned the Public Service Commission to compel Utah Power & Light Company to enter into a contract for service of its power. Both Utah Power & Light Company and Telluride resisted this petition. The Public Service Commission, none the less, ordered Utah Power & Light Company to enter into the contract and to furnish the power. The decision was appealed to this Court by both Utah Power & Light Company and Telluride. This Court upheld the power of the Commission to require the service sought. The language of the Court is as follows:

“There is here no question of inability of the Utah Power & Light Company to perform this service as it is conceded that it can supply all the energy Nephi City may agree to purchase without impairing its ability to serve its other customers. The energy, according to the Commission’s order, is to be sold within the territory served by the Utah Power & Light Company and not elsewhere. Nephi City is to receive the power there and once this energy has entered the transmission line belonging to the city it becomes the property of the city and the Utah Power & Light Company has no further concern about it. As to the agreement under which this purchase of energy is to be

made, it will be subject to the supervision and regulation of the Commission because the Utah Power & Light Company and the contracts into which it enters are subject to such regulation regardless of who the other party to the agreement may be."

The case now before the Court has much stronger equities in favor of compelling the service than does the Nephi City case. In that case there was no question of Utah Power & Light Company having held itself out as being willing to render the service as is the case here. Nor was Utah Power & Light Company the only source of power as is the case here. The Public Service Commission in this case, pursuant to its duty to protect the public interests and to render a just and equitable decision to all parties concerned in a controversy properly within its jurisdiction should have ordered the company to render the service here being sought.

### POINT III

THE UNION AND JORDAN IRRIGATION COMPANY AS A PUBLIC UTILITY HAS AN OBLIGATION TO FURNISH SERVICE TO USERS REASONABLY WITHIN ITS SERVICE AREA.

If the McMullin property is construed to be reasonably within the service area of the Union and Jordan Irrigation Company on the basis set forth above, then the obligation of the company to render the service cannot be doubted. A public utility cannot resist on the ground that its facilities are inadequate. It has the obligation to construct adequate facilities. It cannot defend upon the ground that its finances are inadequate.



quate as it has the obligation to secure adequate finances. Even where the service rendered by the company entails the servicing of a natural commodity such as gas or water, the company cannot defend upon the grounds that its source of supply is being exhausted if it is within the power of the company to secure additional supply by purchase, condemnation, or by development of natural resources. The following language is found in 43 American Jurisprudence at Pages 601 and 602:

“In general, where a public utility accepts a franchise to serve the public or a portion thereof and undertakes to serve a community or territory and its inhabitants, it assumes a public duty to render service commensurate with its offer of providing a service system which will be reasonably adequate to meet the wants of the community or territory, not only at the time of the commencement of the service, but likewise to keep pace with the growth of the community or territory served and gradually to extend its system as the reasonable wants of the community or territory may require. Accordingly, a public utility, at the suit of a consumer, may be required to extend its service to any part of the district wherein it has received a franchise and has undertaken to operate, if the extension is a reasonable one, and a public service commission may, where its action is not unlawful, arbitrary or capricious, order such an extension of service for the inhabitants in such territory.”

The evidence in this case is clear that the company has considerably more water which is suitable for culinary use than it is actually devoting to culinary distribution. It is and has been devoting only 1.5 cfs to its pipelines and the Public Service Commission's finding that the company could serve

only approximately 1,000 homes is based upon the consumption of 1,000 homes during the heaviest consumption season as measured against 1.5 cfs. Yet the evidence is clear and the Public Service Commission finds that the company has available an additional .56 cfs during January and February, the period of minimum supply and also a period of minimum demand and an additional 3.21 cfs available during August, the period of maximum demand. As is pointed out above, by using the Public Service Commission's own figures, if this additional water were devoted to the pipeline, the company could serve 3,000 connections rather than the 1,000 that it is now serving. Certainly, if the Public Service Commission has the power to compel a utility to construct additional facilities for production, or to go out and purchase additional supplies, is it not unreasonable to say that the Public Service Commission has not the power to compel a company to devote to the public service a source of supply which it already owns and controls? It may well be that the company will have to make financial arrangements within its own structure with its members who are currently using the water over and above 1.5 cfs for irrigation purposes, however, that is something which it is well within the power of the company to do. If such financial arrangements make the water available for the extension of service more expensive, it may be that the Public Service Commission would be justified in authorizing the company to place an arbitrary extra charge on the new connections but it is certainly not a basis for refusing service absolutely as is done in this case.

## CONCLUSION

Counsel is cognizant of the scarcity of legal authority which they have cited to guide the Court in a decision in this case. However, we predict that the legal authorities in point to be cited by the respondents will be equally scarce. The situation here is unique. Seldom, if ever, will you find a case where the service area of a public utility has been so indefinite as to be subject to interpretation by a Commission; and seldom, if ever will there be a case where the service area will depend upon the conduct of the parties as is true in this case. This Court and the Commission, however, are charged with the responsibility of affording justice to all members of the public regardless of whether judicial precedent has been established in a particular case. When all of the factors in this case are considered—the uncertainty of the service area, the definite availability of water, and the conduct of the respondent company upon which the petitioners replied to their detriment, justice and good conscience require that this Court find that the petitioners' property is reasonably within the company's service area and that the extension of service to the petition will not jeopardize existing customers of the company. The case should be remanded to the Public Service Commission with instructions to direct the respondent company to extend the service being sought by the petitioners.

Respectfully submitted,

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