The State of New Hampshire

SUPERIOR COURT

ROCKINGHAM COUNTY

( ) COURT

(X) JURY

WRIT OF SUMMONS

The RiverWoods Company at Exeter, New Hampshire
7 RiverWoods Drive
Exeter, NH 03833

v.

Unitil Energy Systems, Inc.
6 Liberty Lane West
Hampton, NH 03842

The Sheriff or Deputy of any County is ordered to summon each defendant to file a written appearance with the Superior Court at the address listed below by the return day of this writ which is the first Tuesday of AUGUST (MONTH), 2011 (YEAR).

The PLAINTIFF(S) state(s):

See attached Special Declaration

and the Plaintiff(s) claim(s) damages within the jurisdictional limits of this Court.

INDORSER (sign and print name)
Christopher H.M. Carter

6/20/11
DATE OF WRIT

NOTICE TO THE DEFENDANT

The Plaintiff listed above has begun legal action against you. You do not have to physically appear in Court on the return day listed above since there will be no hearing on that day. However, if you intend to contest this matter, you or your attorney must file a written appearance form with the Clerk's Office by that date. (Appearance forms may be obtained from the Clerk's Office.) You will then receive notice from the Court of all proceedings concerning this case. If you fail to file an appearance by the return day, judgment will be entered against you for a sum of money which you will then be obligated to pay.

Tina Nadeau
Witness, ~~Robert J. Lynn~~, Chief Justice, Superior Court.

Raymond W. Taylor, Clerk
NH Superior Court Rockingham County
10 Route 125
Brentwood, NH

Mailing Address:
P.O. Box 1258
Kingston, NH 03848-1258
(603) 642-5256

SIGNATURE OF PLAINTIFF/ATTORNEY

Christopher H.M. Carter, Esq. (Bar #12452)
PRINTED/TYPED NAME
Hinckley Allen & Snyder LLP
11 South Main Street, Suite 400
ADDRESS
Concord, NH 03301 (603) 225-4334
PHONE

213-003-5

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT

Docket No. _____

The RiverWoods Company at Exeter, New Hampshire

v.

Unitil Energy Systems, Inc.

SPECIAL DECLARATION

Plaintiff, The RiverWoods Company at Exeter, New Hampshire, submits this Special Declaration in support of its Writ of Summons in this matter.

I. INTRODUCTION

RiverWoods seeks damages arising from over $1.8 million in overpayments that it was erroneously directed to make on behalf of its elderly residents between 2004 and 2011, as a direct result of Defendant Unitil Energy Systems' installation of faulty electricity metering equipment at one of RiverWoods' residential facilities. As a result of Unitil's faulty metering equipment, RiverWoods received monthly bills that overstated its electricity consumption by approximately 100%. Unitil alone was responsible for the metering error, which remained undisclosed until February 2011. Unitil accepted full responsibility for the error and, at first, promised to repay RiverWoods in full for the overpayments. Regrettably, Unitil reversed course. It ultimately agreed to repay only one-third of the overpayments, and has refused to voluntarily repay the balance of at least $1,189,805 that remains owed. By this action, RiverWoods seeks recovery of this amount, together with interest, costs and attorneys fees it has incurred due to Unitil's unlawful conduct in this matter.

II. PARTIES

1. Plaintiff, The RiverWoods Company at Exeter, New Hampshire ("RiverWoods") is a New Hampshire not-for-profit corporation with a principal place of business at 7 RiverWoods Drive, Exeter, NH 03833.

2. Defendant Unitil Energy Systems, Inc. ("Unitil") is, upon information and belief, a New Hampshire business corporation with a place of business at 6 Liberty Lane West, Hampton, NH 03842-1720.

III. JURISDICTION AND VENUE

3. The Court has personal jurisdiction over Unitil, which conducts business in New Hampshire, and the events giving rise to this case occurred in this state.

4. Venue is appropriate in this Court pursuant to RSA 507:9.

IV. FACTS

5. RiverWoods operates a continuing care retirement community in Exeter. It provides a full range of residential and health care services to approximately 600 retired and elderly residents.

6. The RiverWoods retirement community has three campuses: "The Woods," which opened in 1994, "The Ridge," which opened in 2004, and "The Boulders," which opened in 2010.

7. Unitil is in the business of the transmission, distribution, and retail sale of electricity and natural gas.

8. Since approximately 1994, Unitil has had a contract to deliver electricity to RiverWoods. Pursuant to the parties' contractual agreement, Unitil is responsible for the installation and maintenance of the electricity transmission and metering equipment that is used

to deliver electricity to RiverWoods. Unitil is required to use metering equipment that accurately measures RiverWoods' consumption of electricity. The Unitil consumption measurements are used to generate monthly billing statements sent to RiverWoods.

9. In or about September 2004, during the construction of The Ridge campus, Unitil installed electricity transmission equipment at The Ridge. The equipment includes electrical meters and a so-called current transformer, or "CT." The CT is used to measure a customer's electrical usage. In essence, the customer's electrical usage, as measured by the CT, is multiplied by a set ratio, or "meter constant," to determine the customer's billable usage.

10. Unitil owns the electricity meter and CT at The Ridge campus. Unitil is responsible for the installation, maintenance and repair of this equipment.

11. Unknown to RiverWoods, the CT that Unitil installed at The Ridge campus was not calibrated properly. The CT was programmed to have a meter constant of "600," when it should have had a meter constant of "300." As a result of this error, The Ridge's calculated energy usage was double the facility's actual usage.

12. From November 2004 until February 2011, the monthly electricity bills RiverWoods received in connection with The Ridge campus were approximately double what the bills should have been. The total overpayments made by RiverWoods during this period as a result of Unitil's faulty electricity meter totaled at least $1,801,504.

13. After RiverWoods opened The Boulders campus in June 2010, it discovered a significant disparity between the electricity consumption at this facility and at The Ridge. This was not logical, since the two campuses are of comparable size and have essentially the same electrical equipment. In November 2010, RiverWoods asked Unitil to investigate the problem and test the metering equipment installed at The Ridge and The Boulders.

14. Through its investigation, Unitil discovered that the CT equipment at The Ridge had been miscalibrated, and that this had caused RiverWoods to be overcharged by nearly twice the proper amount since September 10, 2004. From that date through January 2011, RiverWoods was billed a total amount of $3,613,338. It is undisputed that at least $1,801,504 of this amount should not have been billed. It further is undisputed that RiverWoods paid this full amount, and is entitled to recovery of the same.

15. Unitil's management immediately recognized that Unitil was fully responsible for the metering error and overbillings, and for repaying RiverWoods in full for the amount it had overpaid. Thus, on February 10, 2011, one of Unitil's billing administrators, Jennifer Nelson, made the following computer entry in RiverWoods' file:

> FEBRUARY 2011 IT WAS DISCOVERED THAT THE METERING FOR THIS ACCOUNT HAD AN ERROR IN THAT THE CT WAS MARKED INCORRECTLY BY THE MANUFACTURER AND AS A RESULT WE DETERMINED THAT THE CUSTOMER WAS BEING BILLED TWICE THE CONSUMPTION/CHARGES THAT SHOULD HAVE BEEN BILLED – **WE WILL CREDIT THE CUSTOMER EXACTLY ½ OF ALL CHARGES** MINUS THE CUSTOMER CHARGE AND MISC CHARGE ALL THE WAY BACK TO THE CUSTOMERS INT DATE OF 9/10/04 – **SIGNIFICANT CREDIT REFUND IS PENDING.**

See Exhibit A (3/9/11 email from Jennifer Nelson to Lisa Gove) (emphasis added).

16. In fact, Unitil did not "credit" RiverWoods as represented in Ms. Nelson's notes.

17. On February 17, 2011, Unitil first disclosed the metering error to RiverWoods. Despite having already determined the financial impact of this error on RiverWoods' residents, Unitil inexplicably declined to share this information with RiverWoods.

18. For weeks Unitil's senior management stalled and delayed, alleging they could not quantify RiverWoods' loss before reviewing each of the 76 bills that RiverWoods received during the period in question, and asking for RiverWoods' "patience and understanding." See

Exhibit B (2/18/11 letter from Tim Noonis to Kevin Goyette); Exhibit C (2/25/11 letter from Tim Noonis to Justine Vogel); Exhibit D (3/4/11 letter from Tim Noonis to Kevin Goyette). During this time, when RiverWoods requested that Unitil at least provide general confirmation as to the extent of the overbillings, so that RiverWoods could adjust its utility budgets accordingly, Unitil's senior management was evasive, replying: "Unfortunately I am unable to confirm the metering ratio inaccuracy until the analysis is completed." Exhibit E (3/4/11 email from Tim Noonis to Kevin Goyette).

19. In mid-March 2011, Unitil finally disclosed that the metering error had resulted in overbillings to RiverWoods totaling approximately $1.8 million. At that time, Unitil advised it had been communicating "informally" with the New Hampshire Public Utilities Commission ("PUC") about the issue of repaying RiverWoods. Unitil stated unequivocally that it intended to repay RiverWoods in full. For example, on March 23, 2011, Unitil informed RiverWoods: "I can also confirm that under our proposal *Unitil will provide RiverWoods with a full refund.*" See Exhibit F (3/23/11 email from Cindy Carroll to Justine Vogel) (emphasis added).

20. Unitil also assured RiverWoods that it was proceeding in good faith and that the parties' interests were completely aligned. Thus, in an April 6, 2011 email, Unitil's Senior Business Development Executive, Tim Noonis, represented to RiverWoods: "*Please bear with us just a bit longer and we will see this through together.*" Exhibit G (4/6/11 email from Tim Noonis to Justine Vogel) (emphasis added).

21. Despite these representations, Unitil reversed course and adopted the position that it would not accept full responsibility for its admitted error. Unitil alleged, among other things, that RiverWoods was not entitled to full recovery due to provisions of RSA 365:29, which provides that a PUC reparation order, issued in response to complaint over an illegal or

discriminatory rate or fare charged by a utility, can only cover payments made within two years of the complaint. RSA 365:29 is inapposite, of course, since this matter clearly does not concern a dispute over an illegal or discriminatory rate or fare charged by a utility; it concerns Unitil's liability for an equipment malfunction that caused RiverWoods and its elderly residents to be billed and to pay for electricity they did not receive or use.

22. On May 13, 2011, Unitil paid partial restitution in the amount of $611,900, representing only one-third of the total amount overpaid by RiverWoods as a result of Unitil's metering error. Unitil has refused to pay the balance owed, which totals at least $1,189,805.

Count I
(Breach of Contract)

23. RiverWoods repeats and realleges the allegations in the above paragraphs as if stated fully herein.

24. Since approximately 1994, Unitil has had a contract with RiverWoods pursuant to which Unitil distributes electricity to the RiverWoods facilities in Exeter, New Hampshire.

25. Pursuant to the parties' contractual agreement, Unitil is responsible for the installation and maintenance of the electricity transmission and metering equipment that is used to distribute electricity to RiverWoods, and that records electricity consumption in order to generate monthly bills sent to RiverWoods.

26. Unitil breached its contract with RiverWoods by installing electricity transmission equipment that grossly miscalculated the energy used by RiverWoods, by submitting monthly bills that overcharged RiverWoods, and by failing to immediately and fully pay restitution to RiverWoods for overpayments caused by Unitil's metering error.

27. Unitil is liable to RiverWoods for damages incurred as a result of Unitil's breach of contract.

Count II
(Negligence)

28. RiverWoods repeats and realleges the allegations in the above paragraphs as if stated fully herein.

29. Unitil had a duty to correctly install, read, maintain, and/or operate the electrical transmission and metering equipment on the RiverWoods facilities.

30. Unitil breached that duty in that it negligently installed, read, maintained, and/or operated the electrical equipment on the RiverWoods facilities.

31. As a proximate result of Unitil's negligence, RiverWoods has suffered significant damages.

32. RiverWoods is entitled to full compensation for the damages it has suffered, together with interest, fees and costs.

Count III
(Unjust Enrichment)

33. RiverWoods repeats the allegations in the above paragraphs as if stated fully herein.

34. Unitil has been unjustly enriched by charging RiverWoods for electricity RiverWoods did not use and by refusing to fully repay RiverWoods the full amount of overpayments caused by Unitil's metering error.

35. It would be manifestly unjust to allow Unitil to retain the benefit of any such overcharges.

36. RiverWoods is entitled to a full and complete refund of the amount it overpaid as a result of overcharges by Unitil.

Count IV
(Violation of RSA 358-A)

37. RiverWoods repeats and realleges the allegations in the above paragraphs as if stated fully herein.

38. Unitil is engaged in trade or business within the meaning of RSA 358-A.

39. Unitil committed unfair and deceptive business practices in violation of RSA 358-A by, *inter alia*, installing improperly calibrated electricity metering equipment at the RiverWoods facilities; causing RiverWoods to be overbilled in excess of $1.8 million over a six year period; failing to promptly identify and correct the metering error; refusing to promptly disclose the financial impact of the metering error, even when that information was known to Unitil; and representing to RiverWoods that it would pay full restitution for the overpayments arising from its metering error, and, after RiverWoods had relied on said representations, abruptly changing course and raising baseless claims as to why Unitil purportedly is not liable for paying full restitution.

40. As a result of its violations of RSA 358-A, Unitil is liable to RiverWoods for double or treble damages, as well as for costs and reasonable attorneys' fees.

#933462

EXHIBIT A

From: Lisa Gove [mailto:lgove@riverwoodsrc.org]
Sent: Wednesday, March 09, 2011 10:49 AM
To: 'Kevin Goyette'
Subject: FW: Unitil Bill

fyi

From: Nelson, Jennifer [mailto:nelson@unitil.com]
Sent: Wednesday, March 09, 2011 10:45 AM
To: 'Lisa Gove'
Subject: RE: Unitil Bill

Hi Lisa,

The supervisor is aware of this. I just wanted to let you know that there was a meter change in 7/2008, so we are double checking to see if the problem started then, or back in 2004 I have given your phone number and email over to a Tim Noonis You might get a phone call from him so he can explain in detail what had happened

Thanks
Jennifer

From: Lisa Gove [mailto:lgove@riverwoodsrc.org]
Sent: Wednesday, March 09, 2011 9:08 AM
To: Nelson, Jennifer
Subject: RE: Unitil Bill

Thanks for the info! I will go ahead and enter the rest of the statements for payment

Lisa

5/31/2011

From: Nelson, Jennifer [mailto:nelson@unitil.com]
Sent: Wednesday, March 09, 2011 9:07 AM
To: 'Lisa Gove'
Subject: RE: Unitil Bill

Well. . good and bad . .good is you will be getting a huge credit on this account . bad, we have been billing wrong for a while now. .Please see notes'

FEBRUARY 2011 IT WAS DISCOVERED THAT THE 2/10/11
METERING FOR THIS ACCOUNT HAD AN ERROR 2/10/11
IN THAT THE CT WAS MARKED INCORRECTLY 2/10/11
BY THE MANUFACTURER AND AS A RESULT WE 2/10/11
DETERMINED THAT THE CUSTOMER WAS BEING 2/10/11
BILLED TWICE THE CONSUMPTION/CHARGES 2/10/11
THAN SHOULD HAVE BEEN BILLED –
. WE WILL BE CREDIT THE CUSTMR 2/10/11
EXACTLY 1/2 OF ALL CHARGES MINUS THE 2/10/11
CUSTOMER CHARGE AND MISC CHARGES ALL THE 2/10/11
WAY BACK TO THE CUSTOMRS INT DATE OF 2/10/11
9/10/04 - SIGNIFICANT CREDIT REFUND IS 2/10/11
PENDING -CP 2/10/11

Once all the billing has been corrected, I will let you know what the ending credit will be...this might take some time to get done.

Thanks
Jennifer

From: Lisa Gove [mailto:lgove@riverwoodsrc.org]
Sent: Wednesday, March 09, 2011 8:51 AM
To: Nelson, Jennifer
Subject: RE: Unitil Bill
Importance: High

Hi Jennifer,

I just opened up the attachment and the bill is the same one I received for last month. Do you have one for the billing period 1/20 to 2/18? That is the date range on all of the other statements I received last week.

Thanks!

Lisa
(603) 658-3097

From: Nelson, Jennifer [mailto:nelson@unitil.com]
Sent: Wednesday, March 09, 2011 8:48 AM
To: 'Lisa Gove'
Subject: Unitil Bill

Thanks
Jennifer

EXHIBIT B

From: Noonis, Tim [mailto:noonis@unitil.com]
Sent: Friday, February 18, 2011 4:39 PM
To: kgoyette@riverwoodsrc.org
Subject: Unitil meeting summary

Hi Kevin...here is the summary you asked for. Please let me know if you need anything else in the near term. Tim

Tim Noonis
Unitil
noonis@unitil.com
603-294-5123

Unitil

We deliver.
It's that simple.

2/18/2011

Mr. Kevin Goyette
Chief Financial Officer
Riverwoods
7 Riverwoods Dr.
Exeter, NH 03833

Dear Kevin,

I am following up to your request for a summary of the main points from our meeting yesterday regarding the metering equipment issue at the Riverwoods facility known as "The Ridge".

Here are the highlights of our discussion:

1. I have been working with Tim Bishop of Riverwoods on identifying ways of reducing the energy consumption at your different facilities. The Ridge in particular seemed to have a higher consumption than your other facilities. Through the monitoring of your sub-panels at the Ridge, we were able to identify that there were mislabeled manufactured equipment that led to billing inaccuracies.

2. In order to meter large customer loads, utilities must install instruments that transform large current flows into measurable quantities by our meters. This device is called a current transformer or CT. The output of the CT's are a ratio of the actual load. The meter uses this reduced current output to measure energy usage. In order to determine billable usage, this ratio (or meter constant) is multiplied by the metered values to calculate actual usage.

3. The CT's installed at the Ridge were mis-labeled by the manufacturer. Unitil used the CT ratio provided by the manufacturer as a basis for billing the Ridge account. This billing inaccuracy existed since the metering equipment was installed in September of 2004.

4. Our metering personnel performed additional testing of the metering installation at the Ridge including the CT's and all of the ancillary metering equipment to ensure everything is working properly, and there was nothing physically or mechanically wrong with the equipment.

Corporate Office
6 Liberty Lane West
Hampton, NH 03842-1720
Phone 603-772-0775
Fax 603-773-6605
Email corp@unitil.com

5. In addition to testing the metering equipment at the Ridge, we took the initiative to test the meters and the CTs at the Woods and the Boulders to ensure they are functioning and billing correctly. There were no problems at these sites.

6. We have corrected the metering constant in our billing system for the Ridge and we will hold your February bill until the historical billing analysis can be completed.

7. There were 76 billing periods that were affected and each bill has multiple components per billing cycle. Each bill will have to be individually reviewed and corrected. We estimate that this will take 3 to 4 weeks to complete. We thank you for your patience while we perform this analysis.

8. To complicate matters, The Ridge account went out on competitive supply starting in 2006 so there are issues that need to be worked out with your 3rd party supplier (TransCanada). We appreciate your approval for us to work directly with them on this billing analysis.

9. At this point we expect the correction will be in Riverwoods favor. Once our analysis is completed we would like to meet again to discuss the results.

Kevin, I hope this accurately summarizes our discussion yesterday. Thank you for your patience and understanding in this matter.

Sincerely,

Tim Noonis
Sr. Business Development Executive
Unitil

EXHIBIT C

From: Noonis, Tim [mailto:noonis@unitil.com]
Sent: Friday, February 25, 2011 4:20 PM
To: jvogel@riverwoodsrc.org
Cc: kgoyette@riverwoodsrc.org
Subject: Unitil - Ridge billing update

Justine, here is the latest on the Ridge billing situation. Tim

Tim Noonis
Unitil
noonis@unitil.com
603-294-5123

Unitil
We deliver.
It's that simple.

2/25/11

Justine Vogel
Chief Executive Officer
Riverwoods
7 Riverwoods Drive
Exeter, NH 03833

Dear Justine,

As you are aware, I met with Kevin Goyette last week regarding the billing inaccuracy that occurred at the Ridge.

Kevin asked that I update you weekly regarding the progress that we are making to rectify the account billing.

With Kevin's permission, we contacted your 3rd party supplier, TransCanada. We have notified TransCanada that there has been a billing inaccuracy on your account and TransCanada and Unitil are sharing billing information on the Ridge account.

As I conveyed to Kevin, the analysis of the billing is complex and must be done for each of the individual 76 billing periods.

We estimate that this will take another 2 to 3 weeks to complete. We realize this is a substantial amount of time but want to make sure we are thorough and get it right.

Thank you for your patience while we perform our analysis.

If you have any questions in the interim, please call me at 294-5123.

Sincerely,

Tim Noonis
Sr. Business Development Exec.

cc: Kevin Goyette

Corporate Office
6 Liberty Lane West
Hampton, NH 03842-1720
Phone: 603-772-0775
Fax: 603-773-6605
Email: corp@unitil.com

EXHIBIT D

From: Noonis, Tim [mailto:noonis@unitil.com]
Sent: Friday, March 04, 2011 3:40 PM
To: jvogel@riverwoodsrc.org; kgoyette@riverwoodsrc.org
Subject: The Ridge - Unitil update

Hi Justine & Kevin, please find attached the latest update on the Ridge. Please call me with any questions or concerns. Tim

Tim Noonis
Unitil
noonis@unitil.com
603-294-5123

5/31/2011

Unitil

3/4/11

Justine Vogel
Chief Executive Officer
Riverwoods
7 Riverwoods Drive
Exeter, NH 03833

Dear Justine,

I am contacting you with an update on Unitil's efforts to resolve the billing inaccuracy for the Ridge campus.

During this past week, we have obtained the billing information from TransCanada for the billing periods of July 21st, 2006 through January 19th, 2011.

We now have sufficient information to begin our analysis.

I realize that Riverwoods is eager for a swift resolution of this issue. As you may imagine, this is a delicate and complex transaction requiring thorough analysis and consideration.

I thank you for your continued patience while we carefully analyze the data.

If you have any questions in the interim, please contact me at 294-5123.

Sincerely,

Tim Noonis
Sr. Business Development Exec.

Corporate Office

5 Liberty Lane West
Hampton, NH 03842-1720

Phone: 603-772-0775
www.unitil.com

EXHIBIT E

From: Kevin Goyette [mailto:kgoyette@riverwoodsrc.org]
Sent: Friday, March 04, 2011 4:48 PM
To: 'Noonis, Tim'
Subject: RE: The Ridge - Unitil update

Tim.

I understand the sensitive nature but this is a major inconvenience impacting our 600 residents. I will be back in touch next week to discuss how Unitil will be able to provide us with the correct meter information.

-Kevin

Kevin P. Goyette
Chief Financial Officer
The RiverWoods Company
(603) 658-3035 phone
(603) 778-9623 fax

From: Noonis, Tim [mailto:noonis@unitil.com]
Sent: Friday, March 04, 2011 4:36 PM
To: Kevin Goyette
Subject: RE: The Ridge - Unitil update

Hi Kevin, unfortunately I am unable to confirm the metering ratio inaccuracy until the analysis is completed. I apologize for the inconvenience in the forecasting of your utility budgets. Perhaps a hybrid value based on the square footage might be a short term solution. Tim

Tim Noonis
Unitil
noonis@unitil.com
603-294-5123

From: Kevin Goyette [mailto:kgoyette@riverwoodsrc.org]
Sent: Friday, March 04, 2011 4:01 PM
To: Noonis, Tim
Cc: jvogel@riverwoodsrc.org
Subject: RE: The Ridge - Unitil update

Importance: High

Tim,

I am formulating the utility budgets this weekend and really need to have good information so that I can set the correct rates. Can you at least confirm the amount that your factor was off on the meter read? 50%?

Thanks.

-Kevin

Kevin P. Goyette
Chief Financial Officer
The RiverWoods Company
(603) 658-3035 phone
(603) 778-9623 fax

From: Noonis, Tim [mailto:noonis@unitil.com]
Sent: Friday, March 04, 2011 3:40 PM
To: jvogel@riverwoodsrc.org; kgoyette@riverwoodsrc.org
Subject: The Ridge - Unitil update

Hi Justine & Kevin, please find attached the latest update on the Ridge. Please call me with any questions or concerns. Tim

Tim Noonis
Unitil
noonis@unitil.com
603-294-5123

EXHIBIT F

From: Carroll, Cindy [mailto:carroll@unitil.com]
Sent: Wednesday, March 23, 2011 2:33 PM
To: 'Justine Vogel'
Cc: 'Kevin Goyette'; Noonis, Tim
Subject: RE: RiverWoods

Justine,

Thank you for your note. I have had a chance to discuss your information requests with the internal team working with the NHPUC Staff on the proposal we have pending and they advise that: (1) yes, we can and will provide RiverWoods with a copy of the analysis that we have submitted to the NHPUC once we have received feedback from Staff about the proposal. It is our intention to be transparent to RiverWoods with regard to this calculation/analysis. We may, however, ask that the analysis be treated confidentially, depending upon our discussions with NHPUC Staff; (2) I can also confirm that under our proposal Unitil will provide RiverWoods with a full refund; it should not be necessary for you to seek refunds from other parties; and (3) Since our meeting on 3/7 the NHPUC Staff has asked for a follow-up meeting with Unitil to discuss the proposal and we are currently in the process of scheduling that meeting. We are doing what we can to schedule the meeting as soon as possible to expedite the matter

Thank you for your patience as we move through the process with the PUC Staff. We will provide you with an update on Friday however, should you have any additional questions please do not hesitate to contact me

Best,
Cindy

Cindy L. Carroll – Director, Business Development
Unitil Corp | 325 West Road | Portsmouth, NH 03801
o: 603.294 5120 | f: 603.294 5220
carroll@unitil.com | www.unitil.com

From: Justine Vogel [mailto:jvogel@riverwoodsrc.org]
Sent: Monday, March 21, 2011 4:34 PM
To: Carroll, Cindy
Cc: 'Kevin Goyette'; Noonis, Tim
Subject: RiverWoods

Cindy – since our meeting Kevin and I have been in discussion with our Board, our auditors and our attorneys.

Some good questions and suggestions have arisen from these discussions. Pursuant to those discussions, we have some requests:

- Will you provide us with a copy of what Unitil submitted to the PUC in regard to the calculation/analysis for the overbilling and the PUC approval. This will serve as backup for our auditors to support the payment and also allow us to complete the appropriate level of fiduciary oversight regarding the calculation.
- Can you confirm that the reason the PUC has to authorize the refund is because you are proposing that the full refund be made by Unitil instead of RW having to seek refunds from the three parties (Unitil, TransCanada and the SNH)?
- Can you provide an update to any discussion or timing that you have had with the PUC since our meeting of 3/7?

Thank you and I look forward to hearing from you.

Justine

Justine Vogel
President and CEO
The RiverWoods Company
603 658 3005 (O)
603 686 0235 (C)
603 778 9623 (F)

EXHIBIT G

From: Noonis, Tim [mailto:noonis@unitil.com]
Sent: Wednesday, April 06, 2011 4:20 PM
To: Justine Vogel
Cc: Epler, Gary
Subject: RE: Ridge billing update

Justine,

The analysis and information that we have provided to the NH PUC Staff to date was for our initial and informal discussions with them.

We would prefer to submit to Riverwoods copies of the actual documents that will be filed with the NH PUC. The analysis that will be formally presented to the Commission for their consideration as a part of the official filing may be slightly different than the information provided during our informal discussions with Staff.

I realize that you have made a commitment to your Board to perform your own analysis and are anxious to begin however; to ensure that you are presenting them with the final and formally filed information I ask that you allow us two more weeks to complete our filing and officially submit it to the NH PUC; we will promptly provide Riverwoods with duplicate copies.

We are acutely aware of the inconvenience that this billing inaccuracy has caused Riverwoods. Please bear with us just a bit longer and we will see this through together.

Sincerely,

Tim

Tim Noonis
Unitil
noonis@unitil.com
603-294-5123

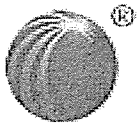
From: Justine Vogel [mailto:jvogel@riverwoodsrc.org]
Sent: Wednesday, April 06, 2011 3:25 PM
To: Noonis, Tim
Cc: kgoyette@riverwoodsrc.org
Subject: RE: Ridge billing update

Tim – I was expecting more. I understood Cindy's prior email to indicate that you would send us a copy of what you had submitted already.
Justine

From: Noonis, Tim [mailto:noonis@unitil.com]
Sent: Wednesday, April 06, 2011 2:57 PM
To: jvogel@riverwoodsrc.org
Cc: kgoyette@riverwoodsrc.org
Subject: Ridge billing update

Hi Justine, I apologize for the delay. Our discussions with the NH PUC continue to be a delicate and complex issue Tim

Tim Noonis
Unitil
noonis@unitil.com
603-294-5123



Caution
As of: Jul 11, 2011

SUMMIT PROPERTIES, INC., Plaintiff/Appellee/Cross-Appellant, v. PUBLIC SERVICE COMPANY OF NEW MEXICO, formerly doing business as SANGRE DE CRISTO WATER COMPANY, and now doing business as PNM WATER SERVICES, and CITY OF SANTA FE, a municipality, Defendants/Appellants/Cross-Appellees.

Docket No. 24,231

COURT OF APPEALS OF NEW MEXICO

138 N.M. 208; 2005 NMCA 90; 118 P.3d 716; 2005 N.M. App. LEXIS 82

May 9, 2005, Filed

SUBSEQUENT HISTORY: Certiorari Denied, No. 29,260, July 15, 2005. Released for Publication July 26, 2005.
Writ of certiorari denied *Summit v. Public Serv. Co, 138 N.M. 145, 117 P.3d 951, 2005 N.M. LEXIS 390 (N.M., July 15, 2005)*

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY. James A. Hall, District Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant water utility appealed a judgment of the District Court of Santa Fe County (New Mexico) that awarded plaintiff developer damages in its action for breach of contract and violations of the Unfair Practices Act (UPA), *N.M. Stat. Ann. § 57-12-1 et seq.* The developer filed a cross-appeal of the grant to the utility of an offset against the damages awarded for the amount of the developer's settlement with defendant city.

OVERVIEW: The developer claimed the utility breached a contract to reimburse it for the cost of constructing a water system by collecting connection fees from customers outside the development. The utility later sold its system to the city. On appeal, the utility claimed the developer's suit pertained to filed rates and matters of public concern, therefore the Public Service Commission had exclusive jurisdiction. The court held that jurisdiction over contract or tort claims against a public utility usually rested with the courts, and that the developer was not challenging the reasonable of rates, but the utility's failure to carry out its obligations under the contract to collect connection fees set for the developer's private benefit, not public benefit. The court noted that the Commission did not establish or approve the connection fees or the contract, thus the fees were not "filed rates" and the filed-rate doctrine did not apply. The court rejected the utility's defenses of abandonment, novation, and impracticability/impossibility, and held that the offset was proper because the settlement funds from the city were not a collateral source and double recovery was not allowed in New Mexico.

OUTCOME: The court affirmed the trial court judgment.

LexisNexis(R) Headnotes

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
Energy & Utilities Law > Utility Companies > Contracts for Service
[HN1] New Mexico Public Service Commission "Rule 19" generally sets forth the requirements for line extensions and provides that they are to be paid by the customer to whose property the services are run. Rule 19 also provides that where unusual circumstances exist, an extension may be made under a special long-term contract providing the contract terms are such that no adverse effects sic will be imposed on utility's existing customers; and further providing any such contracts entered into shall be filed with the Commission.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Civil Procedure > Appeals > Standards of Review > Fact & Law Issues
Civil Procedure > Appeals > Standards of Review > Substantial Evidence > General Overview
[HN2] The appellate court reviews questions of law under a de novo standard of review and questions of fact under a substantial evidence standard of review.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
[HN3] The power of the New Mexico Public Service Commission is limited to matters and controversies involving the rights of a utility and the public and does not extend to acts by the utility that do not affect its public duties.

Administrative Law > Separation of Powers > Jurisdiction
Energy & Utilities Law > Administrative Proceedings > General Overview
Energy & Utilities Law > Purchase Contracts > Remedies for Breach
[HN4] The general rule is that jurisdiction over contract or tort claims made against a public utility usually rests with the courts. Claims related to rates and service are within expertise and jurisdiction of New Mexico Public Service Commission, but contract disputes are not. In New Mexico, as in most other states, the Commission has no power to award damages where a contract with a utility has been breached. The Commission has power to decide whether a utility can enter into a given contract, but once entered into, the construction and interpretation of the contract are to be determined by the courts. The only exclusive power given to the Commission is to "regulate and supervise" every public utility. *N.M. Stat. Ann. § 62-6-4(A)* (2003). This does not preempt lawsuits involving contracts a utility enters into with private parties.

Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN5] A filed rate is one that is approved by the regulatory agency and is per se reasonable and unassailable in judicial proceedings brought by ratepayers.

Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN6] The purposes behind the filed-rate doctrine are to prevent price discrimination by requiring similarly situated customers to pay the same rates for service, to preserve the role of regulatory agencies in approving rates, and to keep courts out of rate-making.

Administrative Law > Judicial Review > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Environmental Law > Litigation & Administrative Proceedings > Judicial Review
[HN7] Exhaustion of remedies concerns the "timing of judicial review" of an administrative action and applies only in situations where an administrative agency has original jurisdiction.

Contracts Law > Performance > Discharges & Terminations
[HN8] A contract is abandoned where the acts of one

party inconsistent with its existence are acquiesced in by the other party. A contract may be abandoned if the act or conduct of the parties is inconsistent with the continued existence of the contract, and mutual assent to abandon a contract may be inferred from the attendant circumstances and conduct of the parties. Abandonment of a contract involves questions of fact to be determined from the particular circumstances.

Contracts Law > Performance > Novation

[HN9] Novation requires (1) an existing and valid contract, (2) an agreement to the new contract by all parties, (3) a new valid contract, and (4) an extinguishment of the old contract by the new one. For a novation, "here must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well-settled principle that novation is never to be presumed.

Civil Procedure > Appeals > Reviewability > Notice of Appeal
Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN10] Where an argument was made for the first time in a reply brief, the appellate court will not consider it.

Contracts Law > Performance > Impossibility of Performance > Impracticability

[HN11] The doctrine of impracticability, which is sometimes referred to as impossibility, applies in situations where performance by a party is made impracticable without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. In order for a party to assert this defense, the condition creating the impossibility must have arisen through no fault of the party. The party pleading defense of impossibility must show that it took virtually every action within its powers to perform its duties under the contract. An impracticability defense requires a showing that (1) a supervening event made performance on the contract impracticable, (2) the non-occurrence of the event was a basic assumption on which the contract was based, (3) the occurrence of the event was not the party's fault, and (4) the party did not assume the risk of the occurrence. One cannot create an impossibility preventing performance on a contract and then be shielded from obligations under the contract by hiding behind that self-created "impossibility" defense.

Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview

[HN12] A party is entitled to have a jury instructed on a legal theory if the theory is supported by the evidence.

Antitrust & Trade Law > Industry Regulation > Transportation > Railroads
Civil Procedure > Appeals > Reviewability > Notice of Appeal
Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN13] The appellate court does not address an argument that has not been developed sufficiently to allow the appellate court to consider it. Issues raised in appellate briefs that are unsupported by cited authority will not be reviewed on appeal.

Administrative Law > Judicial Review > Reviewability > Preclusion
Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > General Overview
Energy & Utilities Law > Utility Companies > General Overview

[HN14] *N.M. Stat. Ann. § 57-12-7* (1999) states that the Unfair Practices Act shall not apply to actions or transactions expressly permitted under laws administered by a regulatory body.

Insurance Law > Industry Regulation > Insurance Company Operations > Representatives > Brokers
Torts > Damages > Collateral Source Rule > Insurance Payments
Torts > Procedure > Settlements > General Overview

[HN15] The general rule is that a plaintiff may not recover more than his or her actual loss. An exception to that general rule is the collateral source rule, which provides that a plaintiff may recover his or her full losses from the responsible defendant, even though he may have recovered part of his losses from a collateral source. The general rule is limited to situations where there are no facts showing that the parties were jointly liable for the damages caused to the plaintiff. In addition, payments from a joint obligor on a contract are credited toward the amount received from other joint obligors. This principle is based on the idea that a contracting party is not entitled

to double recovery because a contracting party should not receive more than was bargained for. New Mexico does not allow duplication of damages or double recovery for injuries received.

Civil Procedure > Remedies > Costs & Attorney Fees > Attorney Expenses & Fees > American Rule
Legal Ethics > Client Relations > Attorney Fees > Fee Agreements
[HN16] In the absence of statutory or contractual authority, a party to a lawsuit is not entitled to recover attorney fees from an opposing party. New Mexico follows American Rule that absent statutory or other legal authority, parties are responsible for their own attorney fees.

Contracts Law > Remedies > Compensatory Damages > General Overview
Torts > Damages > General Overview
Torts > Procedure > Multiple Defendants > Joint & Several Liability
[HN17] Where a joint obligor provides consideration to a plaintiff, that consideration must be credited against the obligation of other joint obligors, and any agreement to the contrary is of no effect. Allowing a party to avoid crediting a joint obligor for the amount of the settlement by characterizing the settlement as attorney fees the party was not entitled to recover in the lawsuit for breach of contract would violate the rule against double recovery of damages and the principles underlying the theory of joint obligations. Duplication of damages or double recovery for injuries received is not permissible. The function of offset is to achieve equity and justice and that fundamental fairness does not permit double recovery.

Civil Procedure > Settlements > Releases From Liability > General Overview
[HN18] Courts must decide whether a party has been released by settlement by looking at the intent of the parties and whether an injured party has been fully compensated.

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JUDGES: LYNN PICKARD, Judge. WE CONCUR: CYNTHIA A. FRY, Judge, RODERICK T. KENNEDY, Judge.

OPINION BY: LYNN PICKARD

OPINION

[*211] [***719]

PICKARD, Judge.

[**1] Summit Properties (Summit), a real estate developer, sued the Public Service [***720] [*212] Company of New Mexico (PNM) and the City of Santa Fe (City) for, among other things, breach of contract and violation of the *Unfair Practices Act* (UPA). Summit settled its claims against the City. A trial was held on the claims against PNM, which resulted in the jury's awarding damages to Summit. The trial court also entered an order granting PNM an offset against the judgment based on Summit's settlement with the City. PNM appeals, and Summit cross-appeals. We affirm.

FACTS

[**2] PNM owned and operated a water utility in Santa Fe under the name of Sangre de Cristo Water Company (SDCW) (hereinafter we may refer to both entities as PNM). Summit purchased property in the City for development. Before Summit purchased the property, PNM represented to Summit that it planned to expand its water utility system to serve the area where the property was located. After the purchase of the property, PNM withdrew its plan to construct an expansion of its water utility system into the area to be developed. Although Summit was prepared to construct a private water system to serve its 26 lots, the City would approve Summit's development plans only on the condition that PNM's water utility system be expanded to cover Summit's property, as well as other developments in the area. Following discussions between PNM and Summit, PNM agreed to provide water service to the development area based on the terms of a special and unique contract between PNM and Summit under a line extension policy authorized by the New Mexico Public Service Commission (Commission), SDCW "Rule 19." Rule 19

[HN1] generally sets forth the requirements for line extensions and provides that they are to be paid by the customer to whose property the services are run. Rule 19 also provides that where unusual circumstances exist, an extension may be made under a special long-term contract providing the contract terms are such that no adverse affects [sic] will be imposed on Company's existing customers; and further providing any such contracts entered into shall be filed with [the] New Mexico Public Service Commission.

[**3] This special contract between PNM and Summit was filed with the Public Service Commission on October 16, 1990 (1990 Contract). The essence of the contract was that Summit would construct a water system including a 500,000 gallon water storage tank, transmission lines, and a pump station (Facilities) to serve approximately twenty times the number of customers than it originally contemplated for its own development. This expansion system would be designed by PNM and would be transferred to PNM at no cost under the 1990 Contract. Upon this transfer, PNM would collect hook-up fees from the other customers not in Summit's development, which PNM would then pay over to Summit, allowing Summit to recoup the investment not required by its own development.

[**4] The financial arrangements by which Summit would recoup its investment in the water system from PNM under the 1990 Contract were contained in what the contract called a "Rebate Provision." The Rebate Provision provided that the Facilities would provide water service in a designated area to 523 single family residences. Third-party users of the Facilities would be allowed to connect to the Facilities by paying "a proportionate share of the cost of the Facilities as a Connection Fee" determined by a specific formula. Additionally, the Rebate Provision provided a method for determining the cost of the Facilities, which cost would be determined at the time the Facilities were transferred to PNM. The Connection Fee was to be collected by PNM "at the time it would normally collect service line extension charges" and would be paid to Summit within thirty days of its receipt by PNM. The 1990 Contract did not set a specific amount for the Connection Fee.

[**5] The dispute in this case centered around the elements that should be included in the Facilities Cost pursuant to which the Connection Fee was calculated. Summit and PNM signed a bill of sale establishing a Facilities Cost, following which PNM wrote to the Commission, stating that the Connection Fee would be that amount divided by [***721] [*213] 523. Summit, on the other hand, claimed that this figure excluded certain costs and that Summit signed the bill of sale under economic coercion because otherwise PNM would not accept the water system Summit had built, leaving Summit with a development without water service. Summit also had a number of related claims about how PNM was charging third parties.

[**6] PNM entered into an agreement to sell SDCW, including the Facilities, to the City on February 28, 1994. On February 24, 1994, Summit had entered into a contract with the City for water and sewer service (Water and Sewer Service Agreement). The Water and Sewer Service Agreement recognized that Summit had built the Facilities at its own expense under the 1990 Contract. On July 3, 1995, PNM sold the Facilities to the City. An Operating Agreement was signed which authorized PNM to continue managing and operating the Facilities. The sale was approved by the Commission.

[**7] On appeal, PNM claims that (1) the trial court erred in allowing Summit to bring claims arising before the sale of the Facilities to the City because the Commission had exclusive jurisdiction over those claims; (2) Summit's claims under the UPA were barred as a matter of law; and (3) Summit's claims arising after the sale of the Facilities should have been dismissed because PNM's liability was precluded by the doctrines of abandonment, novation, and impracticability/impossibility. In the cross-appeal, Summit challenges the trial court's grant of an offset of the damages award, claiming that PNM was solely liable on certain breach of contract claims, and Summit and the City had expressly agreed that the settlement was for attorney fees and not for damages. Some arguments made by the parties involve legal questions, and some involve factual questions. The parties are not completely in agreement regarding the standard of review. [HN2] We review questions of law under a de novo standard of review and questions of fact under a substantial evidence standard of review. See *Jicarilla Apache Nation v. Rodarte, 2004 NMSC 35, P24, 136 N.M. 630, 136 N.M. 630, 103 P.3d 554.* As discussed in this opinion, we affirm.

DISCUSSION

Jurisdiction

[**8] PNM makes two main jurisdictional arguments on appeal. Under the broader argument, PNM claims that, as a matter of New Mexico statutory and common law, the Commission has exclusive jurisdiction over the matters raised in this case, and a breach of contract lawsuit cannot be used to litigate those matters. More narrowly, PNM claims that Summit's attack on the Connection Fees should not have been allowed because those fees amounted to "filed rates," and, under the filed-rate doctrine, a contract or tort lawsuit cannot be used to change a filed rate.

Statutory and Common-Law Jurisdiction Arguments

[**9] PNM contends that the Commission has exclusive jurisdiction under our statutes to regulate and supervise rates and service regulations of a public utility. Relying on *NMSA 1978, § 62-3-3(H), (J)* (2003), PNM argues that the term "rates" is broadly defined to include "every practice, act or requirement 'in any way relating' to charges for utility service," and that the term "service regulations" is even more broadly defined to include "every practice, act or requirement relating to the service or facility of a utility." PNM claims that the Connection Fees that were to be charged under the 1990 Contract were "charges to be imposed upon third parties as a condition to obtaining water service," and are therefore "rates." PNM also claims its "acts and practices in implementing" the 1990 Contract related to "service regulations." Therefore, because the Connection Fees are "rates" and because PNM's acts with regard to the 1990 Contract were "service regulations," PNM concludes that the Commission has exclusive jurisdiction over the 1990 Contract and the Connection Fees.

[**10] In addition, relying on New Mexico common law, PNM claims that this case involves a matter in controversy that affects the public and does not involve a purely private dispute. See *Southwestern Pub. Serv. Co. v. Artesia Alfalfa Growers' Ass'n, 67 N.M. 108, 117-18, 353 P.2d 62, 68-69 (1960)* (discussing rule that [HN3] the power of the [***722] [*214] Commission is limited to matters and controversies involving the rights of a utility and the public and does not extend to acts by the utility that do not affect its public duties). PNM claims, in this case, that the matter in controversy -- the 1990 Contract -- is of public concern because it has to do with Connection Fees that were to be charged in conjunction with the development of 523 residences.

[**11] PNM's argument is far too broad. PNM's position would create a situation where no public utility could be sued for any matter related to its activities. [HN4] The general rule, however, is to the contrary--that jurisdiction over contract or tort claims made against a public utility usually rests with the courts. See *Nev. Power Co. v. Eighth Judicial Dist. Ct., 102 P.3d 578, 586 (Nev. 2004)*; see also *Campbell v. Mountain States Tel. & Tel. Co., 120 Ariz. 426, 586 P.2d 987, 990-92 (Ariz. Ct. App. 1978)* (discussing the doctrine of primary jurisdiction and the rule that construction of contracts and determination of their validity are judicial functions for the courts); *Ethyl Corp. v. Gulf States Utils., Inc., 836 So. 2d 172, 176 (La. Ct. App. 2002)* (noting that courts have no jurisdiction over fixing and regulating rates by utility and commission has no jurisdiction over contract disputes with utility); *State ex rel. GS Techs. Operating Co. v. Pub. Serv. Comm'n, 116 S.W.3d 680, 696 (Mo. Ct. App. 2003)* (determining that controversies over contracts are enforceable by courts, not the commission, because courts can enforce contract and enter judgment); *Bell Tel. Co. v. Uni-Lite, Inc., 294 Pa. Super. 89, 439 A.2d 763, 765 (Pa. Super. Ct. 1982)* (reasoning that claims related to rates and service are within expertise and jurisdiction of commission, but contract disputes are not). In New Mexico, as in most other states, the Commission has no power to award damages where a contract with a utility has been breached. See *Southwestern Pub. Serv. Co., 67 N.M. at 117-18, 353 P.2d at 68* (noting that Commission has power to decide whether utility can enter into a given contract, but once entered into, the construction and interpretation of the contract are to be determined by the courts); see also *NMSA 1978, § 62-6-4* (2003) (discussing powers and duties of the Commission). The only exclusive power given to the Commission is to "regulate and supervise" every public utility. See *§ 62-6-4(A)*. This does not preempt lawsuits involving contracts a utility enters into with private parties. See *Southwestern Pub. Serv. Co., 67 N.M. at 117-18, 353 P.2d at 68.*

[**12] The *Nevada Power Co.* case is instructive. In that case, an electric utility was sued for breach of contract, breach of the covenant of good faith and fair dealing, and unfair practices. *102 P.3d at 581*. The claims arose out of the placement of meters, which can be placed on the primary side of a transformer before the voltage

level of electricity is converted to an amount that can be used by the customer, or on the secondary side of the transformer after the voltage level is converted. *Id. at 581-82*. The meter is typically placed on the secondary side, after the conversion has taken place, in order to avoid charging the customer for the energy that is lost in the conversion process. *Id. at 582*. The utility represented to its customers that it would be to their benefit to place the meters on the primary side of the transformers. Id. The plaintiffs claimed that the utility had deceptively advised them that placement of the meters in a particular location would be in their best interest, when, in fact, the placement of the meters allowed the utility to charge a higher rate for the electricity used. *Id. at 583*. The utility claimed that the Nevada Public Utilities Commission had exclusive jurisdiction over the customers' claims because the claims constituted challenges of tariff rates and placement of the meters and, as in New Mexico, the Commission retained exclusive jurisdiction to regulate and supervise public utilities and the setting of rates charged to customers. *Id. at 584*. The Nevada court held that the general rule that the courts have original jurisdiction "over claims sounding in tort, contract, and consumer fraud" applied and that the court had original jurisdiction over the plaintiffs' claims. *Id. at 586-87*. In so holding, the court pointed out that the plaintiffs were not challenging the reasonableness of the rates approved by the Commission. *Id. at 586*. Instead, they were challenging misrepresentations made by the utility that resulted in [***723] [*215] certain rates being charged to the plaintiffs. *Id. at 587*.

[**13] Similarly, in this case, Summit has not challenged the reasonableness of any rates established or approved by the Commission. In fact, as discussed below, the Commission had no role in establishing or approving the Connection Fees. Instead, Summit challenged PNM's failure to carry out its obligations under a contract that was intended to compensate Summit for advancing the costs of the Facilities. Summit claimed, for example, that PNM had incorrectly calculated the cost of the Facilities, had failed to collect certain Connection Fees, and had allowed connections for service from the Facilities by third parties outside the service area. These claims are not related to the reasonableness of any rates established by the Commission. Even though the means chosen to supply the compensation for the costs advanced by Summit were based on Connection Fees to be charged to new third-party customers, the Commission did not therefore obtain exclusive jurisdiction over Summit's claims. See *id. at 586-87*. The dispute between the parties remains a private dispute concerning the construction of the Facilities and compensation due to Summit as a result.

[**14] As noted above, PNM also maintains that the Commission had exclusive jurisdiction over this dispute because, according to PNM, the dispute was a matter of public concern, rather than simply a private dispute between PNM and Summit. PNM points out that the 1990 Contract for water service affected 523 residences, "or their equivalent." We disagree that the dispute was a matter of public concern. The point of the 1990 Contract was not to establish Connection Fees that were reasonable or fair for the public. Rather, the 1990 Contract established fees that would allow Summit to recover the monies expended to build the Facilities. Although other members of the public might be affected by the collection of the Connection Fees, the dispute in this case is a private one over PNM's actions in executing the terms of the 1990 Contract.

[**15] In addition, the Commission had no part in establishing the amount of the Connection Fees or in regulating or approving that amount. According to the testimony of Steve Schwebke, an engineering bureau chief who was employed by the Commission, there are no requirements under the line extension policy "for the Commission to approve any of [these] special or specific contracts that might be submitted"; the special contracts are submitted to the Commission "for informational purposes only." Schwebke stated that it was his understanding that "there is no specific authorization or approvals that are implied by the Commission just as a result of the contract being filed." Schwebke also testified that, in his experience, when reviewing a filed contract, such as the one in this case, he would initial the filing to show that he reviewed it and found no particular problem that would require further action by the Commission staff. If a staff member identified a problem when reviewing a special contract, the staff member would likely convert an informal investigation to a formal one by filing a motion to bring the contract to the attention of the Commission. Schwebke testified that the Commission staff is not an official body itself, that an action by the staff does not constitute an official act by the Commission, and that official acts by the Commission would likely be reflected in the form of an order. As established by Schwebke's testimony, the fact that a staff member of the Commission cursorily reviewed the 1990

Contract and found nothing glaringly wrong does not automatically grant the Commission exclusive authority to resolve all disputes arising out of the contract, particularly where the Commission cannot compensate Summit for all of the harm it suffered from PNM's failure to abide by the terms of the 1990 Contract.

Filed-Rate Doctrine

[**16] PNM argues that the main thrust of Summit's lawsuit was to attack the amount of the Connection Fees. PNM claims that Summit asked for damages that included an increase in the Connection Fees. PNM argues that the Connection Fees were "filed rates" and Summit's breach of contract lawsuit cannot be used to change a filed rate. We note that PNM's argument regarding filed rates [***724] [*216] affects only those damages awarded that concerned the amount of the Connection Fees and not other damages such as Connection Fees that should have been, but were not, collected from third parties that connected to the Facilities. These other damages are not in any way attacks on the amount of the Connection Fees, and the filed-rate argument is therefore not applicable to them.

[**17] [HN5] A filed rate is one that is approved by the regulatory agency and is "per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Valdez v. State, 2002 NMSC 28, P5, 132 N.M. 667, 54 P.3d 71* (internal quotation marks and citations omitted). In this connection, PNM claims that mere filing, without positive approval, is sufficient to create a filed rate. However, the authorities cited by PNM do not stand for that proposition. In *Keogh v. Chicago & Northwestern Railway, 260 U.S. 156, 67 L. Ed. 183, 43 S. Ct. 47 (1922)*, the rates were "published," had been challenged in hearings before the commission, and had not gone into effect until the commission approved them. *Id. at 161, 163.* In *Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 90 L. Ed. 2d 413, 106 S. Ct. 1922 (1986)*, the rates were filed with the commission and "allowed to go into effect" by the commission. *Id. at 417.* Here, the Commission played no role in setting or approving the Connection Fees. PNM has pointed to no evidence in the record showing that the Commission had the power to approve or disapprove of the amount of the Connection Fees.

[**18] [HN6] The purposes behind the filed-rate doctrine are to prevent price discrimination by requiring similarly situated customers to pay the same rates for service, to preserve the role of regulatory agencies in approving rates, and to keep courts out of rate-making. *Valdez, 2002 NMSC 28, P5.* PNM claims that the Connection Fee referred to in the 1990 Contract qualifies as a filed rate because the Commission received, reviewed, and approved the 1990 Contract entered into pursuant to Rule 19, and the Facilities' Cost and Connection Fee were reported to the Commission by a letter on August 18, 1994. According to PNM, the letter and the filing of the 1990 Contract provided the Commission with "all of the information required to judge the reasonableness of the Connection Fee" and the Commission did not disapprove of the Connection Fee.

[**19] As discussed above, the testimony by Schwebke demonstrated that the Commission did not give its approval of the 1990 Contract. Instead, a member of the Commission staff merely reviewed the 1990 Contract for glaring problems. The 1994 letter sent to the Commission provided notice that the Facilities were completed, indicated that PNM believed that the Connection Fee should be in the amount of $ 2,013.08, and alleged that the 1990 Contract was "one of the specific contracts" being assumed by the City as part of the sale of the Facilities. There is nothing to indicate that the Commission reviewed or approved the letter or its contents. In particular, there is nothing to indicate that the Commission approved of the specific amount to be rebated to Summit in the form of Connection Fees. Without approval by the Commission, the Connection Fees cannot be categorized as "filed rates." Therefore, the filed-rate doctrine does not apply to this case.

[**20] The Connection Fees under the 1990 Contract were set not for public benefit, but for the private benefit to Summit in rebating its costs for the Facilities. PNM, in breaching the contract, prevented Summit from recovering its costs. The 1990 Contract involves matters of private concern between Summit and PNM, and therefore the Commission does not have exclusive jurisdiction over the matter.

[**21] PNM, in passing, states that where "the Commission has exclusive jurisdiction, a plaintiff must exhaust his administrative remedies, even when the plaintiff seeks damages." [HN7] Exhaustion of remedies concerns the "timing of judicial review" of an administrative action and applies only in situations where "an administrative agency has original jurisdiction." See *Nevada Power Co., 102 P.3d at 586* (internal quotation

marks and citations omitted). As discussed above, the Commission did not have original [***725] [*217] jurisdiction over Summit's claims. Therefore, the exhaustion of remedies doctrine does not apply to this case.

[**22] Finally, PNM argues that Summit attempted to have the jury enforce PNM's utility obligations, enforceable only by the Commission, by asking the jury during closing argument to "make [PNM] live up to the standard of fair, just and reasonable." However, Summit used these words in closing, not to ask the jury to approve what it thought to be fair, just, and reasonable rates, but instead to rebut what PNM's witnesses appeared to contend, which was that PNM engaged in the conduct complained of because of its perceived obligation to be fair, just, and reasonable. Summit's closing argument does not demonstrate to us that it was doing anything other than seeking to enforce a private obligation.

Post-Sale Contract Defenses

[**23] PNM argues that claims based on its post-sale conduct were barred, as a matter of law, under theories of abandonment, novation, and impracticability/impossibility. Abandonment

[**24] PNM sold the Facilities to the City after obtaining approval from the Commission for the sale. PNM contends that the Commission's approval was also for PNM's abandonment of the water utility, "including the utility services addressed" in the 1990 Contract. PNM also contends that Summit expressly consented to its abandonment of utility services. In other words, PNM claims that Summit and the Commission, by agreeing to the sale of the Facilities, also agreed to the abandonment by PNM of its 1990 Contract with Summit. The abandonment issue was submitted to the jury, and PNM is therefore, by necessity, arguing that there was abandonment in this case as a matter of law.

[**25] [HN8] A contract is abandoned "where the acts of one party inconsistent with its existence are acquiesced in by the other party." See *Keeth Gas Co. v. Jackson Creek Cattle Co., 91 N.M. 87, 91, 570 P.2d 918, 922 (1977)*; see also *Lansdale v. Geerlings, 523 P.2d 133, 136 (Colo. Ct. App. 1974)* (stating that a contract may be abandoned if the act or conduct of the parties is inconsistent with the "continued existence of the contract, and mutual assent to abandon a contract may be inferred from the attendant circumstances and conduct of the parties"). Abandonment of a contract involves questions of fact to be determined from the particular circumstances. *Keeth, 91 N.M. at 91, 570 P.2d at 922.* As Summit points out, none of the documents created in connection with the sale of the Facilities contained any mention of any party's intentions regarding continued enforcement of the 1990 Contract. There is no evidence that PNM asked to be relieved of its obligations under the 1990 Contract or that Summit consented to such a request. In fact, Summit continued to negotiate with PNM concerning the execution of the Rebate Provision of the 1990 Contract long after PNM and the City had executed the sale agreement.

[**26] PNM's only argument is, in essence, that Summit's agreement not to contest the sale to the City must constitute abandonment as a matter of law. We disagree; at most, this evidence raised a factual issue concerning abandonment, which was properly submitted to, and rejected by, the jury.

[**27] PNM attempts to bolster its abandonment and as-a-matter-of-law arguments by pointing out that the Commission approved the sale. By doing so, PNM argues that the Commission essentially approved abandonment of the 1990 Contract as well. Furthermore, PNM argues that the Commission had the power to set aside the Rebate Provision. Although PNM entitles this theory "regulatory abandonment," it is not really an "abandonment" proposition, since it does not rely on abandonment by Summit, the other party to the 1990 Contract. Instead, PNM appears to be arguing that the Commission's actions terminated PNM's obligations under the 1990 Contract as a matter of law, no matter what Summit's intentions toward the Contract might have been. One problem with this argument is that PNM has pointed to no evidence that the Commission even considered the 1990 Contract when it approved the sale from PNM to the City. As [***726] [*218] discussed above, PNM did not request permission to do anything with respect to its obligations under the 1990 Contract. PNM can only argue, therefore, that the Commission implicitly approved of its abandonment of the 1990 Contract by approving of the termination of PNM's status as a utility. Because there is no evidence that the 1990 Contract was before the Commission in any way, we cannot agree with this proposition.

Novation

[**28] PNM claims that its obligations under the

1990 Contract were discharged through novation. PNM's only argument is that, as a matter of law, the 1994 Water and Sewer Service Agreement between the City and Summit was to be substituted for the 1990 Contract between PNM and Summit. In other words, PNM claims that, as a matter of law, the City was substituted as obligor under the 1990 Contract when the Facilities were sold. Contrary to PNM's argument, the trial court ruled that, as a matter of law, the 1994 agreement was not a novation or agreement to substitute the City for PNM under the 1990 Contract.

[**29] [HN9] Novation requires "(1) an existing and valid contract, (2) an agreement to the new contract by all parties, (3) a new valid contract, and (4) an extinguishment of the old contract by the new one." *Sims v. Craig, 96 N.M. 33, 35, 627 P.2d 875, 877 (1981)*. For a novation, "there must be a clear and definite intention on the part of all concerned that such is the purpose of the agreement, for it is a well-settled principle that novation is never to be presumed." Id. (internal quotation marks and citation omitted). As argued by Summit, PNM was not a party to the 1994 agreement, and Summit was not a party to PNM's sale of the Facilities to the City. In addition, the 1994 Water and Sewer Service Agreement includes no language regarding "extinguishment" of the 1990 Contract, and there is no language in the sale agreement between PNM and the City regarding "extinguishment" of the 1990 Contract. In sum, there is nothing that would show a "clear and definite intention" by all parties, and in particular by Summit, that the purpose of the 1994 Water and Sewer Service Agreement was to replace the 1990 Contract, including all of PNM's obligations under the 1990 Contract. Therefore, while there was an existing and valid contract (the 1990 Contract), and a new valid contract (the 1994 Water and Sewer Service Agreement), there was no agreement to a new contract by all parties, and there was no extinguishment of the old contract by the new one. The 1994 Water and Sewer Service Agreement, standing alone, does not qualify as a novation of the 1990 Contract.

[**30] In its reply brief, PNM appears to claim that, at a minimum, there is an issue of fact about whether there was a novation, and the issue should have been submitted to the jury. PNM did not make this argument in the brief-in-chief, despite its protestations to the contrary. Instead, PNM's only argument, made in a footnote, was that its impracticability defense should have been submitted to the jury. PNM did not assert that the novation defense should also have been submitted to the jury. PNM's cursory statement in the footnote that an instruction given by the trial court "negated jury consideration of PNM's affirmative defenses" is not sufficient to raise the argument that the jury should have been instructed on the defense of novation. [HN10] Since this argument was made for the first time in the reply brief, we will not consider it. See *State v. Castillo-Sanchez, 1999 NMCA 85, P20, 127 N.M. 540, 984 P.2d 787.*

[**31] Moreover, even if the argument had been preserved, PNM has failed to demonstrate that there was a factual issue allowing the novation defense to be presented to the jury. The 1994 Water and Sewer Service Agreement does not raise an issue of fact about novation because it does not meet the requirements for a novation. Similarly, Summit's agreement not to contest the sale of SDCW to the City, with no evidence of Summit's intentions concerning the 1990 Contract, does not raise an issue of fact as to novation. PNM has pointed to no other evidence that might have supported a finding of a "clear and definite intention" by all parties to substitute the 1994 Water and Sewer Service Agreement for the 1990 Contract. [***727] [*219] Therefore, the trial court correctly refused to submit this issue to the jury.

Impracticability/Impossibility

[**32] The trial court found that, as a matter of law, it was not impracticable or impossible for PNM to comply with the terms of the 1990 Contract after the Facilities were sold to the City. [HN11] The doctrine of impracticability, which is sometimes referred to as impossibility, applies in situations where performance by a party "is made impracticable without his fault by the occurrence of an event[,] the non-occurrence of which was a basic assumption on which the contract was made." In re Estate of Duncan, 2002-NMCA-069, P27, *2002 NMCA 69, 132 N.M. 426, 50 P.3d 175* (quoting *Restatement (Second) of Contracts § 261* (1979)), rev'd on other grounds by *Estate of Duncan v. Kinsolving , 2003 NMSC 13, 133 N.M. 821, 70 P.3d 1260.* In order for PNM to assert this defense, the condition creating the impossibility must have arisen through no fault of PNM. See *Kama Rippa Music, Inc. v. Schekeryk, 510 F.2d 837, 842 (2d Cir. 1975)* (noting that party pleading defense of impossibility must show that "it took virtually every action within its powers to perform its duties under the

contract"); see also *Restatement (Second) of Contracts § 261* (1981). An impracticability defense requires a showing by PNM that (1) a supervening event made performance on the contract impracticable, (2) the non-occurrence of the event was a basic assumption on which the contract was based, (3) the occurrence of the event was not PNM's fault, and (4) PNM did not assume the risk of the occurrence. See *Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1294-95 (Fed. Cir. 2002)*; see also *Bradford Dyeing Ass'n, Inc. v. J. Stog Tech GMBH, 765 A.2d 1226, 1238 (R.I. 2001)* (stating that one cannot create an impossibility preventing performance on a contract and then be shielded from obligations under the contract "by hiding behind that self[-]created 'impossibility' defense").

[**33] In this case, the undisputed fact is that PNM voluntarily agreed to the sale of SDCW and the Facilities to the City. The Agreement to Purchase and Sell SDCW and the Facilities was between the City and PNM, and no other party. PNM argues that it was not at fault for "causing a regulatory order" to be entered. However, PNM agreed to the sale and, based on its own duties as a utility, sought authorization for the sale from the Commission, obtaining an order allowing it to go forward with the sale and with its plan to discontinue its utility status. These actions were initiated by PNM and not by the Commission or Summit. PNM entered into a contract with Summit, a private entity, to have the Facilities constructed and then entered into an agreement with the City to sell the Facilities. PNM cannot create the impossibility of performing under the contract with Summit by entering into an agreement with the City to sell the Facilities and then hide behind the impossibility that it helped create. The trial court correctly determined that the impossibility defense was not available to PNM as a matter of law.

[**34] To the extent that PNM contends that the jury should have been instructed on the impossibility defense, there were no factual issues for the jury to decide. The evidence was undisputed that PNM procured the regulatory ruling that it contends created the impossibility. As discussed above, the defense of impracticability/impossibility is not available under those circumstances. See *Thompson Drilling, Inc. v. Romig, 105 N.M. 701, 705, 736 P.2d 979, 983 (1987)* (holding that [HN12] a party is entitled to have a jury instructed on a legal theory if the theory is supported by the evidence).

[**35] In one sentence, PNM argues that the fact that it procured the approval of the Commission to abandon its status as a utility cannot be used to deny PNM the defense of impracticability, because to do so would violate PNM's constitutional right to petition the government. [HN13] We do not address this argument because it has not been developed sufficiently to allow us to consider it. A citation to two cases, *United Mine Workers v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, and *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*, both generally [***728] [*220] exempting from the anti-trust act concerted action seeking to influence public officials, without any explanation of how those cases support PNM's position, is not sufficient to obtain a ruling from this Court on a constitutional claim such as the one PNM apparently raises.

[**36] PNM also contends that the impossibility was created with Summit's acquiescence because Summit agreed not to challenge the sale of SDCW to the City. PNM has cited no authority for the proposition that a self-created impossibility can still be a defense to a contract action if the other party to the contract acquiesced in the creation of the impossibility. See *Wilburn v. Stewart, 110 N.M. 268, 272, 794 P.2d 1197, 1201 (1990)* ("Issues raised in appellate briefs that are unsupported by cited authority will not be reviewed . . . on appeal."). Although we need not consider this contention, as it is not supported by any authority, we note that Summit's acquiescence in the sale appears to be relevant only to PNM's other defenses, such as the abandonment defense that was submitted to the jury. It does not seem correct that a party to a contract would be absolved of its role in creating an impossibility simply because the other party to the contract did not object to the action creating the claimed impossibility.

[**37] Due to our decision on this argument, we need not address Summit's contention that PNM remained in charge of operating SDCW as an independent contractor after the sale. Summit contends that PNM therefore retained the ability to carry out the terms of the 1990 Contract. PNM, on the other hand, claims that it had no authority or responsibility toward Summit after the sale because PNM was only an agent at that point. While we do not resolve this issue, we note that PNM provided no facts concerning its powers or duties as operator of SDCW following the sale. It may be

true, therefore, that PNM had the necessary authority to carry out the duties required by its pre-existing contract with Summit.

Post-Sale UPA Claims

[**38] Prior to trial, the trial court granted PNM's motions for summary judgment in part, dismissing the UPA claims to the extent that the claims were "based on conduct occurring before July 3, 1995." The trial court believed that the Commission's adoption of Rule 19, the provisions of the 1990 Contract under Rule 19(G), and review of the 1990 Contract by the Commission staff constituted "sufficient active supervision to meet the standards required under Section" *57-12-7. NMSA 1978, § 57-12-7* (1999) [HN14] states that the UPA shall not apply to actions or transactions expressly permitted under laws administered by a regulatory body. With respect to claims based on actions occurring after July 3, 1995, the trial court stated that it was PNM's burden to "affirmatively establish that the active supervision continued after the City took over direction of the water company." The trial court found that the undisputed facts did not support a conclusion that "such active supervision exists." Based on its findings, the trial court denied summary judgment with respect to claims arising after July 3, 1995 (post-sale). We do not comment on the correctness of the trial court's ruling that the pre-July 3, 1995 (pre-sale), actions were exempt.

[**39] On appeal, PNM argues that the trial court erred in allowing the post-sale claims to go to the jury. PNM makes two major arguments regarding the UPA claims. First, PNM states that the UPA claims were based on "the very same actions and representations made before that date, and the district court determined that those actions or transactions were exempt" under the UPA. Second, PNM contends that, since its actions before and after the sale of the Facilities had not changed, the finding that its pre-sale actions were exempt would, as a matter of law, apply also to its post-sale actions even though the Commission no longer had authority to supervise PNM's actions with respect to the Facilities.

[**40] Summit argues that these arguments were not made below and therefore were not preserved for appeal. Summit contends that PNM instead argued only that the City regulated the Facilities after the sale, and the City's regulation was sufficient to entitle PNM to the UPA exemption contained in *Section 57-12-7*. In response, [***729] [*221] PNM claims that it did make this argument below and provides various cites to the record proper and transcripts in support of that assertion. We have reviewed those citations and find they do not support PNM's claim that this argument was preserved. The only arguments made in the portions of the record and transcript cited by PNM are as follows: (1) no misrepresentation made by PNM after the sale was a proximate cause of any of Summit's damages; (2) PNM did not make any false or misleading statements because PNM continued to do the same acts after the sale as it had before the sale; and (3) any statements made by PNM, that are the subject of Summit's UPA claims, were made before the sale when PNM enjoyed immunity under *Section 57-12-7*. These arguments are not the same as the argument PNM makes now on appeal--that its conduct after the sale is exempt because it is the same conduct it engaged in before the sale. The arguments made by PNM below did not fairly invoke a ruling from the trial court on the "continued exemption" theory now advanced by PNM, and this new theory was therefore not preserved for appeal. See *Woolwine v. Furr's, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987)*.

[**41] Even if PNM had properly preserved its "continued exemption" argument, we would find that argument to be without merit. First, to the extent that PNM is arguing that approval and supervision by the Commission of its pre-sale actions extended to its post-sale actions, we point out that the statute requires that the actions be expressly permitted by a regulatory body. What is important therefore is whether PNM's actions after the sale were expressly permitted. See *§ 57-12-7*. Even if we accept PNM's claim that the Commission's "approval" carried over to its post-sale actions, those actions could not have been expressly permitted by the Commission because, after the sale, the Commission no longer had the authority to supervise actions connected to the Facilities.

[**42] Second, PNM argues that the claims made by Summit involve "alternative interpretations of uncertain contract terms," which are not actionable under the UPA. PNM claims that it merely had a different interpretation than Summit of an ambiguous contract, and therefore, as a matter of law, any dispute about the contract terms cannot be the basis for a claim under the UPA. PNM concedes that the trial court correctly instructed the jury that no violation of the UPA would result if PNM gave "its interpretation of terms of the 1990 Agreement for which Summit has asserted a

different interpretation or for PNM to perform the Agreement in accordance with its interpretation provided its interpretation is reasonable." The jury was therefore given an opportunity to decide whether PNM's interpretation of the 1990 Contract was reasonable and decided that it was not.

[**43] In order to avoid that decision, PNM contends in effect that its interpretation of the 1990 Contract was reasonable as a matter of law. PNM's argument is as follows: (1) The trial court found that PNM's actions with respect to the 1990 Contract before the sale were approved by the Commission; (2) PNM and the City continued to act in exactly the same manner after the sale; and (3) therefore, the prior approval by the Commission makes PNM's and the City's post-sale conduct reasonable as a matter of law, even if PNM's interpretation might have been a mistaken interpretation of the 1990 Contract. However, the trial court's ruling was not that the Commission approved everything PNM did in carrying out its obligations under the 1990 Contract. The trial court's ruling was clearly directed only at the Commission's approval, allowing utilities to enter into special contracts under Rule 19 concerning line extensions, as well as the "approval" of the 1990 Contract itself by the Commission. The trial court never found that the Commission approved of all the conduct PNM engaged in while executing its duties under the 1990 Contract. In addition, there were different allegations of pre-sale and post-sale conduct. The trial court's ruling therefore does not support PNM's claim that its actions were reasonable as a matter of law. Accordingly, the reasonableness of PNM's actions was a factual issue for the jury to resolve.

[***730] [*222] **Offset of Settlement Amount**

[**44] Summit and the City reached a settlement on the breach of contract claim against the City. In exchange for $ 100,000, Summit released the City from all claims arising to the date of the settlement agreement. Summit claims that, as part of the settlement agreement, the parties expressly agreed that this sum was not attributable to any of the actual damages allegedly caused by the City's breach of contract, but rather that the settlement payment was for legal fees Summit incurred litigating its claims against the City. After the jury awarded damages against PNM, PNM moved to have the damages amount offset by the $ 100,000 settlement amount. The trial court granted the motion, and Summit appeals that decision. Summit makes three arguments with respect to the order allowing the offset: (1) the settlement funds are from a collateral source from which PNM cannot benefit, (2) the settlement funds do not represent a duplicative recovery, and (3) the City and Summit agreed that the settlement was for attorney fees incurred in litigating claims against the City and not to cover damages for any breach of contract by the City.

Collateral Source

[**45] Summit contends that the settlement is from a collateral source and cannot be used to offset the damages award against PNM. As asserted by Summit, *McConal Aviation, Inc. v. Commercial Aviation Insurance Co., 110 N.M. 697, 799 P.2d 133 (1990)* (McConal), states that [HN15] the general rule is that a plaintiff may not recover more than his or her actual loss. *Id. at 700, 799 P.2d at 136.* An exception to that general rule is the collateral source rule, which provides that a plaintiff may recover his or her "full losses from the responsible defendant, even though he may have recovered part of his losses from a collateral source." Id. McConal involved a plaintiff who sued an insurance company, agent, and broker for damages based on the insurance company's failure to issue an insurance policy. *Id. at 698, 799 P.2d at 134.* The plaintiff sued the broker for negligence and the insurance company for breach of contract, the broker settled with the plaintiff prior to trial, and the plaintiff was awarded damages at trial based on the breach of contract claim against the insurance company. Id. The Supreme Court held that an offset of the settlement amount should not be applied toward the damage award. *Id. at 700, 799 P.2d at 136.* Summit claims that this case is like McConal.

[**46] We disagree. As pointed out by PNM, *McConal* was later limited by the decision in *Sanchez v. Clayton, 117 N.M. 761, 765, 877 P.2d 567, 571 (1994)*, to situations where there are no facts showing that the parties were jointly liable for the damages caused to the plaintiff. In addition, as pointed out by PNM, *Restatement (Second) of Contracts § 294(3)* (1981), provides that payments from a joint obligor on a contract are credited toward the amount received from other joint obligors. This principle is based on the idea that a contracting party is not entitled to double recovery. See, e.g., *Evanow v. M/V Neptune, 163 F.3d 1108, 1119 (9th Cir. 1998)* (noting that the rule under the Restatement of Contracts is "simply a manifestation of the rule that a

contracting party should not receive more than was bargained for"). "New Mexico does not allow duplication of damages or double recovery for injuries received." *Hale v. Basin Motor Co., 110 N.M. 314, 320, 795 P.2d 1006, 1012 (1990)*. Here, the trial court found that PNM and the City were jointly liable under the 1990 Contract after the sale in July 1995. It appears that the finding was, in part, based on Summit's argument. Summit does not challenge that finding. Therefore, there is no dispute that PNM and the City were joint obligors for damages arising after the sale of SDCW and the Facilities. Based on this, we conclude that the settlement payment cannot be considered to be from a collateral source.

Duplication of Damages

[**47] Summit claims that PNM failed to show that the settlement amount was a duplication of damages that Summit was awarded, or that the settlement amount, along with the damage award, was more than the total amount of damages suffered by Summit. Summit claims that there was a period of time when PNM was solely liable for the [***731] [*223] damages to Summit, that the joint liability of PNM and the City did not begin until after the sale, and that for a portion of that time PNM was necessarily solely liable because the City was successful in asserting a statute of limitations defense. Summit cites no authority for the proposition that a finding of joint and several liability is legally changed to sole liability where one of the joint obligors is successful in asserting a statute of limitations defense. See *Wilburn, 110 N.M. at 272, 794 P.2d at 1201* ("Issues raised in appellate briefs that are unsupported by cited authority will not be reviewed . . . on appeal."). Moreover, this argument was not raised in the trial court. See *Woolwine, 106 N.M. at 496, 745 P.2d at 721*.

[**48] On the merits of this issue, in this case, the jury was not asked to separate the damages and award damages only for the pre-sale period of time or only for the period of time between the sale and December 11, 1997, when the statute of limitations defense no longer applied. The jury's damage award, therefore, was a comprehensive award that included both pre-sale and post-sale damages, and the award was intended to compensate Summit for all of the damages it suffered as a result of conduct by PNM and the City. Therefore, the settlement amount was in addition to all of the damages suffered by Summit and was duplicative of a portion of those damages.

[**49] We also disagree with Summit's argument that it requested a higher amount of damages than the jury awarded, and therefore the payment by the City could be attributed to the amount of damages the jury refused to award. The flaw in this argument is obvious: the jury was asked to determine the total amount of damages suffered by Summit and found that the amount was lower than the amount Summit claimed. The jury's determination of damages is the measure of the true amount of damages suffered by Summit. Therefore, the payment by the City cannot be considered "compensation" for damages that, according to the jury, Summit did not in fact incur.

Express Agreement in Settlement

[**50] Summit argues that when it entered into the settlement agreement with the City, the parties expressly agreed that the settlement was for legal fees incurred by Summit in its suit against the City. Summit cites to no statutory or contractual authority giving Summit a legal right to recover such attorney fees from the City. [HN16] In the absence of such statutory or contractual authority, a party to a lawsuit is not entitled to recover attorney fees from an opposing party. See *N.M. Right to Choose/NARAL v. Johnson, 1999 NMSC 28, P9, 127 N.M. 654, 986 P.2d 450* (reiterating that New Mexico follows American Rule that absent statutory or other legal authority, parties are responsible for their own attorney fees). The agreement between Summit and the City, therefore, provided compensation to Summit that it was not otherwise entitled to receive. As provided in *Restatement (Second) of Contracts § 294(3)*, [HN17] where a joint obligor provides consideration to a plaintiff, that consideration must be credited against the obligation of other joint obligors, and any agreement to the contrary is of no effect. The agreement between the City and Summit to characterize the settlement as payment for attorney fees, where there was no legal right to those fees, appears to be an effort to circumvent this rule. Under the Restatement, such agreements should not be given effect. See id. In addition, allowing Summit to avoid crediting a joint obligor for the amount of the settlement by characterizing the settlement as attorney fees Summit was not entitled to recover in the lawsuit for breach of contract would violate the rule against double recovery of damages and the principles underlying the theory of joint obligations. See, e.g., *Hood v. Fulkerson, 102 N.M. 677, 680, 699 P.2d 608, 611 (1985)* ("Duplication of damages or double recovery for injuries received is not

permissible."); *Washington v. Atchison, Topeka & Santa Fe Ry., 114 N.M. 56, 58, 834 P.2d 433, 435 (Ct. App. 1992)* (stating that function of offset is to achieve equity and justice and that fundamental fairness does not permit double recovery).

[**51] Summit claims that reliance on *Restatement (Second) of Contracts § 294(3)*, [***732] [*224] would ignore precedent that encourages courts to consider the intent of the parties when deciding whether a "non-settling, co-defendant has been released." Summit points to three cases as precedent. See *McConal, 110 N.M. at 700, 799 P.2d at 136*; *Gallegos v. Citizens Ins. Agency, 108 N.M. 722, 779 P.2d 99 (1989)*; *Johnson v. Aztec Well Servicing Co., 117 N.M. 697, 875 P.2d 1128 (Ct. App. 1994)*. As we noted above, *McConal* was limited by Sanchez to situations, unlike the one in this case, where there are no facts showing that the parties were jointly liable for the damages. *Sanchez, 117 N.M. at 765, 877 P.2d at 571*. To the extent that the decisions in Gallegos and Johnson stand for the proposition that [HN18] courts must decide whether a party has been released by settlement by looking at the intent of the parties and whether an injured party has been fully compensated, we agree. See *Gallegos, 108 N.M. at 730, 779 P.2d at 107*; *Johnson, 117 N.M. at 701, 875 P.2d at 1132*. However, the intent of the parties cannot override principles against double recovery in the context of joint obligors. As discussed above, characterizing the settlement as attorney fees when Summit had no legal right to those fees appears to be an attempt to evade those principles. Furthermore, both Gallegos and Johnson require a court to examine whether the injured party has been fully compensated. *Gallegos, 108 N.M. at 730, 779 P.2d at 107*; *Johnson, 117 N.M. at 701, 875 P.2d at 1132*. In this case, the judgment against PNM fully compensated Summit for all damages found by the jury, and the payment by the City to Summit was purportedly for damages Summit was not entitled to recover. Therefore, allowing the offset in this case is consistent with both of these cases.

CONCLUSION

[**52] Based on the foregoing, we affirm on all issues raised in the appeal and the cross-appeal.

[**53] **IT IS SO ORDERED.**

LYNN PICKARD, Judge

WE CONCUR:

CYNTHIA A. FRY, Judge

RODERICK T. KENNEDY, Judge

Caution
As of: Jul 11, 2011

NEVADA POWER COMPANY, A NEVADA CORPORATION, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE KATHY A. HARDCASTLE, DISTRICT JUDGE, Respondents, and BONNEVILLE SQUARE ASSOCIATES, LLC, A NEVADA LIMITED LIABILITY COMPANY AND UNION PLAZA OPERATING COMPANY, D/B/A THE PLAZA HOTEL AND CASINO, A NEVADA CORPORATION; FOR THEMSELVES AND OTHERS SIMILARLY SITUATED, Real Parties in Interest.

No. 41215

SUPREME COURT OF NEVADA

120 Nev. 948; *102 P.3d 578*; *2004 Nev. LEXIS 140*; *120 Nev. Adv. Rep. 97*

December 23, 2004, Decided

PRIOR HISTORY: [***1] Original petition for a writ of prohibition, or in the alternative, a writ of mandamus, challenging the district court's jurisdiction over claims against a public utility.

DISPOSITION: Petition denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner public utility filed a petition for a writ of prohibition, or, in the alternative, a writ of mandamus that challenged the jurisdiction of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, over a class action complaint against the public utility that alleged causes of action for deceptive and unfair trade practices, breach of the covenant of good faith and fair dealing, and breach of contract.

OVERVIEW: Two commercial customers of the public utility made allegations regarding the public utility's representations as to the proper placement of a meter for measuring electrical use on their properties and the reasonableness of the customer rate that was then charged them. The public utility argued that the district court lacked subject-matter jurisdiction to entertain the complaint, because the Public Utilities Commission of Nevada (PUC) had either original or primary jurisdiction over the allegations in the complaint. On appeal, the court noted that the customers were not asking the district court to determine the reasonableness of the meter tariff or the customer rate. Rather, the claims fell within the district court's original jurisdiction over claims sounding in tort, contract, and consumer fraud. Therefore, the court found that the causes of action alleged by the customers were within the original jurisdiction of the district court. Furthermore, the district court properly exercised its discretion in refusing to defer primary jurisdiction to the

PUC. Accordingly, the district court did not exceed its jurisdiction.

OUTCOME: The petition was denied.

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Writs > General Overview

[HN1] Writ relief is an extraordinary remedy that will only issue at the discretion of the Supreme Court of Nevada.

Civil Procedure > Remedies > Writs > Common Law Writs > Prohibition

[HN2] A writ of prohibition is available to arrest the proceedings of any tribunal when such proceedings are without, or in excess of, the jurisdiction of such tribunal.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Remedies > Writs > Common Law Writs > Prohibition

[HN3] A petition for a writ of prohibition is an appropriate means of challenging a district court's exercise of jurisdiction.

Torts > Business Torts > Unfair Business Practices > General Overview

[HN4] *Nev. Rev. Stat. ch. 598* generally provides for a public cause of action for deceptive trade practices. *Nev. Rev. Stat. § 41.600*, however, provides for a private cause of action by a person who is a victim of consumer fraud and defines "consumer fraud" to include a deceptive trade practice as defined in *Nev. Rev. Stat. §§ 598.0915 to 598.0925*, inclusive. *Nev. Rev. Stat. § 41.600(2)(d)*.

Business & Corporate Law > Agency Relationships > Authority to Act > Actual Authority > Implied Authority > General Overview
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
Energy & Utilities Law > Utility Companies > General Overview

[HN5] The Nevada Legislature has created a comprehensive statutory scheme for the regulation of public utilities. As part of that scheme, the Legislature created the Public Utilities Commission of Nevada (PUC). Because the PUC is a creature of statute, it has no inherent power; rather, its powers and jurisdiction are determined by statute. The PUC thus has only those powers and jurisdiction as are expressly or by necessary or fair implication conferred by statute. Any enlargement of express powers by implication must be fairly drawn and fairly evident from agency objectives and powers expressly given by the Legislature. Any doubt about the existence of the PUC's power or authority must be resolved against finding of such power or authority. But, where power is clearly conferred or fairly implied, and is consistent with the purposes for which the PUC was established by law, the existence of the power should be resolved in favor of the commissioners so as to enable them to perform their proper functions of government.

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
Energy & Utilities Law > Utility Companies > General Overview

[HN6] The Nevada Legislature has expressly given the Public Utilities Commission of Nevada authority to supervise and regulate the operation and maintenance of public utilities in accordance with the provisions of *Nev. Rev. Stat. ch. 704*. *Nev. Rev. Stat. § 703.150*.

Communications Law > U.S. Federal Communications Commission > Jurisdiction
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
Energy & Utilities Law > Utility Companies > Rates > General Overview

[HN7] *Nev. Rev. Stat. ch. 704* sets forth the general statutory framework for the regulation of public utilities and the setting of rates that public utilities may charge their customers. In enacting chapter 704, the Nevada Legislature declared the following purpose and policy: (1) to confer upon the Public Utilities Commission of Nevada the power, and to make it the duty of the Commission, to regulate public utilities to the extent of its jurisdiction; (2) to provide for fair and impartial regulation of public utilities; (3) to provide for the safe, economic, efficient, prudent, and reliable operation and

service of public utilities; and (4) to balance the interests of customers and shareholders of public utilities by providing public utilities with the opportunity to earn a fair return on their investments while providing customers with just and reasonable rates. *Nev. Rev. Stat. § 704.001.*

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Judicial Review
Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN8] The Public Utilities Commission of Nevada (PUC) has authority to regulate utility rates under *Nev. Rev. Stat. §§ 704.100 to 704.130* and *Nev. Rev. Stat. § 704.210*. The Supreme Court of Nevada has described that power as being plenary, meaning that it is broadly construed. The only limit on the PUC's authority to regulate utility rates is the legislative directive that rates charged for services provided by a public utility must be just and reasonable, *Nev. Rev. Stat. § 704.040(1)*, and that it is unlawful for a public utility to charge an unjust or unreasonable rate. *Nev. Rev. Stat. § 704.040(2)*. The PUC also has authority to regulate the service standards and practices of public utilities in accordance with various provisions in *Nev. Rev. Stat. ch. 704. Nev. Rev. Stat. § 704.143 to 704.320*. Under *Nev. Rev. Stat. § 704.130*, the rates fixed and regulations prescribed by the PUC are lawful and reasonable until modified by the PUC or by a court on judicial review.

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
[HN9] See *Nev. Rev. Stat. § 704.130.*

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
Energy & Utilities Law > Utility Companies > Rates > General Overview
Governments > Legislation > Effect & Operation > Prospective Operation
[HN10] The Nevada statutory scheme authorizes the Public Utilities Commission of Nevada (PUC) to entertain customer complaints against a public utility related to the reasonableness of a rate, regulation, measurement, practice, or act. Specifically, *Nev. Rev. Stat. § 703.310(1)* provides that the PUC's Division of Consumer Complaint Resolution must investigate a complaint against a public utility that an unjust or unreasonable rate is being charged for regulated services or that a regulation, measurement, practice, or act affecting or relating to the production, transmission, delivery, or furnishing of power or any service in connection therewith or the transmission thereof is unreasonable, insufficient, or unjustly discriminatory. If the Division is unable to resolve the complaint, it must transmit the complaint, the results of its investigation, and its recommendation to the PUC. *Nev. Rev. Stat. § 703.310(2)*. The PUC then determines whether there is probable cause for the complaint and, if so, conducts a hearing on the complaint. *Nev. Rev. Stat. § 703.310(2)*. Under *Nev. Rev. Stat. § 704.120*, the PUC has authority to give prospective relief from an unjust, unreasonable, or unjustly discriminatory rate, regulation, practice, or service by substituting a just and reasonable rate, regulation, practice, or service after an investigation and a hearing.

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
[HN11] See *Nev. Rev. Stat. § 704.120.*

Administrative Law > Judicial Review > Reviewability > General Overview
Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Judicial Review
[HN12] A decision of the Public Utilities Commission of Nevada (PUC) on a complaint against a public utility is subject to judicial review under Nev. Rev. Stat. *§ 703.373. Nev. Rev. Stat. § 703.373(1)*. Judicial review under the statute is limited to the record, *Nev. Rev. Stat. § 703.373(4)*, and a court may set aside the PUC's decision only under certain circumstances. *Nev. Rev. Stat. § 703.373(6)*. Any party may then appeal the district court's judgment to the Supreme Court of Nevada under *Nev. Rev. Stat. § 703.376.*

Administrative Law > Judicial Review > Reviewability > General Overview
Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview
[HN13] See *Nev. Rev. Stat. § 703.373(1).*

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview
[HN14] See *Nev. Rev. Stat. § 703.373(4).*

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Judicial Review
[HN15] *Nev. Rev. Stat. § 703.373(6)* provides that a court may set aside the decision of the Public Utilities Commission of Nevada (PUC), if the appellant's substantial rights have been prejudiced because the decision: (1) violates constitutional or statutory provisions, (2) exceeds the PUC's statutory authority, (3) was made upon unlawful procedure, (4) was affected by other error of law, (5) is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or (6) was arbitrary or capricious or characterized by abuse of discretion.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN16] The Nevada statutory scheme supports the conclusion that the Public Utilities Commission of Nevada has original jurisdiction over the regulation of utility rates and service.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Civil Procedure > Justiciability > Exhaustion of Remedies > Administrative Remedies
Energy & Utilities Law > Administrative Proceedings > General Overview
[HN17] The power to prescribe rates for a public utility company is a legislative function, as distinguished from judicial power. The Nevada Legislature has delegated that power to the Public Utilities Commission of Nevada (PUC). Moreover, the Legislature has provided a vehicle for the PUC to entertain complaints against a public utility as to the reasonableness of a rate, regulation, or service, subject to limited judicial review. *Nev. Rev. Stat. § 703.310 to 703.376.* Because that power rests first with the PUC, the courts lack subject-matter jurisdiction, except on review, as provided in *Nev. Rev. Stat. §§ 703.373 to 703.376.* In other words, a challenge to the reasonableness of a rate or regulation fixed by the PUC must be presented first to the PUC before it may be presented to the courts for judicial review. This is essentially the doctrine of exhaustion of administrative remedies. The exhaustion doctrine is concerned with the timing of judicial review of administrative action. The doctrine applies only when an administrative agency has original jurisdiction.

Administrative Law > Separation of Powers > Jurisdiction
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
[HN18] While the Public Utilities Commission of Nevada has original jurisdiction over utility rates and service, *Nev. Rev. Stat. § 41.600* permits a victim of consumer fraud, including a deceptive trade practice as defined in Nev. Rev. Stat. *§ 598.0915 to 598.0925, Nev. Rev. Stat. § 41.600(2)(d)*, to bring an action in court. And the Nevada Constitution states that the district courts have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts. *Nev. Const. art. VI, § 6(1).*

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Authority
[HN19] A court must resolve any doubt about the existence of the Public Utilities Commission of Nevada's authority against finding such authority.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Administrative Law > Separation of Powers > Primary Jurisdiction
[HN20] Primary jurisdiction is a concept of judicial deference and discretion. The United States Supreme Court has explained that primary jurisdiction "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim

requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue
Administrative Law > Separation of Powers > Primary Jurisdiction
Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
[HN21] The doctrine of primary jurisdiction requires that courts should sometimes refrain from exercising jurisdiction so that technical issues can first be determined by an administrative agency. The doctrine is premised on two policies: (1) the desire for uniformity of regulation and (2) the need for an initial consideration by a tribunal with specialized knowledge. Thus, in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. Application of the doctrine is discretionary with a court.

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Richard L. Hinckley, Commission General Counsel, and Jan Cohen and Marguerite Edith Russell, Assistant General Counsel, Carson City, for Amicus Curiae Public Utilities Commission of Nevada.

OPINION

[*951] [**581] BEFORE THE COURT EN BANC. [1]

1 The Honorable Janet J. Berry, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of the Honorable Myron E. Leavitt, Justice. *Nev. Const. art. 6, § 4.* The Honorable Michael L. Douglas, Justice, did not participate in the decision of this matter.

[***2] PER CURIAM:

This original writ petition challenges the district court's jurisdiction over a class action complaint against petitioner Nevada Power Company that alleges causes of action for deceptive and unfair trade practices, breach of the covenant of good faith and fair dealing, and breach of contract. We address two principal issues. First, does the district court have subject-matter jurisdiction to entertain a complaint against a public utility that alleges causes of action for unfair and deceptive trade practices, breach of the covenant of good faith and fair dealing, and breach of contract? Second, if the district court does have jurisdiction over those claims, does the Public Utilities Commission of Nevada (PUC) have primary jurisdiction over them so that the district court should defer to the PUC? We conclude that the district court has subject-matter jurisdiction over the claims against Nevada Power and properly chose to exercise that jurisdiction. Accordingly, we deny the petition.

[*952] *FACTS*

2

2 Our recitation of the facts is taken from the real parties' allegations in their first amended complaint.

[***3] Petitioner Nevada Power is a regulated public utility that provides electric power to more than 657,000 residential and commercial customers in southern Nevada. The real parties in interest are Bonneville Square Associates, LLC, and Union Plaza Operating Company. [3] Bonneville is primarily engaged in the business of owning commercial office buildings and has its principal place of business in Las Vegas, Nevada. Union Plaza is engaged in the business of hotel and gaming operations and also has its principal place of business in Las Vegas. Bonneville and Union Plaza are commercial customers of Nevada Power.

3 Bonneville and Union Plaza filed suit as representatives for a class of similarly situated Nevada Power customers. It appears that the district court has not yet certified the class. Accordingly, and for the sake of efficiency, we refer solely to Bonneville and Union Plaza as the real parties in interest in this original proceeding.

Nevada Power classifies its customers by size and

the voltage level at [***4] which service is taken and charges its customers based on rates approved by the PUC. Nevada Power classified Bonneville and Union Plaza as Large General Service-Secondary (LGS-S) customers and charged them at the LGS-S rate.

The LGS-S customers receive service at an incoming voltage of approximately 12,000 volts. That voltage must be reduced or converted to 480 volts before the customer can use the power. As part of its service to LGS-S customers, Nevada Power provides an on-site transformer to perform this conversion. The transformer uses energy in the conversion process. As the owner of the transformer, Nevada Power is responsible for its maintenance and upkeep, including the energy used in the conversion process. The LGS-S rate includes costs related to the maintenance and upkeep of the transformers and the energy lost in the conversion process.

Another class of Nevada Power customers of similar size and receiving a similar incoming voltage level own their own transformers. These customers are charged at the Large General Service Primary (LGS-P) rate. Because a LGS-P customer owns the transformer and provides for its maintenance and upkeep, including the energy lost in the conversion [***5] process, the LGS-P rate does not include those costs and is therefore lower than the LGS-S rate.

The customer is charged for electricity based on a meter reading. Meters can be placed on either side of a transformer: on the primary side of the transformer, before the conversion process, or on the secondary side of the transformer, after the conversion [**582] process. Because energy is lost in the conversion process, the meter's placement affects the amount of electricity that the customer [*953] is charged for using. The LGS-S customer, since it does not own the transformer, does not use the energy lost in the conversion process. Thus, the meter usually is placed on the secondary side of the transformer, after the conversion has taken place, so that the LGS-S customer is not charged for energy that it did not use. In contrast, the LGS-P customer is usually metered on the primary side of the transformer to account for the energy used by its transformer.

When Union Plaza built its two towers in 1971 and 1983, Nevada Power prepared the plans for the placement of the meters and transformers needed for the towers. Although Nevada Power had classified Union Plaza as a LGS-S customer, Nevada Power's [***6] plans called for the meters to be placed on the primary side of the transformers for both towers. When Nevada Power presented the plans to Union Plaza, it represented that primary side placement of the meters was in Union Plaza's best interest because Nevada Power would pay for the meters and installation costs if the meters were placed on the primary side of the transformers. Nevada Power did not disclose that because Union Plaza was an LGS-S customer, metering on the primary side would result in it being charged twice for the lost energy.

In 1990, Bonneville expanded its office building in Las Vegas. As part of the expansion, Bonneville planned to install a new meter and transformer. Nevada Power prepared the plans for the placement of the meter and transformer. Although Nevada Power was charging Bonneville at the LGS-S rate, Nevada Power prepared plans that placed the meter on the primary side of the transformer and represented to Bonneville that this meter placement was in Bonneville's best interest because Nevada Power would pay for the meter and installation costs if it were placed on the primary side. As in its interactions with Union Plaza, Nevada Power did not disclose that [***7] because Bonneville was a LGS-S customer, metering on the primary side would result in it being charged twice for the lost energy.

Bonneville and Union Plaza, individually and on behalf of others similarly situated, filed in the district court a class action complaint against Nevada Power. In the first amended class action complaint, Bonneville and Union Plaza asserted claims for unfair and deceptive trade practices, breach of the covenant of good faith and fair dealing, and breach of contract. All three claims are based on the general allegation that Nevada Power deliberately and knowingly engaged in a pattern and practice of misleading or failing to disclose material facts that caused some of its LGS-S customers to be metered on the primary side while being charged the higher LGS-S tariff rate. Bonneville and Union Plaza seek special and compensatory damages and, for the unfair-and-deceptive-trade-practices claim, punitive damages.

[*954] Nevada Power filed a motion to dismiss for lack of subject-matter jurisdiction and lack of primary jurisdiction. It argued that Bonneville and Union Plaza's claims essentially challenged the tariff rate and the placement of their meters. According to [***8] Nevada Power, those claims are within the PUC's exclusive

jurisdiction and therefore the district court lacks subject-matter jurisdiction. Alternatively, Nevada Power argued that, at the very least, the PUC has primary jurisdiction over the claims and therefore the district court should defer to the PUC and dismiss the complaint. Bonneville and Union Plaza opposed the motion, taking issue with Nevada Power's characterization of their claims and arguing that the district court, not the PUC, has jurisdiction over those claims.

After hearing arguments, the district court summarily denied the motion. Nevada Power then filed this original petition, and the district court stayed further proceedings in the underlying case.

DISCUSSION

Writ relief

[HN1] Writ relief is an extraordinary remedy that will only issue at the discretion of this court. [4] [HN2] A writ of prohibition is available [**583] to "arrest[] the proceedings of any tribunal . . . when such proceedings are without or in excess of the jurisdiction of such tribunal." [5]

4 *Ashokan v. Dep't of Ins., 109 Nev. 662, 665, 856 P.2d 244, 246 (1993).*

[***9]

5 *NRS 34.320.*

Nevada Power argues that the district court lacks subject-matter jurisdiction to entertain the complaint filed by Bonneville and Union Plaza because the PUC has either original or primary jurisdiction over the allegations in the complaint. [HN3] A petition for a writ of prohibition is an appropriate means of challenging the district court's exercise of jurisdiction. [6] Accordingly, we will entertain the petition for a writ of prohibition. But, because we conclude that the district court did not exceed its jurisdiction, we deny writ relief.

6 *South Fork Band, Te-Moak Tribe v. Dist. Ct., 116 Nev. 805, 811, 7 P.3d 455, 459 (2000)* ("We have held that a writ of prohibition is an appropriate vehicle through which to challenge the district court's improper exercise of jurisdiction."); *see also Snooks v. District Court, 112 Nev. 798, 919 P.2d 1064 (1996)* (granting petition for writ of prohibition where district court lacked jurisdiction over complaint filed by non-Indian against Indian for incident that occurred on Indian land or in Indian country).

[***10] *Jurisdiction*

The overarching issue in this case is the jurisdiction of the PUC and the district court over the causes of action alleged by Bonneville [*955] and Union Plaza. In their amended complaint, Bonneville and Union Plaza alleged three causes of action against Nevada Power: unfair and deceptive trade practices, [7] breach of the covenant of good faith and fair dealing, and breach of contract. Bonneville and Union Plaza alleged that Nevada Power represented to them that "placement of the meter on the primary side of the transformer" was in their best interest because Nevada Power would pay for the meter, installation costs and equipment if the meter was placed on the primary side, whereas Bonneville and Union Plaza would have to bear those costs if the meter was placed on the secondary side of the transformer. Bonneville and Union Plaza further alleged that Nevada Power "never disclosed material facts" that their status as LGS-S customers "entitled them to metering on the secondary or low side of the transformer" and that Nevada Power "failed to disclose that metering on the primary side for LGS-S customers would result in excessive billing." These general allegations appear [***11] to form the basis for all three causes of action stated in the amended complaint. Additionally, the cause of action for deceptive trade practices alleges that "the rate being charged to LGS-S customers is in violation of state statute, namely *NRS 704.040*, because the service furnished under the LGS-S rate schedule is not just and reasonable" as "some LGS-S customers are metered properly on the secondary or low side of the transformer (post-transformer) while other LGS-S customers are metered improperly on the primary or high side of the transformer (pre-transformer)." The amended complaint seeks special damages equal to the energy lost each month in the conversion process and, for the deceptive-trade-practices claim, punitive damages.

7 In their deceptive-trade-practices claim, Bonneville and Union Plaza specifically allege that Nevada Power's conduct violates *NRS 598.0915(5), (7)* and *(15)*, and *NRS 598.0923(2)* and *(3)*. *NRS Chapter 598* [HN4] generally provides for a public cause of action for deceptive trade practices. *NRS 41.600*, however, provides for a private cause of action by a person who is a

victim of consumer fraud and defines "consumer fraud" to include "[a] deceptive trade practice as defined in *NRS 598.0915 to 598.0925*, inclusive." *NRS 41.600(2)(d)*. We are not presented with and express no opinion regarding the merits of the deceptive-trade-practices claim, or the other claims, alleged in the amended complaint.

[***12] As we recognized in *Consumers League v. Southwest Gas*, [HN5] the Nevada Legislature has created a comprehensive statutory scheme for the regulation of public utilities. [8] As part of that scheme, the Legislature created the PUC. [9] Because the PUC is a creature of [*956] statute, it has no inherent power; rather, its powers and jurisdiction are determined [**584] by statute. [10] The PUC thus has only those powers and jurisdiction as are expressly or "by necessary or fair implication" conferred by statute. [11] "Any enlargement of express powers by implication must be fairly drawn and fairly evident from agency objectives and powers expressly given by the legislature." [12] "Any doubt about the existence of [the PUC's] power or authority must be resolved against finding of such power or authority." [13] But "where power is clearly conferred or fairly implied, and is consistent with the purposes for which the [PUC] was established by law, the existence of the power should be resolved in favor of the commissioners so as to enable them to perform their proper functions of government." [14]

8 *94 Nev. 153, 157, 576 P.2d 737, 739 (1978).*

[***13]

9 The Legislature created the PUC in 1997. 1997 Nev. Stat., ch. 482, § 65, 1904 (amending *NRS 704.010*); *id.* § 332, at 2020 (amending *NRS 703.010*). Before that, the same authority over the regulation of public utilities resided with the Public Service Commission of Nevada. 1911 Nev. Stat., ch. 162, § 1, at 322.

10 50-919 Op. Att'y Gen. 468, 470 (1950) (stating that "all powers and jurisdiction" of the PUC's predecessor "must be found within the four corners of the statutes creating it, since it is a tribunal of purely statutory creation"); 57-326 Op. Att'y Gen. 275, 275-76 (1957) (stating that PUC's predecessor was a creature of statute and thus derived its powers from statutory provisions); 73B C.J.S. *Public Utilities* § 159, at 408 (2004) ("A public service or public utilities commission derives its authority, powers, duties, and jurisdiction from . . . statutory provisions.").

11 57-326 Op. Att'y Gen. 275, 276 (1957); *see also Chugach v. Regulatory Com'n of Alaska, 49 P.3d 246, 251 (Alaska 2002)* (stating that regulatory commission is administrative agency that has whatever powers are expressly granted by legislature or conferred upon it by implication as necessarily incident to exercise of express powers); *Union Pacific v. State ex rel. Corp. Com'n, 1999 OK CIV APP 99, 990 P.2d 328, 329 (Okla. Civ. App. 1999)* (stating that corporation commission has only such authority as is expressly or by necessary implication conferred by statute); *US West v. Public Service Com'n, 2000 UT 1, 998 P.2d 247, 249 (Utah 2000)* (stating that public service commission has no inherent regulatory powers other than those expressly granted or clearly implied by statute); 73B C.J.S. *Public Utilities* § 159, at 408.

[***14]

12 73B C.J.S. *Public Utilities* § 159, at 409.

13 *Id.* § 166, at 413.

14 *Id.* at 413-14.

[HN6] The Legislature has expressly given the PUC authority to "supervise and regulate the operation and maintenance of public utilities" in accordance with the provisions of NRS *Chapter 704*. [15] [HN7] NRS Chapter 704 sets forth the general statutory framework for the regulation of public utilities and the setting of rates that public utilities may charge their customers. In enacting *NRS Chapter 704*, the Legislature declared the following "purpose and policy":

> 1. To confer upon the Commission the power, and to make it the duty of the Commission, to regulate public utilities to the extent of its jurisdiction;
>
> 2. To provide for fair and impartial regulation of public utilities;
>
> [*957] 3. To provide for the safe, economic, efficient, prudent and reliable operation and service of public utilities; and
>
> 4. To balance the interests of customers and shareholders of public utilities by providing public utilities with the opportunity to earn a fair return on

their investments while providing customers [***15] with just and reasonable rates. [16]

15 *NRS 703.150.*

16 *NRS 704.001.*

[HN8] The PUC has authority to regulate utility rates under *NRS 704.100 to 704.130* and *NRS 704.210.* We have described that power as being "plenary," [17] meaning that it is "broadly construed." [18] The only limit on the PUC's authority to regulate utility rates is the legislative directive that rates charged for services provided by a public utility must be "just and reasonable" [19] and that it is unlawful for a public utility to charge an unjust or unreasonable rate. [20] The PUC also has authority to regulate the service standards and practices of public utilities in accordance with various provisions in *NRS Chapter 704.* [21] Under *NRS 704.130*, the rates fixed and regulations prescribed by the PUC are lawful and reasonable until modified by the PUC or [**585] by a court on judicial review. [22]

17 *Consumers League, 94 Nev. at 157, 576 P.2d at 739.*

[***16]

18 *Black's Law Dictionary* 1189 (7th ed. 1999).

19 *NRS 704.040(1).*

20 *NRS 704.040(2).*

21 *See generally NRS 704.143-.320.*

22 *NRS 704.130* provides:

> [HN9] 1. All rates, charges, classifications and joint rates fixed by the Commission are in force, and are prima facie lawful, from the date of the order until changed or modified by the Commission, or pursuant to *NRS 703.373 to 703.376*, inclusive.
>
> 2. All regulations, practices and service prescribed by the Commission must be enforced and are prima facie reasonable unless suspended or found otherwise in an action brought for the purpose, pursuant to the provisions of *NRS 703.373 to 703.376*, inclusive, or until changed or modified by the Commission itself upon satisfactory showing made, or by the public utility by filing a bond pursuant to *NRS 703.374.*

[HN10] The statutory scheme also authorizes the PUC to entertain customer complaints against [***17] a public utility related to the reasonableness of a rate, regulation, measurement, practice or act. Specifically, *NRS 703.310(1)* provides that the PUC's Division of Consumer Complaint Resolution must investigate a complaint against a public utility that an unjust or unreasonable rate is being charged for regulated services or that a "regulation, measurement, practice or act affecting or relating to the production, transmission or delivery or furnishing" of power "or any service in [*958] connection therewith or the transmission thereof" is unreasonable, insufficient or unjustly discriminatory. If the Division is "unable to resolve the complaint," it must transmit the complaint, the results of its investigation, and its recommendation to the PUC. [23] The PUC then determines whether there is probable cause for the complaint and, if so, conducts a hearing on the complaint. [24] Under *NRS 704.120*, the PUC has authority to give prospective relief from an unjust, unreasonable, or unjustly discriminatory rate, regulation, practice or service by substituting a just and reasonable rate, regulation, practice or service after an investigation and a [***18] hearing. [25]

23 *NRS 703.310(2).*

24 *Id.*

25 *NRS 704.120* provides:

> [HN11] 1. If, upon any hearing and after due investigation, the rates, tolls, charges, schedules or joint rates shall be found to be unjust, unreasonable or unjustly discriminatory, or to be preferential, or otherwise in violation of any of the provisions of this chapter, the Commission shall have the power to fix and order substituted therefor such rate or rates, tolls, charges or schedules as shall be just and reasonable.

> 2. If it shall in like manner be found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory or otherwise in violation of the provisions of this chapter, or if it be found that the service is inadequate, or that any reasonable service cannot be obtained, the Commission shall have the power to substitute therefor such other regulations, measurements, practices, service or acts and make such order relating thereto as may be just and reasonable.
>
> . . . .
>
> 5. The Commission may at any time, upon its own motion, investigate any of the rates, tolls, charges, rules, regulations, practices and service, and, after a full hearing as above provided, by order, make such changes as may be just and reasonable, the same as if a formal complaint had been made.

[***19] [HN12] The PUC's decision on a complaint against a public utility is subject to judicial review under *NRS 703.373*. [26] Judicial review under the statute is limited to the record, [27] and the court may set aside the PUC's decision only under certain circumstances. [28] Any [*959] party may then appeal the district court's judgment to this court under *NRS 703.376*.

> 26 *NRS 703.373(1)* provides: [HN13] "Any party of record to a proceeding before the Commission is entitled to judicial review of the final decision."
> 27 *NRS 703.373(4)* states: [HN14] "The review must be conducted by the court without a jury and be confined to the record."
> 28 *NRS 703.373(6)* [HN15] provides that the court may set aside the PUC's decision if the appellant's substantial rights have been prejudiced because the decision: (a) violates constitutional or statutory provisions, (b) exceeds the PUC's statutory authority, (c) was made upon unlawful procedure, (d) was affected "by other error of law," (e) is clearly erroneous "in view of the reliable, probative and substantial evidence on the whole record," or (f) was arbitrary or capricious "or characterized by abuse of discretion."

[***20] [HN16] The statutory scheme supports the conclusion that the PUC has original jurisdiction over the regulation of utility rates and service. As we explained in *Garson v. Steamboat Canal Co.*, [HN17] "the power to prescribe rates for . . . a public utility company is a legislative function as distinguished [**586] from judicial power." [29] The Legislature has delegated that power to the PUC. [30] Moreover, the Legislature has provided a vehicle for the PUC to entertain complaints against a public utility as to the reasonableness of a rate, regulation, or service, subject to limited judicial review. [31] Because that power rests first with the PUC, the courts lack subject-matter jurisdiction except on review as provided in *NRS 703.373* to *NRS 703.376*. [32] In other words, a challenge to the reasonableness of a rate or regulation fixed by the PUC must be presented first to the PUC before it may be presented to the courts for judicial review. This is essentially the doctrine of exhaustion of administrative remedies: "'The exhaustion doctrine is concerned with the timing of judicial review of administrative action.' The doctrine applies only when an administrative [***21] agency has original jurisdiction." [33]

> 29 *43 Nev. 298, 312, 185 P. 801, 805 (1919).*
> 30 *Id.*
> 31 *NRS 703.310-.376*; *see also NRS 704.130* (providing that rates fixed by the PUC are prima facie lawful and regulations prescribed by the PUC are prima facie reasonable until changed or modified by the PUC or on judicial review); *Garson, 43 Nev. at 313, 185 P. at 805-06* (explaining that a court may review reasonableness of rate set by Public Service Commission but lacks any authority to set utility rates itself).
> 32 *See State, Dep't of Taxation v. Scotsman Mfg., 109 Nev. 252, 849 P.2d 317, 319 (1993)* (stating that failure to exhaust administrative remedies "deprives the district court of subject matter jurisdiction").
> 33 *Campbell v. Mountain States Tel. & Tel. Co.,*

120 Ariz. 426, 586 P.2d 987, 990 (Ariz. Ct. App. 1978) (quoting 3 K. Davis, *Administrative Law Treatise* § 20.01 at 57 (1958)), *quoted in Qwest Corp. v. Kelly, 204 Ariz. 25, 59 P.3d 789, 795 (Ariz. Ct. App. 2002).*

[***22] [HN18] While the PUC has original jurisdiction over utility rates and service, *NRS 41.600* permits a victim of consumer fraud, including a "deceptive trade practice as defined in *NRS 598.0915 to 598.0925*," [34] to bring an action in court. And the Nevada Constitution states that the district courts have "original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts." [35] Additionally, courts in other jurisdictions have [*960] taken the position that the courts have jurisdiction over contract and common-law tort claims against a public utility. [36] The question, then, is whether the claims alleged in the amended complaint are within the PUC's exclusive original jurisdiction or are within the district court's original jurisdiction. To answer that question, we must look at the substance of the claims, not just the labels used in the amended complaint. [37]

34 *NRS 41.600(2)(d).*

35 *Nev. Const. art. 6, § 6(1).*

36 *See, e.g., Gayheart v. Dayton Power & Light Co., 98 Ohio App. 3d 220, 648 N.E.2d 72, 76 (Ohio Ct. App. 1994); see also* 73B C.J.S. *Public Utilities* § 244, at 495.

[***23]

37 *State ex rel. Illuminating Co. v. Cuyahoga County Court of Common Pleas, 97 Ohio St. 3d 69, 2002 Ohio 5312, 776 N.E.2d 92, 97 (Ohio 2002).*

Nevada Power and the PUC, as amicus curiae, argue that the amended complaint challenges the reasonableness of the LGS-S rate and a tariff that permits Nevada Power to place meters on the primary side of the transformer. [38] Consequently, they assert that the PUC has exclusive original jurisdiction and that Bonneville and Union Plaza must challenge the rate and tariff through the administrative proceedings provided by *NRS 703.310-.370.* We disagree with their characterization of the claims in the amended complaint.

38 Rule 2(J), approved by the PUC, provides: "Where a transformer bank having a capacity of 750 Kva or more is installed exclusively to serve one Customer, the Utility may meter such service at primary service voltage."

While the amended complaint includes allegations regarding [***24] the meter's proper placement and the reasonableness of the LGS-S rate when the meter is placed on the primary side of the transformer, Bonneville and Union Plaza are not asking the district court to determine the reasonableness of the meter tariff or the LGS-S rate. The meter tariff is permissive; it allows a public utility to meter on the primary side, but it does not set forth the circumstances in which the utility may do so or require that the utility do so in any [**587] particular circumstance. Similarly, the LGS-S rate in effect at the times alleged in the complaint did not account for primary-side metering. The meter tariff and the LGS-S rate are relevant to the causes of action alleged in the amended complaint, but those issues are not predominant. Rather, the causes of action focus on Nevada Power's misrepresentations and failures to disclose information to certain of its customers, resulting in over billing. These claims fall within the district court's original jurisdiction over claims sounding in tort, contract, and consumer fraud. [39]

39 Nevada Power's reliance on *Southwest Gas v. Public Service Commission, 86 Nev. 662, 474, P.2d 379 (1970)*, as support for the argument that the claims in this case are within the PUC's exclusive jurisdiction, is misplaced. *Southwest Gas* was decided in the context of judicial review of a Public Service Commission order, and we did not address the commission's jurisdiction over the customer complaints at issue. Rather, the opinion addresses the commission's jurisdiction only in the context of the relief that it awarded against the public utility. *Id. at 664, 667-69, 474 P.2d at 381, 382-83.*

[***25] [*961] Moreover, it appears that the PUC does not have authority to award the compensatory, special, and punitive damages that Bonneville and Union Plaza seek. Although Nevada Power suggests that the PUC can provide similar relief through refunds [40] and civil penalties, [41] these options, even if they are available, are not equivalent to the relief sought by Bonneville and Union Plaza in the amended complaint. The PUC's lack of power to grant the relief Bonneville and Union Plaza seek in their suit further supports our conclusion that the PUC lacks exclusive original jurisdiction over the amended complaint. [42]

40 Neither Nevada Power nor the PUC has cited a statute that expressly permits the PUC to grant refunds. Our research revealed one statute, *NRS 703.375*, related to refunds, but it addresses refunds where a court determines on judicial review that a public utility has collected excessive rates. However, our decision in *Southwest Gas* suggests that although the PUC may not engage in retroactive rate making, it may order refunds as a sanction where a public utility has failed to comply with rules and regulations that affected customers' bills. *86 Nev. 662, 474 P.2d 379.*

[***26]

41 *See NRS 703.380* (authorizing the PUC to file a complaint in district court against a public utility seeking civil penalties not to exceed $ 1,000 per day when a public utility violates an applicable provision of *NRS Chapter 703*, *704*, *704B*, 705 or 708, violates a rule or regulation of the PUC, or fails, neglects, or refuses to comply with a PUC order or a district court order requiring compliance with a PUC order).

42 *Cf. Ambassador Ins. Corp. v. Feldman, 95 Nev. 538, 539, 598 P.2d 630, 631 (1979)* (concluding that because insurance commissioner was powerless to award damages caused by defamation, "the doctrine of exhaustion of administrative remedies is not applicable").

The causes of action alleged and the relief sought in the amended complaint are not clearly within the PUC's exclusive jurisdiction. And, as previously noted, [HN19] we must resolve any doubt about the existence of the PUC's authority against finding such authority. Accordingly, we conclude that the PUC does not have exclusive original jurisdiction over the causes of action [***27] alleged in the amended complaint and that the district court has original jurisdiction to entertain the amended complaint. [43]

43 We also reject Nevada Power's reliance on the filed-rate doctrine as barring Bonneville and Union Plaza from seeking the requested relief in the district court.

Nevada Power alternatively argues that even if the district court has original jurisdiction, the PUC has primary jurisdiction because the amended complaint raises issues related to rates and service that are within the specialized knowledge of the PUC and its staff. Based on the doctrine of primary jurisdiction, Nevada Power argues that the district court should have deferred jurisdiction to the PUC and dismissed the amended complaint.

[*962] [HN20] Primary jurisdiction "is a concept of judicial deference and discretion." [44] The United States Supreme Court has explained that primary jurisdiction "applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution [***28] of issues which, under a regulatory scheme, have been [**588] placed within the special competence of an administrative body." [45] As we explained in *Sports Form v. Leroy's Horse & Sports*, [HN21] the "doctrine of primary jurisdiction requires that courts should sometimes refrain from exercising jurisdiction so that technical issues can first be determined by an administrative agency." [46] The doctrine is premised on two policies: "'(1) the desire for uniformity of regulation and, (2) the need for an initial consideration by a tribunal with specialized knowledge.'" [47] Thus, "in every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." [48] Application of the doctrine is discretionary with the court. [49]

44 *Rinaldo's Const. v. Michigan Bell, 454 Mich. 65, 559 N.W.2d 647, 652 (Mich. 1997)* (quotation marks omitted).

45 *United States v. Western Pac. R. Co., 352 U.S. 59, 63-64, 1 L. Ed. 2d 126, 77 S. Ct. 161, 135 Ct. Cl. 997 (1956).*

46 *108 Nev. 37, 41, 823 P.2d 901, 903 (1992).*

[***29]

47 *Id.* (quoting *Kappelmann v. Delta Air Lines, 176 U.S. App. D.C. 163, 539 F.2d 165, 169 (1st Cir. 1976)).*

48 *United States v. Western Pac. R. Co., 352 U.S. 59, 64, 1 L. Ed. 2d 126, 77 S. Ct. 161, 135 Ct. Cl. 997 (1956).*

49 *Rabon v. City of Seattle, 107 Wn. App. 734, 34 P.3d 821, 824 (Wash. Ct. App. 2001).*

Based on our review of the amended complaint, we conclude that the district court could have deferred action under the primary jurisdiction doctrine for the PUC to address one issue implicated in the amended complaint: the percentage of electricity used by the transformers in the conversion process. This technical issue lies within

the specialized knowledge of the PUC and its trained staff. Additionally, it appears that this issue requires uniformity of regulation. However, during the proceedings in district court, Nevada Power presented a tariff filing to the PUC explicitly asking that the PUC approve a tariff that sets the percentage loss factor. Bonneville and Union Plaza intervened in the PUC proceedings. After the original writ petition was filed [***30] in this court, the PUC determined the appropriate transformer loss factor and directed Nevada Power to file a revised tariff. Thus, the PUC has now spoken on this issue and applied its expertise to determine the percentage of electricity used by the transformers in the conversion process. Under *NRS 704.130*, the PUC's determination is prima facie reasonable unless it is found otherwise on judicial review. [*963] Because the PUC has now addressed the transformer-loss-factor issue, we conclude that that issue does not warrant application of the primary jurisdiction doctrine. We further conclude that to the extent any other issues in this case are within the PUC's concurrent jurisdiction, the district court properly exercised its discretion in refusing to defer primary jurisdiction to the PUC.

CONCLUSION

The causes of action alleged in Bonneville and Union Plaza's amended complaint are within the original jurisdiction of the district court. Furthermore, the district court properly exercised its discretion in refusing to defer primary jurisdiction to the PUC. Accordingly, the district court has not exceeded its jurisdiction. We therefore deny the petition. [***31]

Positive
As of: Jul 11, 2011

IOWA ELECTRIC LIGHT AND POWER COMPANY, Appellant, v. MARTHA LAGLE d/b/a LAGLE CARDS & PARTY, Appellee

No. 87-194

Supreme Court of Iowa

430 N.W.2d 393; *1988 Iowa Sup. LEXIS 273*

October 19, 1988, Filed

PRIOR HISTORY: [**1] On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Linn County, Larry J. Conmey, Judge. Utility company appeals from order denying preclusive effect, in district court litigation, to prior informal proceedings by Iowa Utilities Board.

DISPOSITION: DECISION OF COURT OF APPEALS AND JUDGMENT OF DISTRICT COURT AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff utility brought an interlocutory appeal to challenge a judgment of the Iowa Court of Appeals, which affirmed a decision that refused to apply claim preclusion principles to defendant customer's negligence and damages counterclaim in the utility's action on an unpaid bill.

OVERVIEW: Electric service to the customer's shop was disconnected by the utility for nonpayment of her bill. The utilities board (board) processed her complaint on an informal basis and advised her that any power loss was her responsibility. The customer did not initiate a formal complaint, but when the utility brought suit for the unpaid bill, she counterclaimed for damages resulting from the utility's negligence. The district court refused to apply issue preclusion principles to bar the counterclaim, and the utility filed an interlocutory appeal. The appellate court affirmed. On further appeal the court affirmed. One of the elements of issue preclusion required that the issue be raised or litigated in the prior action. The customer did not have a hearing with the board through which she could present evidence in support of her contentions and rebut the utility's arguments. Her failure to request formal proceedings was of no consequence, because the statute establishing the complaint procedure did not give a customer the right to formal proceedings. Although issue preclusion could arise through administrative proceedings, such was not the case here.

OUTCOME: The court affirmed the judgment that affirmed a decision which refused to apply claim preclusion principles to the customer's negligence and damages counterclaim in the utility's action on an unpaid bill.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form
[HN1] The label attached to a motion is not determinative of its legal significance; the court looks to its content to determine its real nature.

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend
Governments > Courts > Court Records
[HN2] A district court's power to correct its own perceived errors has always been recognized by the court, as long as the court has jurisdiction of the case and the parties involved.

Civil Procedure > Summary Judgment > Partial Summary Judgments
Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend
[HN3] Until a final order or a decree is rendered, the trial court has the power to correct any of the rulings, orders, or partial summary judgments it has already entered.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial
[HN4] Iowa R. Civ. P. 177(b) provides in part that a party desiring jury trial of an issue must make written demand therefor by filing a separate instrument clearly designating such demand not later than ten days after the last pleading directed to that issue.

Civil Procedure > Trials > Jury Trials > Right to Jury Trial
[HN5] Iowa R. Civ. P. 177(d) provides that notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court, in its discretion on motion and for good cause shown, but not ex parte, and upon such terms as the court prescribes, may order a trial by jury of any or all issues.

Administrative Law > Agency Adjudication > Decisions > Res Judicata
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN6] Issue preclusion, also called collateral estoppel, prevents relitigation of already litigated factual issues which were essential to an earlier judgment on a different cause of action binding the same parties. Claim preclusion, on the other hand, prevents relitigation of all issues, whether raised or not, following judgment on the same cause of action.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN7] Before issue preclusion may be employed in any case, these four prerequisites must be established: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Administrative Law > Agency Adjudication > General Overview
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
Governments > Local Governments > Administrative Boards
[HN8] Agency action may be adjudicatory if the agency determines an individual's rights, duties, and obligations created by past transactions or occurrences.

Administrative Law > Agency Adjudication > Decisions > Res Judicata
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN9] An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including: a. Adequate notice to persons who are to be bound by the adjudication; b. The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties; c. A formulation of issues of law and fact in terms of the application of rules with respect to specified parties

concerning a specific transaction, situation, or status, or a specific series thereof; d. A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and e. Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

COUNSEL: Julie A. Cohen, Cedar Rapids, for Appellant.

David P. McManus of Olinger & McManus, Cedar Rapids, for Appellee.

JUDGES: Harris, P.J., and Larson, Schultz, Lavorato, and Neuman, JJ.

OPINION BY: LARSON

OPINION

[*394] Electric service to Martha Lagle's retail shop was disconnected by Iowa Electric Light & Power Company for nonpayment of her bill. She protested to the Iowa State Commerce Commission (now known as the Iowa Utilities Board), claiming there must have been a company error, because her meter readings had suddenly gone berserk. (It turned out that another tenant in the building who was on the same meter had abandoned the premises, leaving walk-in cooler doors open.)

[*395] The Iowa Utilities Board (board) processed her complaint on an informal basis and advised her that any power loss was on her side of the meter, and therefore was her responsibility. The board [**2] advised her, also, that if she was dissatisfied with this disposition, she could initiate formal complaint proceedings before the board. She wrote a second letter but did not initiate a formal complaint. Later, when Iowa Electric sued Lagle for her unpaid bill, she counterclaimed for damages resulting from the utility company's alleged negligence.

The district court refused to apply issue preclusion principles to bar Lagle's counterclaim, and Iowa Electric filed this interlocutory appeal. Iowa Electric's appeal was initially heard by the court of appeals, which held that the district court had properly resolved the procedural issues. The court of appeals also held that the informal disposition by the board did not have preclusive effect in the district court case. We granted further review and now affirm the court of appeals and the district court.

I. *The Procedural Issues.*

In Iowa Electric's suit against Lagle, she answered and raised as an affirmative defense Iowa Electric's negligence in connection with her bill. In May 1986, a motion for partial summary judgment was filed by Iowa Electric on the ground that the board's decision in the informal disposition of Lagle's complaint [**3] was res judicata and thus precluded any consideration of Lagle's affirmative defense. Lagle, who was not represented by an attorney at the time, did not file a resistance, and an order was entered granting partial summary judgment to Iowa Electric on issue preclusion grounds.

In November 1986, Lagle retained a lawyer and filed a motion to reconsider the court's earlier summary judgment. She also filed a counterclaim for damages and a demand for a jury trial on all the issues in the case, including those raised by the initial petition and answer.

On Lagle's motion to reconsider, the district court changed its position and entered an order allowing Lagle's counterclaim to stand, concluding it had made a mistake earlier in barring it on res judicata grounds. The court also entered an order granting the demand for a jury trial on all of the issues in the case. Iowa Electric's application for interlocutory appeal followed.

A. *The "Motion to Reconsider."* Do we still recognize a "motion to reconsider" or has this motion become extinct under present-day procedural rules? Lagle argues that such a motion is still viable. Iowa Electric, on the other hand, argues that all motions predating [**4] the rules of civil procedure, including the motion to reconsider, have either been merged into the present procedural rules or abolished. Therefore, since there is no rule expressly providing for a motion to reconsider, Lagle's motion must survive, if at all, as a motion under Iowa Rule of Civil Procedure 179(b) (enlargement or amendment of judgment or decree) or rule 252 (vacation or modification of final judgment or order). Iowa Electric argues that neither of these motions would be appropriate.

[HN1] The label attached to a motion is not

determinative of its legal significance; we will look to its content to determine its real nature. *See, e.g., Peoples Trust & Sav. Bank v. Baird, 346 N.W.2d 1, 2 (Iowa 1984)* ("motion for rehearing," while not expressly recognized by our rules, will be considered as a rule-179(b) motion); *Kagin's Numismatic Auctions, Inc. v. Criswell, 284 N.W.2d 224, 226 (Iowa 1979)* ("motion to reconsider" considered as rule 179(b) motion).

Iowa Electric argues that, even if Lagle's motion is considered to be one under rule 179(b), it was error for the court to grant it, because that rule may not be used to challenge a partial summary judgment. *See City* [**5] *of Eldridge v. Caterpillar Tractor Co., 270 N.W.2d 637, 640-41 (Iowa 1978)* (Rule 179(b) motions are available only for expansion or amendment of judgment when the court is "trying an issue of fact without a jury." In summary judgment cases, the court only determines [*396] whether issues of material fact exist.) *See also Kunau v. Miller, 328 N.W.2d 529, 530 (Iowa 1983)* (rule 179(b) motion unavailable to challenge ruling on motion to dismiss for failure to state claim, because no issue of fact is raised in such motion); *Budde v. City Dev. Bd., 276 N.W.2d 846, 851 (Iowa 1979)* (rule 179(b) motion inappropriate to challenge ruling based solely on questions of law). Moreover, Iowa Electric claims, Lagle's motion could not be considered as a rule 252 motion, because the partial summary judgment was not a "final judgment or order."

It appears that Iowa Electric is correct in arguing that rules 179(b) and 252 are inapplicable. But, if that is so, and a motion to reconsider has no independent validity, it appears that the only review open to Lagle would have been an application for interlocutory appeal to our court or an appeal from a final judgment at the conclusion of the case.

We do [**6] not believe that Lagle's options were so limited. [HN2] A district court's power to correct its own perceived errors has always been recognized by this court, as long as the court has jurisdiction of the case and the parties involved. A motion to reconsider is found in our cases at least as far back as *Townsend v. Wisner, 62 Iowa 672, 18 N.W. 304 (1884)*. And, while this motion is not expressly found in our rules of civil procedure, it is still recognized by our cases. *See, e.g., Hayes v. Kerns, 387 N.W.2d 302 (Iowa 1986)*. We hold

> that as long as the case is before us we may reexamine our jurisdiction in light of further study and oral submission of the case. This holding is consistent with the rule in the trial court that provides, [HN3] "until . . . a final order or a decree [is] rendered, the trial court will have the power to correct any of the rulings, orders, or *partial summary judgments* it has already entered."

Id. at 308 (citations omitted) (emphasis added). *See also Mason City Prod. Credit Ass'n v. Van Duzer, 376 N.W.2d 882, 885 (Iowa 1985)* (until trial is completed and final order rendered, trial court has power to correct any of its rulings, orders, or partial [**7] summary judgments). Consistent with these authorities, we hold that a motion to reconsider may properly be granted prior to final judgment.

Based on these authorities, the district court correctly reconsidered its prior order. Both the case and affected parties remained subject to the court's jurisdiction.

B. *The Jury Demand.* [HN4] Iowa Rule of Civil Procedure 177(b) provides in part:

> A party desiring jury trial of an issue must make written demand therefor by filing a separate instrument clearly designating such demand not later than ten days after the last pleading directed to that issue.

Lagle had not demanded a jury trial on the original issues raised in Iowa Electric's petition. Several months later, however, when she filed her counterclaim, she demanded a jury trial on *all* issues, including those originally raised by the petition. Her right to demand a jury trial on the original issues, of course, had expired because more than ten days had elapsed since the answer. Nevertheless, the court ordered a jury trial on those issues as well as the new ones raised by Lagle's counterclaim. Iowa Electric contends this was error.

[HN5] Iowa Rule of Civil Procedure 177(d) provides considerable discretion [**8] in such a case:

> Notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right,

> the court, in its discretion on motion and for good cause shown, but not ex parte, and upon such terms as the court prescribes, may order a trial by jury of any or all issues.

We find no abuse of that discretion. The district court apparently concluded that, if the new issues were to be tried to a jury, they should all be tried that way.

II. *The Preclusion Issue.*

Lagle's two letters to the board protesting Iowa Electric's bill were treated by the board as informal complaints under its administrative rules. The board's responses to Lagle's letters informed her that it could do nothing for her but, if she was not [*397] satisfied with this disposition, she could file a formal complaint with the board. Information concerning the procedures for filing a formal complaint was enclosed in the board's correspondence with Lagle.

Lagle did not file a formal proceeding. When Iowa Electric sued her for her bill, however, she filed a counterclaim and reasserted her complaints. Her counterclaim sought damages for emotional distress and loss of profits from her business, [**9] as well as "embarrassment and humiliation and other damages."

Iowa Electric argues that, since the board had resolved similar issues against Lagle on her informal complaints, she is barred by principles of issue preclusion from raising similar issues in her counterclaim. Lagle counters that the proceedings before the board were too informal to be preclusive, that the necessary identity of issues was missing, and applying issue preclusion on the basis of the informal disposition by the board would effectively deprive her of any meaningful hearing on her claims since she had not had a formal complaint proceeding before the board.

[HN6] Issue preclusion, also called collateral estoppel, prevents relitigation of already litigated factual issues which were essential to an earlier judgment on a different cause of action binding the same parties. Pershbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. Fla. L. Rev. 422, 424 (1983) [hereinafter Pershbacher]. Claim preclusion, on the other hand, prevents relitigation of all issues, whether raised or not, following judgment on the same cause of action. *Id.;* [**10] *see also id.* n.8, at 423.

The parties agree that the question here is one of issue, not claim, preclusion. *Hunter v. City of Des Moines, 300 N.W.2d 121 (Iowa 1981)*, sets forth the elements of issue preclusion:

> [HN7] Before issue preclusion may now be employed in any case, these four prerequisites must be established: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Id. at 123 (citing *Bertran v. Glens Falls Ins. Co., 232 N.W.2d 527, 533 (Iowa 1975)).*

Application of the second test is dispositive here, that is, whether the issue sought to be precluded was actually "litigated" or "adjudicated" in the board proceedings. We have held that [HN8] agency action may be adjudicatory if the agency determines an individual's rights, duties, and obligations created by past transactions or occurrences. *See Polk County v. Iowa State Appeal Board, 330 N.W.2d 267, 277 (Iowa 1983).* The Restatement provides this, [**11] in part, with respect to the preclusive effects to be given to agency determinations:

> 2. [HN9] An adjudicative determination by an administrative tribunal is conclusive under the rules of res judicata only insofar as the proceeding resulting in the determination entailed the essential elements of adjudication, including:
>
> a. Adequate notice to persons who are to be bound by the adjudication . . .;
>
> b. The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

> c. A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;
>
> d. A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and
>
> e. Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the [**12] opportunity of the parties [*398] to obtain evidence and formulate legal contentions.

Restatement (Second) of Judgments § 83 (1982).

Another authority suggests, for several reasons, a narrow application of issue preclusion in administrative proceedings. Pershbacher at 451, 453-54, 457-58. The problem with according broad preclusive effect to administrative determinations is said to be that

> resolution of a dispute does not require formal court-like proceedings, and informality is considered a virtue of most administrative proceedings. When, however, collateral estoppel effect is given issue determinations made in an administrative proceeding, informality becomes a problem. Judicial proceedings operate within a system where each issue resolved is subject to appellate review. Parties develop the crucial issues, introduce the important evidence, and have an independent fact finder resolve legal and evidentiary conflicts. The reviewability of this process ensures clear and careful issue resolution.
>
> Administrative proceedings are not structured with the same goals in mind as those of formal court-like proceedings, especially with regard to issue determinations.

Id. at 452.

Applying the [**13] Restatement test, Lagle did not have a hearing with the board through which she could "present evidence and legal argument in support of [her] contentions and [a] fair opportunity to rebut evidence and argument by [Iowa Electric]." *Restatement (Second) of Judgments § 83(2)(b)* (1982). Iowa Electric counters that, although Lagle did not have a hearing before the board, she could have filed formal proceedings and had such a hearing. By choosing not to request formal proceedings, Lagle waived the right to such a hearing, and she must be treated, for issue preclusion purposes, as if she had actually had a hearing. *See* id. at 458.

In this regard, we note that, while the board's administrative rules purport to give the right to formal proceedings on the request of a complaining customer, the statute establishing the complaint procedure does not. *Iowa Code section 476.3* provides only for the board or the Office of Consumer Advocate to initiate formal proceedings.

We conclude that, in this case, the necessary prerequisites for issue preclusion have not been established. While issue preclusion may arise through meaningful administrative proceedings, we do not have such a case here.

Iowa [**14] Electric raises a related issue, that the board has exclusive jurisdiction in such matters, citing *Mid-Iowa Community Action v. Commerce Commission, 421 N.W.2d 899 (Iowa 1988)*. Iowa Electric contends that our earlier case of *Oliver v. Iowa Power & Light Co., 183 N.W.2d 687 (Iowa 1971)*, which held the contrary, has now been overruled by *Mid-Iowa*.

We do not agree. As it was made clear in *Oliver*, there are two general types of cases concerning utility charges, and the initial jurisdiction as to each is different. In one type of case, the customer complains about alleged overcharges but does not claim that the rates were unreasonable. For example, the claim might be that the meter was misread or the charge exceeded the filed tariff. This type of case, we noted, is properly resolved by the courts. *Oliver, 183 N.W.2d at 689.*

In the second type of case, a customer seeks to

recover overcharges on the ground that the utility company's rates were unreasonable or complains on other technical-type grounds. In that case, the customer must proceed before the appropriate board to have reasonable rates assessed. *Id.*

It is clear that *Mid-Iowa* did not overrule Oliver. [**15] *Mid-Iowa* involved questions of the second type discussed above, those which turn on the expertise of the board because they involved imposition of civil penalties. *Mid-Iowa, 421 N.W.2d at 900.* In that case, jurisdiction is properly placed in the board. *Oliver, 183 N.W.2d at 689.*

In *Mid-Iowa*, we said that it was "illogical" to suggest that the board may determine the amount of refund due a customer [*399] but require the customer to file a separate action in court to effect recovery. *Id. at 901.* In the present case, an illogical result would also apply if Lagle were required to abandon her counterclaim in district court and pursue an independent claim through an agency action.

We believe that the district court and the court of appeals were correct in their procedural rulings and in denying preclusive effect to the action of the board.

DECISION OF COURT OF APPEALS AND JUDGMENT OF DISTRICT COURT AFFIRMED.

Caution
As of: Jul 11, 2011

W. LAWRENCE OLIVER, Appellant v. IOWA POWER & LIGHT COMPANY, Appellee

No. 54253

Supreme Court of Iowa

183 N.W.2d 687; 1971 Iowa Sup. LEXIS 721

February 9, 1971, Filed

PRIOR HISTORY: [**1] Appeal from Polk District Court. Harry Perkins. Appeal from order sustaining motion to dismiss in class action for alleged overcharges by a public utility.

DISPOSITION: Reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff customer sought review of a decision of the Polk District Court (Iowa), which sustained defendant utility's motion to dismiss the customer's petition that alleged that he had been overcharged for electric power, upon the ground that the customer did not exhaust his administrative remedies.

OVERVIEW: The utility's contention that the customer did not exhaust his administrative remedies posed two questions: did an administrative remedy exist for the claimed wrong and was that remedy exclusive. The court noted that if the customer's action was predicated on a claim that the utility's rates were unreasonable then the customer did not have a cause of action. The court decided that the customer was in a position to claim, so far as his petition was concerned, that he was charged a wrong amount. Iowa Code § 490A.3 permitted proceedings before the state commerce commission for anything done or omitted to have been done by any public utility in contravention of the provisions of the statutes. Therefore, the customer did have an administrative remedy for his complaint. As to the payments of wrong amounts, the court concluded that the administrative remedy available to the customer was not sufficiently adequate to have been his primary remedy. Therefore, a person who believed that he had been charged the wrong amount had two avenues open. He could either pursue his cause of action in front of the commission or file a lawsuit in the courts.

OUTCOME: The court reversed the trial court's judgment.

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Energy & Utilities Law > Utility Companies > Rates > General Overview

[HN1] Where an administrative remedy is available, such as a hearing before the Public Service Commission, to determine the reasonableness of the rate, prior resort to that remedy is a necessary prerequisite to standing before the courts.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Defects of Form

[HN2] A petition that charges negligence generally is subject to a motion to make specific, but if no such motion is made, any negligence proved can be relied on under the general charge.

Energy & Utilities Law > Utility Companies > Rates > General Overview

[HN3] In Iowa public utilities are regulated at the state level. The regulatory agency is the Iowa State Commerce Commission. Iowa Code ch. 490A (1971). Utilities file their initial tariffs with the commission but the commission may investigate the tariffs and change than if they are not reasonable. Iowa Code §§ 490A.3-490A.5, 490A.7. A utility can change tariffs only after a commission proceeding. Iowa Code § 490A.6. Pending completion of such a proceeding, the utility can place new tariffs in effect under bond to the extent permitted by § 490A.6, subject to refunds in a manner to be prescribed by the commission. Iowa Code § 490A.7. Iowa Code § 490A.5 provides that no public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs.

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

[HN4] Iowa Code § 490A.3 provides: Every public utility shall furnish reasonably adequate service at rates and charges in accordance with tariffs filed with the commission. Whenever there is filed with the commission by any person or body politic, or filed by the commission on its own motion, a written complaint requesting the commission to determine the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by any public utility subject to this chapter, in contravention of the provisions thereof, such written complaint thus made shall be forwarded by the commission to such public utility, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the commission. If such public utility shall not satisfy the commission with respect to the complaint within the time specified and there shall appear to be any reasonable ground for investigation said complaint, it shall be the duty of the commission to promptly initiate a formal proceeding. Such a formal proceeding may be initiated at any time by the commission on its own motion.

Energy & Utilities Law > Utility Companies > Rates > General Overview

[HN5] Iowa Code § 490A.3 provides in part: Whenever such a proceeding has been initiated on application or motion, the commission shall set the case for hearing and give such notice thereof as it deems appropriate. Whenever the commission, after a hearing held after reasonable notice, finds any public utility's rates, charges, schedules, service or regulations are unjust, unreasonable, discriminatory or otherwise in violation of any provision of law, the commission shall determine just, reasonable, and nondiscriminatory rates, charges, schedules, service or regulations to be thereafter observed and enforced.

Energy & Utilities Law > Utility Companies > Rates > General Overview

[HN6] Iowa Code § 490A.5 prohibits a utility from deviating from filed tariffs, and Iowa Code § 490A.3 permits proceedings before the commission for anything done or omitted to be done by any public utility subject to this chapter, in contravention of the provisions thereof.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > Justiciability > Exhaustion of Remedies > Administrative Remedies

[HN7] If an administrative agency has "primary" or "exclusive" jurisdiction of a controversy, then the administrative remedy ordinarily must be exhausted before resort may be had to the courts. Whether a particular administrative proceeding is primary depends on the statutory scheme. The doctrine applies where the statute provides for an administrative remedy, even though in general terms, even though the terms of the statute do not provide for "exclusive jurisdiction" or

make the exhaustion of the remedy a condition of the right to resort to the courts, and even though no appeal to a judicial tribunal is provided for in case of rejection of the administrative remedy or the statute declares the administrative determination shall not be subject to judicial review. On the other hand, the doctrine of exhaustion of administrative remedies does not apply where, by the terms or implications of the statute authorizing an administrative remedy, such remedy is permissive only or not exclusive of the judicial remedy, warranting the conclusion that the legislature intended to allow the judicial remedy even though the administrative remedy has not been exhausted.

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies
Administrative Law > Separation of Powers > Jurisdiction
Administrative Law > Separation of Powers > Primary Jurisdiction
[HN8] One test of exclusiveness is whether the administrative remedy is adequate. Inadequacy of that remedy to provide the relief to which the litigant would otherwise be entitled constitutes some indication that the remedy is not exclusive and that an independent action in court can be maintained. The primary jurisdiction doctrine does not apply to require prior resort to an administrative agency when the relief sought is not within the jurisdiction of the agency, or the question is one which the agency has no power to decide, even though it may consider such question in reaching a determination which is within its jurisdiction. Stated negatively, the test is whether the agency is powerless to afford relief in the face of the provisions of the governing statute.

COUNSEL: W. Lawrence Oliver, of Des Moines, Pro Se.

Duncan, Jones, Riley & Davis, of Des Moines, for Appellee.

JUDGES: Uhlenhopp, J. All Justices concur.

OPINION BY: UHLENHOPP

OPINION

[*688] The question presented is whether plaintiff is required to exhaust an administrative remedy before instituting this independent accounting suit for alleged overcharges for electricity.

In his amended petition, plaintiff alleges he previously paid defendant $12 to $15 per month for electricity used in his home. He built a new home on Rural Route 1, Des Moines, Iowa, and thereafter paid defendant $30 per month for substantially the same amount of electricity. He alleges "Defendant has grossly overcharged him for electric power, and has overcharged all of those in his same class". He asks an accounting for himself and for those similarly situated and says the approximate amount defendant owes is $2,000,000.

Defendant moved to dismiss the petition on the ground plaintiff did not exhaust his administrative remedy before the Iowa [**2] State Commerce Commission.

Plaintiff resisted the motion, alleging he complained to the commission, and the commission wrote a letter to defendant about the complaint. Plaintiff further alleged defendant responded to the commission that plaintiff had moved to a rural area where the average distance between houses is more than 200 feet, that plaintiff's rate is governed by the filed tariff entitled "Residential Service Rate 104 Zone 2 Rural", but that the area was being taken into an incorporated town so plaintiff's rate would soon be reclassified to "Rate 102 Zone 2 Urban". Plaintiff continued his allegations saying that upon the commission's receipt of defendant's response, the commission replied to plaintiff, "It appears that the utility has answered your complaint and that the rate you desire will be available in the very near future; however, if you have further questions regarding this matter, please contact this office."

In this state of the pleadings, the trial court sustained the motion on the ground that plaintiff did not exhaust his administrative remedy. Plaintiff appeals.

Defendant's contention that plaintiff did not exhaust an administrative remedy poses two questions: [**3] Does an administrative [*689] remedy exist for the claimed wrong? Is that remedy exclusive?

I. *Does an Administrative Remedy Exist?* The first question involves the Iowa statute regulating public utilities, Code, 1971, chapter 490A. Before examining that statute, the general law on actions to recover payments to utilities must be noticed, as well as the specific allegations of plaintiff's petition.

Plaintiff's action involves alleged overcharges for electricity. Two principal kinds of action of this type exist. In the first kind, the customer of the utility does not claim that the rates were unreasonable but claims he was charged the wrong amount - e.g., his meter was misread, the charge exceeds the filed tariff, or he was placed in the wrong rate class. The doctrine of "public utility duress" has evolved in such cases, allowing the customer to recover his overpayments and to have other relief, in an action in court. *25 Am.Jur.2d Duress and Undue Influence § 8* at 364; 40 Am.Jur. Payment § 178 at 837; 38 C.J.S. Gas § 36 at 724. Numerous illustrations are collected in Annotation, 34 A.L.R. 185.

In the second kind of action, the customer seeks to recover overcharges on [**4] the ground that the utility's rates were unreasonable. These actions the courts will not entertain. The customer must proceed before the appropriate public utility regulatory body to have reasonable rates determined for the future; the utility's filed tariffs govern rates for the past. Cases of this sort are *Montana-Dakota Util. Co. v. Northwestern Public Serv. Co., 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912*, and *Spintman v. Chesapeake & Potomac Tel. Co., 254 Md. 423, 255 A.2d 304*. See also Annot. 12 A.L.R. 404.

The distinction is brought into focus by comparing *Anderson v. St. Paul City Ry., 152 Minn. 213, 216, 188 N.W. 286, 288*, with the Montana-Dakota case, supra, *341 U.S. at 250-52, 71 S. Ct. at 695, 95 L. Ed. at 918-19*. In Anderson the court, after referring to cases denying recovery for unreasonable rates, said:

"If this were an action to fix the rate, or to determine the reasonableness of the rate charged, these decisions would doubtless be in point and the contention well founded. See extended note in 12 A.L.R. 404. Plaintiffs do not contend to the contrary. They base their action on the claim that defendant is exacting a charge not permitted by existing law. If this be true, [**5] if defendant, a public service company, is exacting from its patrons a higher rate for the service which it furnishes them than is permitted by existing law, we think the users of such service may under the circumstances disclosed in the record, maintain an action to enjoin defendant from enforcing the payment of more than the lawful charge."

On the other hand, in the Montana-Dakota case, where the customer happened to be another utility, the Court said:

"It is admitted, however, that a utility could not institute a suit in a federal court to recover a portion of past rates which it simply alleges were unreasonable. It would be out of court for failure to exhaust administrative remedies, for, at any time in the past, it could have applied for and secured a review and, perhaps, a reduction of the rates by the Commission. . . . We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only one or the more reasonable one."

The two situations are commented on in *Spintman v. Chesapeake &* [**6] *Potomac Tel. Co., 254 Md. 423, 428-29, 255 A.2d 304, 307*:

[HN1] "Where an administrative remedy is available, such as a hearing before the Public Service Commission, to determine the reasonableness of the rate, prior resort to that remedy is a necessary prerequisite to a standing before the courts. . . .

[*690] "In the instant case, we are not confronted with a situation where the consumer was charged a rate not in conformity with the established and published tariff set by the Commission or where there was error in the computation or application of the established rate. In such a situation an action in assumpsit may well be the proper remedy for the collection of the overcharge."

These authorities make clear that if the present action is predicated on a claim that defendant's rates were unreasonable, plaintiff does not have a case here. We may therefore place consideration of that basis of recovery aside and confine ourselves to whether plaintiff has stated a case based on a claim he was charged the wrong amount.

The other preliminary matter is one of pleading - whether plaintiff's petition covers a claim based on charges for wrong amounts. He alleges he previously paid $12 to [**7] $15 per month for electricity but paid $30 monthly after he moved to his new home. This lends some credence to the view that he is claiming he was charged the wrong amount in the second home. Moreover, his allegation in the petition is general - "Defendant has grossly overcharged him for electric power". The expression, "gross overcharge," obviously is broad enough to include a wrong amount.

Defendant did not move for more specific statement or take discovery in order to nail down the basis of plaintiff's claim. In this respect the case is somewhat analogous to those in which the petition charges negligence generally; [HN2] such a petition is subject to a motion to make specific, but if no such motion is made, any negligence proved can be relied on under the general charge. *Hanen v. Lenander, 178 Iowa 569, 160 N.W. 18.* We think plaintiff is in a position to claim, so far as his petition is concerned, that he was charged a wrong amount.

Turning to our statute, [HN3] in this jurisdiction public utilities are regulated at the state level. The regulatory agency is the Iowa State Commerce Commission. Code, 1971, ch. 490A. Defendant comes under that statute. § 490A.1. Utilities file their initial [**8] tariffs with the commission but the commission may investigate the tariffs and change than if they are not reasonable. §§ 490A.3-490A.5, 490A.7. A utility can change tariffs only after a commission proceeding. § 490A.6. Pending completion of such a proceeding, the utility can place new tariffs in effect under bond to the extent permitted by § 490A.6, subject to refunds "in a manner to be prescribed by the commission". § 490A.7. Section 490A.5 provides that "No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs . . . ."

The provision pertinent to our inquiry is § 490A.3:

[HN4] "Every public utility shall furnish reasonably adequate service at rates and charges in accordance with tariffs filed with the commission. Whenever there is filed with the commission by any person or body politic, or filed by the commission on its own motion, a written complaint requesting the commission to determine the reasonableness of the rates, charges, schedules, service, regulations, or *anything done or omitted to be done by any public utility subject to this chapter, in contravention of the* [**9] *provisions thereof*, such written complaint thus made shall be forwarded by the commission to such public utility, which shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the commission. If such public utility shall not satisfy the commission with respect to the complaint within the time specified and there shall appear to be any reasonable ground for investigation said complaint, it shall be the duty of the commission to promptly initiate a formal proceeding. Such a formal proceeding may be initiated at any time by the commission on its own motion. [HN5] Whenever such a proceeding has [*691] been initiated on application or motion, the commission shall set the case for hearing and give such notice thereof as it deems appropriate. Whenever the commission, after a hearing held after reasonable notice, finds any public utility's rates, *charges*, schedules, service or regulations are unjust, unreasonable, discriminatory or otherwise *in violation of any provision of law*, the commission shall determine *just*, reasonable, and nondiscriminatory rates, *charges*, schedules, service or regulations *to be thereafter* [**10] *observed and enforced.*" (Italics added.)

Does the statute provide an administrative remedy for wrong amounts charged a customer? Section 490A.5 [HN6] prohibits a utility from deviating from filed tariffs, and § 490A.3 permits proceedings before the commission for "anything done or omitted to be done by any public utility subject to this chapter, in contravention of the provisions thereof".

On this first part of the case, we conclude an administrative remedy plainly does exist for a complaint based on a wrong amount charged a customer.

II. *Is the Administrative Remedy Exclusive*? The second question is really a problem of whether primary administrative jurisdiction exists rather than a problem of whether the administrative remedy was exhausted, although those two doctrines are closely related. Note, 51 Harv. L. Rev. 1251, 1260-61. [HN7] If an administrative agency has "primary" or "exclusive" jurisdiction of a controversy, then the administrative remedy ordinarily must be exhausted before resort may be had to the courts. 2 Am.Jur.2d Administrative Law § 595 at 426, § 788 at 688; 73 C.J.S. Public Administrative Bodies & Procedure § 40 at 347, § 41 at 351.

Whether a particular administrative [**11] proceeding is primary depends on the statutory scheme. "The doctrine applies where the statute provides for an administrative remedy, even though in general terms, even though the terms of the statute do not provide for 'exclusive jurisdiction' or make the exhaustion of the remedy a condition of the right to resort to the courts, and even though no appeal to a judicial tribunal is provided for in case of rejection of the administrative remedy or the statute declares the administrative determination shall not be subject to judicial review. . . On the other hand, the

doctrine of exhaustion of administrative remedies does not apply where, by the terms or implications of the statute authorizing an administrative remedy, such remedy is permissive only or not exclusive of the judicial remedy, warranting the conclusion that the legislature intended to allow the judicial remedy even though the administrative remedy has not been exhausted." 2 Am.Jur.2d Administrative Law § 598 at 432-33. See also *Morrison-Knudsen Co. v. Iowa State Tax Comm'n, 242 Iowa 33, 44 N.W.2d 449*; 73 C.J.S. Public Administrative Bodies & Procedure § 40 at 350.

[HN8] One test of exclusiveness is whether the administrative [**12] remedy is adequate. Inadequacy of that remedy to provide the relief to which the litigant would otherwise be entitled constitutes some indication that the remedy is not exclusive and that an independent action in court can be maintained. *Goldstein v. Groesbeck, 142 F.2d 422*, (2nd Cir.), cert. denied, *323 U.S. 737, 65 S. Ct. 36, 89 L. Ed. 590*. "The primary jurisdiction doctrine does not apply to require prior resort to an administrative agency when the relief sought is not within the jurisdiction of the agency, or the question is one which the agency has no power to decide, even though it may consider such question in reaching a determination which is within its jurisdiction." 2 Am.Jur.2d Administrative Law § 794 at 698. See also 73 C.J.S. Public Administrative Bodies & Procedure § 40 at 350, § 41 at 354, § 43 at 359 (whether the agency has jurisdiction "to afford adequate remedy"). Stated negatively, the test is whether the agency "is powerless to afford relief in the face of . . . the provisions of the governing statute." 2 Am. Jur. 2d Administrative Law § 605 at 441-42.

As seen, traditionally a person charged a wrong amount by a public utility has a cause [*692] of action [**13] in court. Does our public utility statute now require the person to go to the commission instead? Section 490A.6 authorizes the commission to prescribe the manner of refunding overcharges collected under bond during proceedings to fix rates, but this case does not involve a rate proceeding. Plaintiff's claim, so far as the administrative remedy is concerned, comes under § 490A.3 for "something done or omitted to be done" by a public utility subject to the chapter, "in contravention of the provisions thereof". But § 490A.3 provides no machinery and grants no authorization to the commission to require reparation by a utility for wrong amounts charged. That function is apparently left to the courts as before, for the chapter contains no intimation that a person's substantive right to recover past payments of wrong amounts is abrogated. The statute provides as to the administrative proceeding that "the commission shall determine . . . charges . . . to be *thereafter* observed and enforced." § 490A.3 (italics added); cf. Alfredo M. Apodaca and Other Customers of El Paso Electric Co., Utilities Law Reports State (C.C.H. 1970) para. 21,406.03.

As to payments of wrong amounts, we think [**14] the administrative remedy is not sufficiently adequate to be primary. The courts remain open to such suits. Cf. *Louisville Gas & Elec. Co. v. Dulworth, 279 Ky. 309, 130 S.W.2d 753*; *Bee's Old Reliable Shows v. Kentucky Power Co., 334 S.W.2d 765* (Ky.); 73 C.J.S. Public Administrative Bodies & Procedure § 40 at 350 ("The doctrine [exhausting administrative remedies] is not applicable where the issue, regardless of its complexity, is not the reasonableness of a rate or rule, but a violation of such rate or rule."). The present case does not involve utility "service," for which the administrative remedy is in fact exclusive. *Elk Run Tel. Co. v. General Tel. Co., 160 N.W.2d 311* (Iowa); *Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co., 165 N.W.2d 771* (Iowa).

Our conclusion means that a person who believes he has been charged the wrong amount has two avenues open. If he does not want a lawsuit and merely wants the amount corrected prospectively, he can informally complain before the commission or institute formal proceedings there. § 490A.3. The statute and the commission appear to have retained both informal and formal proceedings, as practiced by the predecessor Board of Railroad [**15] Commissioners. Rules 2, 3, 15.3, 15.4, Rules of Practice, Iowa State Commerce Comm'n, 1966 I.D.R. 73-74, 119-20; Note, 51 Iowa L. Rev. 385, 395-96 (numerous informal complaints processed without necessity of notice or hearing). If the person proceeds before the commission by informal complaint only, as plaintiff did here, we are clear that neither he nor the utility is bound in an independent court suit, such as this one, by the result before the commission. Whether the person and the utility would be bound in court by a commission order after formal proceedings on notice and hearing, query. See *2 Am.Jur.2d Administrative Law § 497* at 307-308; 73 C.J.S. Public Administrative Bodies & Procedure § 147 at 480-82. That question is not before us.

But if a person wants to recover past payments of wrong amounts, he can institute an independent court suit like the present one, and he may do so without pursuing any proceedings before the commission.

The motion to dismiss must be overruled. On remand, the parties may make up the issues, discover, and try the suit. If it develops that plaintiff's claim is predicated on unreasonable rates, he cannot recover in this suit. But if it develops [**16] that he was charged the wrong amount, he will not be barred from recovering in this suit because he failed to exhaust an administrative remedy or because of the proceedings he took before the commission.

REVERSED.

All Justices concur.

Positive
As of: Jul 11, 2011

SPINTMAN, et al. v. THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND

No. 330, September Term, 1968

Court of Appeals of Maryland

254 Md. 423; *255 A.2d 304*; *1969 Md. LEXIS 885*

July 1, 1969, Decided

PRIOR HISTORY: [***1] Appeal from the Circuit Court for Prince George's County; Bowie, J.

DISPOSITION: *Order affirmed, appellants to pay costs.*

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant telephone customers sought review of the order of the Circuit Court for Prince George's County (Maryland), which sustained appellee telephone company's demurrer without leave to amend the customers' claims of discriminatory telephone rates. The company alleged that the customers' claims should have been made to the Maryland Public Service Commission (Commission) consistent with the Commission Law (Law), Md. Ann. Code art. 78, §§ 1-107.

OVERVIEW: The telephone customers brought this action after they were charged higher rates for their telephone service than customers within the adjacent metropolitan area. The rates had been approved by the Commission several years prior to the customers bringing their action. The court affirmed the order of the trial court, and ruled that where the legislature expressly provided for the regulation of a public utility by the Commission, any direct court challenge of a telephone company's rates was abrogated. The court found that the Law clearly and unmistakably granted the Commission authority to regulate utility rates and that a challenge of the rates should have been years ago with the Commission, consistent with the Law. The court noted that ratemaking employs a highly technical and complicated process calling for the Commission's expertise. Moreover, the court ruled, ratemaking decisions should not be vested with a court, unless there are no laws providing for utility regulatory ratemaking processes. The court also held that Md. Ann. Code art. 78, § 103 and *49 U.S.C.S. § 908* were inapplicable to the facts of the case.

OUTCOME: The court affirmed the order of the trial court, sustaining the telephone company's demurrer without leave to amend. The court ordered the telephone customers to pay the costs for its discriminatory rate claim against the telephone company.

LexisNexis(R) Headnotes

Energy & Utilities Law > Utility Companies > Rates > General Overview
Governments > Courts > Authority to Adjudicate
[HN1] The common law, like present day statutes, has required that public utility rates be reasonable, but has delegated no power to determine for the future what is reasonable. In the absence of direct or delegated legislative regulation of rates, the courts must determine what is reasonable, in a suit by the utility to collect compensation or a suit by the customer to recover excessive compensation extracted from him.

Energy & Utilities Law > Administrative Proceedings > General Overview
Energy & Utilities Law > Utility Companies > General Overview
Governments > Courts > Common Law
[HN2] Where the legislature expressly provides for the regulation of a public utility by a quasi-legislative body, such as the Maryland Public Service Commission (Commission), that to the extent that the Commission was endowed with general regulatory powers over a public utility, any private right vested in a consumer by virtue of the common law, to have the reasonableness of a rate determined originally by a court, is abrogated.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN3] Where an administrative remedy is available, such as a hearing before the Maryland Public Service Commission, to determine the reasonableness of a rate, prior resort to that remedy is a necessary prerequisite to a standing before the courts.

Energy & Utilities Law > Administrative Proceedings > Judicial Review > General Overview
Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN4] The Maryland Public Service Commission (Commission) Law provides, that if any consumer complains that a rate is either unreasonable or discriminatory and the complaint is deemed to be deserving of explanation, the Commission shall institute a proceeding to investigate the complaint and the Commission shall direct such relief as may be warranted. The Commission also has the authority to commence investigation on its own motion, to determine just and reasonable rates by order, to fix temporary rates, and to order refunds in certain situations defined by the statute. Md. Ann. Code art. 78, §§ 68, 70, 71 and 77. The Commission Law finally provides that orders and decisions of the Commission involving rates and other matters may be appealed to the courts by any party or any person in interest. Md. Ann. Code art. 78, §§ 90 and 98.

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview
Energy & Utilities Law > Utility Companies > Rates > General Overview
[HN5] Md. Ann. Code art. 78, § 103 reads: In any action by any public service company for the collection of any charge, no recovery shall be had if in the transaction on which suit is brought, the company has demanded a rate in excess of that which is lawful under this article at the time.

HEADNOTES

Public Utilities -- *Reasonableness Of Rates -- Public Service Commission Vested With General Regulatory Powers -- Code, 1957, Art. 78, Secs. 1, 2 -- Intent Of Statute Endows Public Service Commission With Authority To Regulate Rates.*

Public Service Commission -- *Where Legislature Intended Rate-Making To Be Function Of Commission, Consumers May Not Challenge Reasonableness Of Rates In Courts Without First Resorting To Administrative Remedy Such As Hearing On Reasonableness Of Rates.*

Public Service Commission -- *Where Consumer Is Charged Rate Not In Conformance With Tariffs Established By Public Service Commission Or If Rates Are Computed Or Applied Improperly Action In Assumpsit Is Proper Remedy For Collection Of Charge.*

Public Utilities -- *Where Rates Have Been Established By Public Service Commission Pursuant To Valid Statutory Authority, It Is Unlawful For Public Utility To Impose Any Charges Other Than Those*

Specified In Tariffs Filed With Commission -- Code, 1957, Art. 78, Sec. 27 (a) (2).

SYLLABUS

Suit by Daniel A. Spintman and Judith A. [***2] Spintman, his wife, for themselves and on behalf of all other similarly situated subscribers to the "262" exchange service in the City of Bowie, and other areas in Prince George's County, Maryland that are not within the area designated for telephone rate services as the "Washington, D. C. Metropolitan Exchange Area." From an order sustaining without leave to amend the demurrer of defendant, plaintiffs appeal.

COUNSEL: *Daniel I. Sherry* for appellants.

Robert A. Levetown, with whom were *Jerrold V. Powers, Sasscer, Clagett, Powers & Channing, Howard C. Anderson* and *L. Manning Muntzing* on the brief, for appellee.

JUDGES: Hammond, C. J., and Marbury, Barnes, Finan and Smith, JJ. Finan, J., delivered the opinion of the Court.

OPINION BY: FINAN

OPINION

[*424] [**305] Daniel A. Spintman and Judith A. Spintman, his wife (appellants), are subscribers to the "262" exchange service of the appellee, Chesapeake and Potomac Telephone Company of Maryland. Appellants brought an action in assumpsit for themselves, and on behalf of all other similarly situated subscribers to the "262" exchange service in the City of Bowie, and other areas in Prince George's County, Maryland, that are [***3] not within the area designated for telephone rate services as the "Washington, D. C. Metropolitan Exchange Area" (D. C. Area). The first count of appellant's declaration claims reimbursement for money paid for telephone services at rates that include mileage and other charges which are not included in the rates charged by the appellee for similar services to subscribers within the "D. C. Area," to the extent of such mileage and other charges. Appellants allege that they are under substantially similar circumstances as those persons who subscribe to the appellee's service within the "D. C. Area," who do not pay such mileage and other charges and that the mileage and other charges applied to appellants are unjustly discriminatory charges for like services under like conditions.

The second count of appellants' declaration claims [*425] money paid for telephone service at rates in excess of just and reasonable rates, resulting in excessive compensation to the appellee, and demands reparations to the extent of such excessive compensation in the amount of $ 2,500,000.00.

The appellee demurred to the appellants' declaration and filed a memorandum in support of its demurrer. The [***4] appellee asserted in its memorandum that: (1) complaints that utility rates are unreasonable or discriminatory must be addressed to the Public Service Commission; (2) standards for Commission determination of rates, which are set forth in the Public Service Commission Law (Code (1965 Repl. Vol.) Art. 78, Sections 1-107), do not create private causes of action; (3) the appellants cannot invoke any common law right of reparations; and (4) there is no injustice in barring suits for reparations where tariff rates have been charged. Appellants filed a memorandum in opposition to the appellee's demurrer setting forth a number of reasons why the demurrer should not be granted. After hearing argument, the lower court sustained the appellee's demurrer without leave to amend, adopting as its opinion the memorandum, points and authorities in support of appellee's demurrer and the oral argument of the appellee. This appeal on behalf of the appellants followed.

We are presented with the question of whether telephone subscribers who have accepted, used, and paid for telephone service, on terms not alleged to be different from those stipulated in tariffs on file with the Public Service Commission, [***5] can attack those tariff rates retroactively and demand refunds in an original court [**306] proceeding allegedly based on common law rights.

For the reasons which will hereinafter follow we are of the opinion that the lower court was correct in sustaining the appellee's demurrer without leave to amend.

The appellants rely heavily upon the case of *Lewis v. Mayor & City Council of Cumberland, 189 Md. 58, 54 A. 2d 319 (1947).* However, we think the rationale of the [*426] Court in *Lewis* amply demonstrates why, in our opinion, there is no common law remedy available to the appellants on which they may predicate their right to

reparations, assuming, *arguendo*, that the rates charged by the appellee were unjustifiable. In the *Lewis* case, an apartment house water consumer challenged a rate established by city ordinance incident to the City of Cumberland's operation of a municipal water company. The lower court invoking common law principles, determined that the rate charged was reasonable and that the classification applicable to the consumer was not discriminatory. This Court in affirming the lower court, emphasized that the common law principle, which forbade [***6] excessive or discriminatory rates for services of public utilities, was applied in this case and that the Court could directly do so, only because the regulatory powers of the Public Service Commission of Maryland did not apply to a municipal water company in Allegany County. [1] Code (1943 Supp.), Art. 23, Sec. 414. In fact there is the strongest implication in the Court's opinion that had the rate making powers of the Public Service Commission applied to a municipal water company, the Court would not have directly entertained a review of the rate. Judge Markell, later Chief Judge, writing for the Court stated:

> [HN1] "The common law, like present day statutes, required that public utility rates be reasonable, but delegated no power to determine for the future what is reasonable. * * * *In the absence of direct or delegated legislative regulation of rates*, the courts must determine what is reasonable, in a suit by the utility to collect compensation or a suit by the customer to recover excessive compensation extracted from him. * * *." *Id. at 67.* (Emphasis supplied)

1 A municipal water company situated in Allegany County is still expressly exempt from the rate making powers and jurisdiction of the Public Service Commission. Code (1965 Repl. Vol.) Art. 78, Sec. 55.

[***7] [*427] The Public Service Commission of Maryland was established by Chapter 180 of the Acts of 1910, and by it the legislature created comprehensive and detailed administrative machinery for the regulation of public utilities throughout the State. We think beyond question that [HN2] where the legislature expressly provided for the regulation of a public utility by a quasi-legislative body, such as the Public Service Commission, that to the extent that the Commission was endowed with general regulatory powers over a public utility, any private right vested in a consumer by virtue of the common law, to have the reasonableness of a rate determined originally by a court, was abrogated. We do not think it necessary to go into the question of legislative pre-emption of the field by occupation, as we did in the recent case of *Mayor and City Council of Baltimore v. Sitnick, 254 Md. 303, 255 A. 2d 376 (1969)*, because in the instant case, which is not a suit for a declaratory judgment, we are confronted with the narrow issue of whether under the facts of this case the common law right of a private consumer to challenge the rate of a public utility survives. It may well be that remedies [***8] available at common law to be invoked by a consumer against a utility, or for that matter, the power of a local subdivision to enact some regulatory control, may still exist in the same areas of regulation. *Lutz v. State, 167 Md. 12, 15, 172 A. 354 (1934)*; *Hooper v. Baltimore, 12 Md. 464, 475 (1859)*. For example, municipal water companies in Allegany County are still exempted from regulation [**307] by the Commission by Section 55 of Article 78, and the Commission does not establish rates for any municipal water company for service to consumers within the corporate boundary of the municipality. *Hagerstown v. Public Serv. Comm., 217 Md. 101, 106, 141 A. 2d 699 (1958)*; and it would further appear that the Commission has not endeavored to establish rules and regulations for taxicab companies in incorporated cities or towns of less than 50,000 population, except Cumberland and Hagerstown. Article 78, Section 45 (1968 Cum. Supp.). However, in the instant case, and what is of concern [*428] to us, the language of the statute makes it clear and unmistakable that the legislature intended that the Public Service Commission should have authority to regulate the rates [***9] of a public utility such as the Chesapeake & Potomac Telephone Company. Article 78, Sections 1 and 2.

The appellants contend that the court may well determine that a rate is discriminatory or produces excessive revenues and grant a retroactive refund to correct this injustice, without in fact, engaging in the function of rate making. This is a spurious argument which advocates that a court may do by indirection that which it is not permitted to do directly.

[HN3] Where an administrative remedy is available, such as a hearing before the Public Service Commission, to determine the reasonableness of a rate, prior resort to that remedy is a necessary prerequisite to a standing before the courts. *Poe v. Baltimore City, 241 Md. 303, 311, 216 A. 2d 707 (1966)*; *Gager v. Kasdon, 234 Md. 7, 9, 10, 197 A. 2d 837 (1964)*, appeal dismissed, *379 U.S. 13 (1964)*; *Shpak v. Mytych, 231 Md. 414, 417, 418, 190 A. 2d 777 (1963)*.

If we were to follow the argument advanced by the appellants to its logical conclusion, we would witness the chaotic situation where juries would be performing the rate making function of the Public Service Commission by having a veto power over rates. Certainly, such [***10] would be the ultimate and practical effect of their action if they were to be allowed to render a verdict for reparation in favor of the plaintiff consumer in an action of assumpsit.

Public utilities are sometimes locally situated and may, on occasions, serve consumers only within the boundary of a political subdivision, but more frequently public utilities have a rate base spread over many political subdivisions, often state-wide in scope and its rates may be, and usually are, applicable to consumers residing in more than one political subdivision. The function of rate making for the purpose of determining what may be a reasonable [*429] return on the utilities' investment, as well as the determination of a fair rate base upon which the return may be computed, involves a highly technical and complicated process calling for an expertise which frequently taxes the experience and knowledge of the members of the Public Service Commission, as well as the court which may be called upon to review an established rate on appeal. The soundness of having such matters originally determined by a commission of persons qualified to evaluate the issues in a specialized field lies beyond dispute. [***11] Cf. *Poe v. Baltimore City, supra. Id. at 307.* See also 2 Md. L. Rev. 185, at 208, "Administrative Law In Maryland" by Hon. Reuben Oppenheimer.

In the instant case, we are not confronted with a situation where the consumer was charged a rate not in conformity with the established and published tariff set by the Commission or where there was error in the computation or application of the established rate. In such a situation an action in assumpsit may well be the proper remedy for the collection of an overcharge, but here the consumers were charged the approved tariff which they now strive to have declared discriminatory and unreasonable by a collateral attack on the decision of the Commission in establishing the rate. The appellants minimize the nature of this collateral attack by emphasizing [**308] that it is necessary in order to support their claim for reparation.

The appellants could have availed themselves of their day in court. The statute provides that all rates for utility service must be filed with the Commission; that such rates may become effective following 30 days notice to the Commission and the public; and that thereafter, only such rates may be charged. [***12] Whenever a new rate is filed with the Commission, the Commission may suspend the effectiveness of the proposed rate for a period up to 150 days while it considers the reasonableness of the rate. Code, Art. 78, Sections 27, 28 and 70.

[HN4] The statute further provides, that if any consumer [*430] complains that a rate is either unreasonable or discriminatory and the complaint is "deemed to be deserving of explanation," the Commission shall institute a proceeding to investigate the complaint and the Commission shall direct such relief as may be warranted. The Commission also has the authority to commence investigation on its own motion, to determine just and reasonable rates by order, to fix temporary rates, and to order refunds in certain situations defined by the statute. Code, Article 78, Sections 68, 70, 71 and 77.

The statute finally provides that orders and decisions of the Public Service Commission involving rates and other matters may be appealed to the courts by any party or any person in interest. Code, Article 78, Sections 90 and 98.

Rate making must necessarily be predictive in nature as it involves the legislative process of making a rule for the future. *Baltimore* [***13] *Gas and Electric Company v. McQuaid, 220 Md. 373, 383, 152 A. 2d 825 (1959).*

The Public Service Commission Law does provide for those situations where a rate becomes operative prior to a final determination of its fairness. In such a situation the statute provides:

"* * * If a proposed new rate or change

> of rate effecting an increase goes into effect before a final order is entered in the said proceedings, the Commission may, where practicable, order the proponent to keep a detailed and accurate account of all amounts received by reason of such new rate or increase, and the persons on whose behalf such amounts are paid, and after the conclusion of said proceedings, require the proponent to refund, with interest, to every such person, such part of the new or the increased rates as the Commission finds unjustified. If such refund is not practicable, the company shall charge off and amortize, by means of a temporary decrease, to be fixed by the Commission, [*431] below the rates as finally determined, for such period as the Commission may determine, the difference between the operating revenues under the rates charge [charged] and the operating revenues that would [***14] have been obtained from the same volume of business from the rates as finally determined." Article 78, Section 70(c).

In the case at bar, the Public Service Commission during the year 1964 reviewed the rates now under attack. No appeal was taken from the decision of the Public Service Commission by the plaintiff or other telephone subscribers in the Bowie area. Now, several years later they are demanding a determination of whether they should receive a $ 2,500,000.00 rebate. If such actions were allowed by this Court, serious attempts at reasonable rate making would prove farcical. The utility company would, in such event, never be able to project what should be a reasonable rate because they would have little knowledge of what contingent liabilities may be lurking in the future by way of rebates awarded by juries to dissatisfied customers. In the end we think this would militate to the disservice of the consumer.

The appellants readily agree that the ruling they are requesting would be an innovation in the public utility law of this [**309] State, and the only authority which approaches support for their proposition is the dissenting opinion in the Supreme Court case [***15] of *Montana-Dakota Utilities v. Northwestern Public Service Company, 341 U.S. 246 (1951).* In that case even the dissenting opinion recognized that the court did not have original jurisdiction to establish utility rates and proposed that upon remand to the District Court that it should stay the proceedings and request the Federal Power Commission, ("a matter within the Commission's special competence.") to determine what should have been the reasonable rate, which would be "only a preliminary interim step towards final judgment, * * *." *Id. at 265.*

In *Montana* both litigants were public utilities under [*432] the same management through interlocking directorships. Montana sued on an inter-company contract covering shared expenses and interchange of electric energy, and in addition to alleging unreasonable charges paid to it and exacted from it, the suit also alleged fraud. Mr. Justice Jackson writing the majority opinion in affirming the judgment of the Circuit Court of Appeals which dismissed the suit stated:

> "* * * It is admitted, however, that a utility could not institute a suit in a federal court to recover a portion of past rates which it simply alleges [***16] were unreasonable. It would be out of court for failure to exhaust administrative remedies, for, at any time in the past, it could have applied for and secured a review and, perhaps, a reduction of the rates by the Commission.
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> * * *
>
> "We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one." *Id. at 250-251.*

The appellants also endeavor to base their right of action on the language found in [HN5] Article 78, Section 103, which reads:

> "In any action by any public service company for the collection of any charge, no recovery shall be had if in the transaction on which suit is brought, the company has demanded a rate in excess of

> that which is lawful under this article at the time."

Their argument is based on the erroneous and gratuitous assumption that the rate charged by the appellee was an unlawful rate within the meaning of Section 103. Actually, [*433] the rate charged was the lawful tariff established by the Commission, and pursuant [***17] to Article 78, Section 27(a) (2), it would have been unlawful for the utility to have imposed any charge other than that specified in the tariffs filed with the Commission.

In like manner we think the appellants have misinterpreted *49 U.S.C. § 908* of the Interstate Commerce Act, which although not pertinent to the case at bar, they cite to demonstrate that the Interstate Commerce Act provides for reparations where excessive rates have been charged and that the failure of the Public Service Commission Law of Maryland to so provide, creates a vacuum into which the court should move by the imposition of a common law remedy. As we read *49 U.S.C. § 908*, although it is titled under the general heading of "Reparation awards; limitation of action," all that *Section 908* provides for is the recovery of overcharges, and in *Section 908 (f) (4)*, it defines "overcharges" as follows:

> "(4) The term "overcharges" as used in this section means *charges* for transportation services *in excess of those* applicable thereto under the *tariffs lawfully on file with the Commission*." (Emphasis supplied.)

[**310] Again, we call attention to the obvious fact that in the instant case [***18] the challenged rates are those which have been established by the Commission.

We are not persuaded by the novel argument advanced by the appellants and finding that their declaration fails to state a cause of action, we affirm the action of the lower court in sustaining the appellee's demurrer, without leave to amend.

Order affirmed, appellants to pay costs.

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Generally, the disobedience of a rule or order of a public utility commission by one bound thereby is a contempt.

Research References

West's Key Number Digest, Public Utilities ⇐172

Generally, the disobedience of a rule or order of a public utility commission by one bound thereby is a contempt.[1] However, there can be no punishment for contempt for disobedience of a portion of a public utility commission order which is void.[2] Statutory terms conferring the power to punish for contempt of its orders or official acts determine the extent of a public utility commission's authority.[3]

§ 243 Administrative review

Under statutory provisions, an appeal may be taken from the decision of the public service commission to a reviewing board.

Research References

West's Key Number Digest, Public Utilities ⇐169.1

Where a statute so provides, an appeal may be taken from the decision of the public utility commission to a reviewing board.[1] Such appeal clearly is not intended to provide for a true appellate review of the decision of an inferior tribunal; rather, it is intended to make available to those who were parties to the prior hearing and whose interests were adversely affected by the decision rendered therein a new hearing on all the issues of facts and law before an intermediate fact-finding tribunal.[2]

Under another statute, an appeal to the full commission may be taken from the ruling of a representative of the commission.[3] When no final decision is made by such a representative, there is no basis to appeal for a full commission hearing;[4] and an appeal for a full department hearing may be taken only upon being notified of the decision of the representative.[5]

C. JUDICIAL INTERVENTION OR REVIEW

Research References

Annotation References

A.L.R. Digest: Public Utilities § 46

A.L.R. Index: Appeal and Error; Appeal and Supersedeas Bond; Certiorari; Declaratory Judgments or Relief; Discretion; Due Process; Exhaustion of Remedies; Hearings; Injunctions; Judicial Review; Jurisdiction; Mandamus; Parties; Presumptions and Burden of Proof; Public Service Commissions; Rates and Charges; Record on Appeal; Remand; Review; Reversal; Rules of Procedure; Rules and Regulations; Setting Aside; Standing to Sue; Stay of Action or Proceeding; Utilities

1. In General

§ 244 Jurisdiction of courts in advance of or pending proceedings before commission

Matters within the original jurisdiction of

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solely for the benefit of the party making the application.

Cal.—Sokol v. Public Utilities Commission, 65 Cal. 2d 247, 53 Cal. Rptr. 673, 418 P.2d 265 (1966).

[Section 242]

[1]Cal.—People v. Hadley, 66 Cal. App. 370, 226 P. 836 (2d Dist. 1924).

Order not validated

Town's continuance of its garbage disposal business was not in violation of a commission's order which directed the town to cease and desist from interfering with a disposal business conducted by a private party under a certificate issued by the commission.

W.Va.—Allen v. Town of Pineville, 152 W. Va. 247, 162 S.E.2d 203 (1968).

[2]Okla.—Gulf Oil Corp. v. State, 1961 OK 71, 360 P.2d 933 (Okla. 1961).

[3]Tex.—Harrington v. Railroad Commission, 375 S.W.2d 892 (Tex. 1964).

[Section 243]

[1]**Person "aggrieved"**

The word "aggrieved" within a statute providing that any person "aggrieved" by a public utility administrator's orders or decisions shall have the right to appeal to the public utility hearing board is not to be construed as strictly as a requirement of aggrievement in the statute setting up a true appellate procedure but must be construed liberally if effect is to be given to the remedial purposes of the statute.

R.I.—Yellow Cab Co. of Providence v. Public Utility Hearing Bd., 96 R.I. 247, 191 A.2d 23 (1963).

[2]R.I.—Yellow Cab Co. of Providence v. Public Utility Hearing Bd., 96 R.I. 247, 191 A.2d 23 (1963).

[3]Mass.—Boston Edison Co. v. Brookline Realty & Inv. Corp., 10 Mass. App. Ct. 63, 405 N.E.2d 995 (1980).

[4]Mass.—Boston Edison Co. v. Brookline Realty & Inv. Corp., 10 Mass. App. Ct. 63, 405 N.E.2d 995 (1980).

[5]Mass.—Boston Edison Co. v. Brookline Realty & Inv. Corp., 10 Mass. App. Ct. 63, 405 N.E.2d 995 (1980).

a public utility or similar commission must be submitted to and passed on by the commission before a reviewing court can take jurisdiction, but no such requirement applies to matters over which the commission has no jurisdiction or lacks exclusive jurisdiction.

Research References

West's Key Number Digest, Public Utilities ⇐181, 183, 190

Primary[1] or original[2] jurisdiction in matters concerning the relationship between public utilities and the public normally rests with the public service commission.[3] Except in an emergency situation,[4] courts generally lack, and will not attempt to exercise, jurisdiction of a matter within the original jurisdiction of a public utility or similar commission until the matter has been submitted to, and passed on by, the commission.[5]

Issues requiring initial determination by a public utility commission include questions

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[Section 244]

[1]Ariz.—Campbell v. Mountain States Tel. & Tel. Co., 120 Ariz. 426, 586 P.2d 987 (Ct. App. Div. 1 1978).

Cal.—Hartwell Corp. v. Superior Court, 27 Cal. 4th 256, 115 Cal. Rptr. 2d 874, 38 P.3d 1098 (2002).

D.C.—Watergate East, Inc. v. District of Columbia Public Service Com'n, 662 A.2d 881 (D.C. 1995).

Fla.—Florida Power Corp. v. Advance Mobile Homes, Inc., 386 So. 2d 897 (Fla. Dist. Ct. App. 5th Dist. 1980).

Idaho—Lemhi Telephone Co. v. Mountain States Tel. & Tel. Co., 98 Idaho 692, 571 P.2d 753 (1977).

Md.—Bell Atlantic of Maryland, Inc. v. Intercom Systems Corp., 366 Md. 1, 782 A.2d 791 (2001).

Mass.—Boston Edison Co. v. Brookline Realty & Inv. Corp., 10 Mass. App. Ct. 63, 405 N.E.2d 995 (1980).

Mich.—Rinaldo's Const. Corp. v. Michigan Bell Telephone Co., 454 Mich. 65, 559 N.W.2d 647 (1997).

N.Y.—Guglielmo v. Long Island Lighting Co., 83 A.D.2d 481, 445 N.Y.S.2d 177 (2d Dep't 1981).

[2]Ind.—Indiana Bell Telephone Co., Inc. v. Friedland, 175 Ind. App. 622, 373 N.E.2d 344 (2d Dist. 1978).

La.—Ardoin v. Central Louisiana Elec. Co., Inc., 306 So. 2d 348 (La. Ct. App. 3d Cir. 1975), writ issued, 309 So. 2d 677 (La. 1975) and judgment aff'd, 318 So. 2d 5 (La. 1975).

Md.—Public Service Com'n of Maryland v. Maryland People's Counsel, 309 Md. 1, 522 A.2d 369 (1987).

N.J.—Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 390 A.2d 566 (1978).

Ohio—Steffen v. General Tel. Co., 60 Ohio App. 2d 144, 14 Ohio Op. 3d 111, 395 N.E.2d 1346 (1st Dist. Butler County 1978).

Vt.—Petition of Twenty-Four Vermont Utilities, 159 Vt. 339, 618 A.2d 1295 (1992).

Wash.—Tenore v. AT & T Wireless Services, 136 Wash. 2d 322, 962 P.2d 104 (1998).

Entry of order

Until state commission has made its finding and has entered its order so that appeal may be taken to court, jurisdiction of commission is exclusive.

Iowa—Elk Run Tel. Co. v. General Tel. Co. of Iowa, 160 N.W.2d 311 (Iowa 1968).

Legislative policy

Power of courts over public utilities is sharply limited by legislative policy intrusting exclusively to administrative bodies, like public service commission, many matters which might otherwise be subject to decision in court proceedings.

U.S.—Citibank, N. A. v. Graphic Scanning Corp., 618 F.2d 222 (2d Cir. 1980); CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp., 614 F.2d 33 (4th Cir. 1980); State of Cal. By and Through Dept. of Water Resources v. Oroville-Wyandotte Irr. Dist., 409 F.2d 532 (9th Cir. 1969).

Judicial abstention not required

N.Y.—Capital Telephone Co., Inc. v. Pattersonville Telephone Co., Inc., 56 N.Y.2d 11, 451 N.Y.S.2d 11, 436 N.E.2d 461 (1982).

[3]Mont.—Montana-Dakota Utilities Co., a Div. of MDU Resources Group, Inc. v. Montana Dept. of Public Service Regulation, 243 Mont. 492, 795 P.2d 473 (1990).

Pa.—Elkin v. Bell Telephone Co. of Pennsylvania, 491 Pa. 123, 420 A.2d 371 (1980).

[4]D.C.—Potomac Elec. Power Co. v. Public Service Com'n of Dist. of Columbia, 457 A.2d 776 (D.C. 1983).

Temporary order

If court, in dispute between two utilities over which one was entitled to serve certain area, was presented with emergency situation it could enter temporary order, under rule that courts may impose temporary equity in aid of agency's jurisdiction until administrative question had been determined, but court would not be able to invoke permanent equity where there was statutory remedy consisting of administrative agency created for express purpose of regulating and controlling service by public utilities.

Ind.—Decatur County Rural Elec. Membership Corp. v. Public Service Co., 150 Ind. App. 193, 275 N.E.2d 857 (Div. 1 1971).

Annotation References: Public service commission's implied authority to order refund of public utility revenues, 41 A.L.R. 5th 783.

[5]U.S.—CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp., 614 F.2d 33 (4th Cir. 1980); Crain v. Blue Grass Stockyards Co., 399 F.2d 868 (6th Cir. 1968).

Cal.—Ventura County Waterworks Dist. v. Susana Knolls Mut. Water Co., 7 Cal. App. 3d 672, 87 Cal. Rptr.

governing utility rates,[6] issuance of a certificate of convenience and necessity,[7] determinations as to what is in the public interest,[8] the reasonableness of the method, practice, or rule or regulation of a public utility,[9] or of utility service,[10] and matters related to public utility facilities.[11]

In some matters, courts may have full jurisdiction, exclusive of that of a public utility commission.[12] In other instances, where the

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1 (2d Dist. 1970).

Del.—Artesian Water Co. v. Cynwyd Club Apartments, Inc., 297 A.2d 387 (Del. 1972).

D.C.—Washington Metropolitan Area Transit Authority v. Public Service Com'n of Dist. of Columbia, 486 A.2d 682 (D.C. 1984).

Fla.—Florida Public Service Com'n v. Bryson, 569 So. 2d 1253 (Fla. 1990).

Kan.—Denison Mut. Tel. Co. v. Kendall, 195 Kan. 227, 403 P.2d 1011 (1965).

La.—South Louisiana Elec. Co-op. Ass'n v. Central Louisiana Elec. Co., 140 So. 2d 687 (La. Ct. App. 1st Cir. 1962); Pointe Coupee Elec. Membership Corp. v. Central La. Elec. Co., 140 So. 2d 683 (La. Ct. App. 1st Cir. 1962).

Md.—Bell Atlantic of Maryland, Inc. v. Intercom Systems Corp., 366 Md. 1, 782 A.2d 791 (2001).

Mass.—Holyoke Water Power Co. v. City of Holyoke, 349 Mass. 442, 208 N.E.2d 801 (1965).

Mich.—Rinaldo's Const. Corp. v. Michigan Bell Telephone Co., 454 Mich. 65, 559 N.W.2d 647 (1997).

Mo.—DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 S.W.2d 674 (Mo. Ct. App. 1978).

N.M.—First Central Service Corp. v. Mountain Bell Tel., 95 N.M. 509, 623 P.2d 1023 (Ct. App. 1981).

N.Y.—Guglielmo v. Long Island Lighting Co., 83 A.D.2d 481, 445 N.Y.S.2d 177 (2d Dep't 1981).

Ohio—State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas, 97 Ohio St. 3d 69, 2002-Ohio-5312, 776 N.E.2d 92 (2002).

Pa.—Allport Water Authority v. Winburne Water Co., 258 Pa. Super. 555, 393 A.2d 673 (1978).

Vt.—Petition of Pfenning, 136 Vt. 92, 385 A.2d 1070 (1978).

Wash.—Tenore v. AT & T Wireless Services, 136 Wash. 2d 322, 962 P.2d 104 (1998).

Nonbinding decision

Decision rendered by court otherwise than on review of action by public service commission would not be binding on commission.

Mo.—State ex rel. and to Use of Public Service Com'n v. Blair, 347 Mo. 220, 146 S.W.2d 865 (1940).

[6]Ark.—Oklahoma Gas and Elec. Co. v. Lankford, 278 Ark. 595, 648 S.W.2d 65 (1983).

Mont.—Montana-Dakota Utilities Co., a Div. of MDU Resources Group, Inc. v. Montana Dept. of Public Service Regulation, 243 Mont. 492, 795 P.2d 473 (1990).

[7]Ala.—Alabama Public Service Commission v. AAA Motor Lines, Inc., 272 Ala. 362, 131 So. 2d 172 (1961).

Construction

Ariz.—Kunkle Transfer & Storage Co. v. Superior Court In and For Maricopa County, 22 Ariz. App. 315, 526 P.2d 1270 (Div. 1 1974); Arizona Tank Lines, Inc. v. Arizona Corp. Commission, 18 Ariz. App. 390, 502 P.2d 539 (Div. 1 1972).

Kan.—Pelican Transfer & Storage, Inc. v. Kansas Corp. Commission, 195 Kan. 76, 402 P.2d 762 (1965).

[8]**Duplication of service**

Ind.—Southern Indiana Gas & Elec. Co. v. Indiana Statewide Rural Elec. Co-op., Inc., 251 Ind. 459, 242 N.E.2d 361 (1968).

[9]D.C.—Bird v. Chesapeake & Potomac Tel. Co., 185 A.2d 917 (Mun. Ct. App. D.C. 1962).

Ind.—Indiana Forge and Mach. Co., Inc. v. Northern Indiana Public Service Co., 396 N.E.2d 910 (Ind. Ct. App. 3d Dist. 1979) (disapproved of on other grounds by, Austin Lakes Joint Venture v. Avon Utilities, Inc., 648 N.E.2d 641 (Ind. 1995)).

Mont.—Montana-Dakota Utilities Co., a Div. of MDU Resources Group, Inc. v. Montana Dept. of Public Service Regulation, 243 Mont. 492, 795 P.2d 473 (1990).

N.Y.—M. R. Glass, Inc. v. New York Tel. Co., 48 Misc. 2d 21, 264 N.Y.S.2d 160 (Sup 1965).

[10]Iowa—Oliver v. Iowa Power & Light Co., 183 N.W.2d 687 (Iowa 1971).

Pa.—Bell Tel. Co. of Pennsylvania v. Uni Lite, Inc., 294 Pa. Super. 89, 439 A.2d 763 (1982).

[11]Pa.—DiSanto v. Dauphin Consol. Water Supply Co., 291 Pa. Super. 440, 436 A.2d 197 (1981).

[12]Miss.—Wejac Utilities, Inc. v. Davenport, 269 So. 2d 339 (Miss. 1972).

Mo.—State ex rel. Fee Fee Trunk Sewer, Inc. v. Litz, 596 S.W.2d 466 (Mo. Ct. App. E.D. 1980).

N.C.—Burke Transit Co. v. Queen City Coach Co., 228 N.C. 768, 47 S.E.2d 297 (1948).

Pa.—Bell Telephone Co. v. Philadelphia Warwick Co., 355 Pa. 637, 50 A.2d 684 (1947).

S.C.—Martin v. Carolina Water Services, Inc., 273 S.C. 43, 254 S.E.2d 52 (1979).

Tex.—Turner v. Zanes, 206 S.W.2d 144 (Tex. Civ. App. Dallas 1947), writ refused n.r.e. and (overruled in part on other grounds by, Ex parte Henry, 147 Tex. 315, 215 S.W.2d 588 (1948)).

W.Va.—Reynolds Transp. Co. v. Public Service Commission, 125 W. Va. 71, 23 S.E.2d 53 (1942).

Wyo.—Tri-County Elec. Ass'n, Inc. v. City of Gillette, 525 P.2d 3 (Wyo. 1974).

Matter of private concern

(1) Where matter is one of purely private concern be-

authority conferred on a public utility commission is not exclusive, courts and public utility commissions may generally exercise concurrent jurisdiction over the same matters.[13] Statutory provisions and rules may provide guidance in harmonizing conflicts that may occur when courts and public utility commissions possess and exercise concurrent jurisdiction over a matter.[14]

Where the public utilities commission is not vested with judicial power, controversies involving matters beyond merely administrative questions need not be submitted to, or decided by, the commission before bringing action in court.[15] Likewise, where a controversy involves only questions of law, direct application for relief may ordinarily be made to the court rather than to the commission.[16]

Courts have entertained jurisdiction without submission of the matter to the public utility commission[17] in contexts including challenges to the jurisdiction of the public utility com-

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tween public utility and one of its patrons, courts have jurisdiction to determine such controversy.

Okla.—James v. Oklahoma Natural Gas Co., 1937 OK 560, 181 Okla. 54, 72 P.2d 495 (1937); Central States Power & Light Corp. v. Thompson, 1936 OK 434, 177 Okla. 310, 58 P.2d 868 (1936).

(2) Commission's lack of power to adjudicate purely private matters between utility and individual, see § 167.

Pending proceeding

Court will interfere to end before its conclusion a proceeding conducted by commission without or in excess of authority only where naked jurisdiction is challenged and not direction of its exercise.

N.Y.—Long Island Lighting Co. v. Maltbie, 176 Misc. 1, 26 N.Y.S.2d 452 (Sup 1941), judgment aff'd, 262 A.D. 376, 29 N.Y.S.2d 532 (3d Dep't 1941), judgment aff'd, 287 N.Y. 691, 39 N.E.2d 301 (1942).

[13]U.S.—Wessely Energy Corp. v. Arkansas Louisiana Gas Co., 593 F.2d 917 (10th Cir. 1979).

Ark.—Southwestern Elec. Power Co. v. Coxsey, 257 Ark. 534, 518 S.W.2d 485 (1975).

Cal.—Ventura County Waterworks Dist. v. Susana Knolls Mut. Water Co., 7 Cal. App. 3d 672, 87 Cal. Rptr. 1 (2d Dist. 1970).

N.Y.—State v. McBride Transp., Inc., 56 Misc. 2d 90, 288 N.Y.S.2d 170 (Sup 1968).

Okla.—Energy Transportation Systems, Inc. v. Kansas City Southern Ry. Co., 1981 OK 159, 638 P.2d 459 (Okla. 1981).

Pa.—Leveto v. National Fuel Gas Distribution Corp., 243 Pa. Super. 510, 366 A.2d 270 (1976).

Exclusive jurisdiction of commission after assumption thereof, see § 168.

"Pending" matter

Absence of formal entry of discontinuance does not mean that matter still is "pending" before public service board so as to preclude exercise of court's concurrent jurisdiction.

Vt.—Gloss v. Delaware & H. R. Co., 135 Vt. 419, 378 A.2d 507 (1977).

Mutual exclusivity of remedies before court and before public utility commission

W.Va.—State ex rel. Chesapeake and Potomac Telephone Co. of W. Va. v. Ashworth, 190 W. Va. 547, 438 S.E.2d 890 (1993).

Court's retention of jurisdiction during public utility commission proceedings

Mich.—Huron Valley Steel Corp. v. Detroit Edison Co., 110 Mich. App. 253, 312 N.W.2d 223 (1981).

Initiation of action by district attorney

Cal.—People ex rel. Orloff v. Pacific Bell, 31 Cal. 4th 1132, 7 Cal. Rptr. 3d 315, 80 P.3d 201 (2003).

Primary jurisdiction of consumer complaints

Public Service Commission has primary, rather than exclusive or concurrent, jurisdiction to hear consumer complaints brought against public service companies that the Commission regulates.

Md.—Bell Atlantic of Maryland, Inc. v. Intercom Systems Corp., 366 Md. 1, 782 A.2d 791 (2001).

[14]Cal.—People ex rel. Orloff v. Pacific Bell, 31 Cal. 4th 1132, 7 Cal. Rptr. 3d 315, 80 P.3d 201 (2003).

Vt.—Petition of Pfenning, 136 Vt. 92, 385 A.2d 1070 (1978).

Exclusive jurisdiction of public utility commission

The Public Utilities Commission has exclusive jurisdiction over the regulation and control of utilities, and once it has assumed jurisdiction, it cannot be hampered, interfered with, or second-guessed by a concurrent superior court action addressing the same issue.

Cal.—Hartwell Corp. v. Superior Court, 27 Cal. 4th 256, 115 Cal. Rptr. 2d 874, 38 P.3d 1098 (2002).

[15]Ind.—Warehouse Distributing Corp. v. Dixon, 97 Ind. App. 475, 187 N.E. 217 (1933).

Or.—Tom Lee, Inc. v. Pacific Telephone & Telegraph Co., 154 Or. 272, 59 P.2d 683 (1936).

[16]Ky.—City of Catlettsburg v. Public Service Commission, 486 S.W.2d 62 (Ky. 1972).

[17]U.S.—Wessely Energy Corp. v. Arkansas Louisiana Gas Co., 438 F. Supp. 360 (W.D. Okla. 1977), judgment aff'd and remanded, 593 F.2d 917 (10th Cir. 1979).

Ill.—People ex rel. Carey v. Lincoln Towing Service, Inc., 54 Ill. App. 3d 61, 11 Ill. Dec. 640, 369 N.E.2d 94 (1st Dist. 1977).

Lawfulness of deposit required for service

Ill.—Davis v. East St. Louis & Interurban Water Co.,

mission,[18] issues concerning franchises or charter powers,[19] or the validity of a public utility commission order requiring a public utility to comply with data requests of the commission,[20] matters initiated by public prosecutors in the public interest, as expressly authorized by state law,[21] and declaratory judgment matters.[22]

Courts also generally have jurisdiction over actions against public utilities for money damages,[23] including most contract actions,[24] and tort claims.[25] Casting allegations in a com-

133 Ill. App. 2d 801, 270 N.E.2d 424 (5th Dist. 1971).

[18]Ill.—Regional Transp. Authority v. Burlington Northern Inc., 100 Ill. App. 3d 779, 55 Ill. Dec. 818, 426 N.E.2d 1143 (1st Dist. 1981).

Nev.—Public Service Com'n of Nevada v. Eighth Judicial Dist. Court of State of Nev., 107 Nev. 680, 818 P.2d 396 (1991).

[19]**Cancellation of franchise**

Cal.—Citizens Utilities Co. v. Superior Court, 56 Cal. App. 3d 399, 128 Cal. Rptr. 582 (1st Dist. 1976); City of Oakland v. Key System, 64 Cal. App. 2d 427, 149 P.2d 195 (1st Dist. 1944).

[20]Me.—Central Maine Power Co. v. Maine Public Utilities Commission, 395 A.2d 414 (Me. 1978).

[21]Cal.—People ex rel. Orloff v. Pacific Bell, 31 Cal. 4th 1132, 7 Cal. Rptr. 3d 315, 80 P.3d 201 (2003).

[22]Okla.—Energy Transportation Systems, Inc. v. Kansas City Southern Ry. Co., 1981 OK 159, 638 P.2d 459 (Okla. 1981).

[23]Cal.—People ex rel. Orloff v. Pacific Bell, 31 Cal. 4th 1132, 7 Cal. Rptr. 3d 315, 80 P.3d 201 (2003).

Ill.—Consumers Guild of America, Inc. v. Illinois Bell Tel. Co., 103 Ill. App. 3d 959, 59 Ill. Dec. 290, 431 N.E.2d 1047 (1st Dist. 1981).

Particular actions

(1) Action for damages for refusal to provide service.

Cal.—Vila v. Tahoe Southside Water Utility, 233 Cal. App. 2d 469, 43 Cal. Rptr. 654 (3d Dist. 1965).

(2) Action for damages for unjustified discontinuance of service.

Conn.—Steele v. Clinton Elec. Light & Power Co., 123 Conn. 180, 193 A. 613, 112 A.L.R. 232 (1937).

(3) Action for damages for failure to give release from service.

Tex.—Mid-South Elec. Co-op. Ass'n v. Cole, 562 S.W.2d 930 (Tex. Civ. App. Waco 1978).

(4) Action for damages for discrimination.

N.Y.—Equitable Paper Bag Co. v. Consolidated Edison Co. of N.Y., 18 Misc. 2d 118, 183 N.Y.S.2d 366 (Sup 1958).

R.I.—Main Realty Co. v. Blackstone Valley Gas & Elec. Co., 59 R.I. 29, 193 A. 879, 112 A.L.R. 744 (1937).

(5) Action for damages under antitrust laws.

Tex.—Woods Exploration & Producing Co. v. Aluminum Co. of America, 382 S.W.2d 343 (Tex. Civ. App. Corpus Christi 1964), writ refused n.r.e.

[24]Ariz.—Campbell v. Mountain States Tel. & Tel. Co., 120 Ariz. 426, 586 P.2d 987 (Ct. App. Div. 1 1978).

Conn.—Seymour Water Co. v. Horischak, 149 Conn. 435, 181 A.2d 112 (1962).

Ind.—Indiana Tel. Corp. v. Indiana Bell Tel. Co., Inc., 171 Ind. App. 616, 358 N.E.2d 218 (2d Dist. 1976), opinion modified on other grounds, 171 Ind. App. 616, 360 N.E.2d 610 (2d Dist. 1977).

Kan.—Hamilton v. United Tel. Co. of Kansas, Inc., 6 Kan. App. 2d 885, 636 P.2d 202 (1981).

Me.—Dickinson v. Maine Public Service Co., 244 A.2d 549 (Me. 1968).

Ohio—State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas, 97 Ohio St. 3d 69, 2002-Ohio-5312, 776 N.E.2d 92 (2002).

Pa.—Nagy v. Bell Tel. Co. of Pennsylvania, 292 Pa. Super. 24, 436 A.2d 701 (1981).

Tex.—Central Power and Light Co. v. Del Mar Conservation Dist., 594 S.W.2d 782 (Tex. Civ. App. San Antonio 1980), writ refused n.r.e., (June 25, 1980).

Vt.—Gloss v. Delaware & H. R. Co., 135 Vt. 419, 378 A.2d 507 (1977).

W.Va.—Benwood-McMechen Water Co. v. City of Wheeling, 121 W. Va. 373, 4 S.E.2d 300 (1939).

Special expertise

Federal Power Commission has no special expertise with respect to matters of contract, and courts should not defer to it in such area.

U.S.—Monsanto Co. v. United Gas Pipe Line Co., 360 F. Supp. 1054 (D.D.C. 1973).

Exception

Public utility commission was required to initially decide whether water company could require that installation of public utility facilities must be performed by its approved contractor rather than by developer or contractor employed by developer.

Pa.—DiSanto v. Dauphin Consol. Water Supply Co., 291 Pa. Super. 440, 436 A.2d 197 (1981).

[25]Ariz.—Campbell v. Mountain States Tel. & Tel. Co., 120 Ariz. 426, 586 P.2d 987 (Ct. App. Div. 1 1978).

Ill.—Consumers Guild of America, Inc. v. Illinois Bell Tel. Co., 103 Ill. App. 3d 959, 59 Ill. Dec. 290, 431 N.E.2d 1047 (1st Dist. 1981).

Kan.—Hamilton v. United Tel. Co. of Kansas, Inc., 6 Kan. App. 2d 885, 636 P.2d 202 (1981).

Mich.—Rinaldo's Const. Corp. v. Michigan Bell Telephone Co., 454 Mich. 65, 559 N.W.2d 647 (1997).

Ohio—State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas, 97 Ohio St. 3d 69, 2002-Ohio-5312, 776 N.E.2d 92 (2002).

plaint to sound in tort or contract is not sufficient, however, to confer jurisdiction on a court where a claim is essentially one that the public utility commission has exclusive jurisdiction to resolve.[26]

Courts may also grant injunctive relief although a matter has not been submitted to the public utility commission,[27] such as where one public service corporation claims harm due to another utility's invasion of its certificated area,[28] and where a particular customer seeks to enjoin discontinuance of service, or to compel the utility to provide or restore service.[29]

Courts lack jurisdiction, however, to enjoin public utilities from performing their duties,[30] and thus may not enjoin the commission from conducting a hearing,[31] unless the allegations of the complaint raise substantial questions as to the commission's jurisdiction over the subject matter.[32]

§ 245 Jurisdiction of courts in advance of or pending proceedings before commission—Jurisdiction as to rates or charges

Questions concerning the rates of a public utility must be addressed to the public utility commission before a court can address them, except where a utility makes the claim that rates approved by the commission are confiscatory.

Research References

West's Key Number Digest, Public Utilities ⇐181

Public utility commissions, not courts, normally make the initial determination as to the rates of a public utility where, under constitutional or statutory provisions, the determination of such questions is within their jurisdiction.[1] Accordingly, public utility commissions typically have primary jurisdiction over the question of the reasonableness of the

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Pa.—Bell Tel. Co. of Pennsylvania v. Pennsylvania Public Utility Commission, 53 Pa. Commw. 241, 417 A.2d 827 (1980).

Fla.—Mobile America Corp., Inc. v. Southern Bell Tel. & Tel. Co., 282 So. 2d 181 (Fla. Dist. Ct. App. 1st Dist. 1973), aff'd as modified on other grounds, 291 So. 2d 199 (Fla. 1974).

[26]Ohio—State ex rel. The Illuminating Co. v. Cuyahoga Cty. Court of Common Pleas, 97 Ohio St. 3d 69, 2002-Ohio-5312, 776 N.E.2d 92 (2002).

[27]Ind.—Southern Indiana Gas & Elec. Co. v. Indiana Statewide Rural Elec. Co-op., Inc., 251 Ind. 459, 242 N.E.2d 361 (1968).

La.—Gulf States Utilities Co. v. Louisiana Public Service Com'n, 578 So. 2d 71 (La. 1991).

Nev.—City of Las Vegas v. Cragin Industries, Inc., 86 Nev. 933, 478 P.2d 585 (1970) (disapproved of on other grounds by, Sandy Valley Associates v. Sky Ranch Estate Owners Ass'n, 117 Nev. 948, 35 P.3d 964 (2001)).

Wash.—Kittitas County v. Chicago, M., St. P. & P. R. Co., 4 Wash. App. 768, 483 P.2d 1279 (Div. 3 1971).

[28]Ariz.—Tucson Gas, Elec. Light & Power Co. v. Trico Elec. Co-op., Inc., 2 Ariz. App. 105, 406 P.2d 740 (1965).

[29]Cal.—Vila v. Tahoe Southside Water Utility, 233 Cal. App. 2d 469, 43 Cal. Rptr. 654 (3d Dist. 1965).

Conn.—Steele v. Clinton Elec. Light & Power Co., 123 Conn. 180, 193 A. 613, 112 A.L.R. 232 (1937).

Ill.—Davis v. East St. Louis & Interurban Water Co., 133 Ill. App. 2d 801, 270 N.E.2d 424 (5th Dist. 1971).

[30]Cal.—Union City v. Southern Pac. Co., 261 Cal. App. 2d 277, 67 Cal. Rptr. 816 (1st Dist. 1968).

Limitation of jurisdiction statute

In view of statute depriving particular courts of jurisdiction to interfere with public utilities commission's performance of its official duties, statute vesting such courts with jurisdiction to award damages against public utility is limited to situation in which award of damages would not hinder or frustrate commission's declared supervisory and regulatory policies.

Cal.—Waters v. Pacific Telephone Co., 12 Cal. 3d 1, 114 Cal. Rptr. 753, 523 P.2d 1161 (1974).

[31]Pa.—Borough of Akron v. Pennsylvania Public Utility Commission, 453 Pa. 554, 310 A.2d 271 (1973).

[32]Pa.—Pennsylvania Public Utility Commission v. Borough of Akron, 441 Pa. 9, 270 A.2d 393 (1970).

[Section 245]

[1]U.S.—Maine Public Service Co. v. Federal Power Commission, 579 F.2d 659 (1st Cir. 1978); Crain v. Blue Grass Stockyards Co., 399 F.2d 868 (6th Cir. 1968).

Ariz.—Arizona Corp. Commission v. Citizens Utilities Co., 120 Ariz. 184, 584 P.2d 1175 (Ct. App. Div. 1 1978).

Colo.—Public Utilities Commission v. District Court in and for City and County of Denver, 186 Colo. 278, 527 P.2d 233 (1974).

D.C.—Potomac Elec. Power Co. v. Public Service Commission, 380 A.2d 126 (D.C. 1977).

Fla.—Richter v. Florida Power Corp., 366 So. 2d 798 (Fla. Dist. Ct. App. 2d Dist. 1979).

Ga.—Norman v. United Cities Gas Co., 231 Ga. 788, 204 S.E.2d 127 (1974).

Ill.—Consumers Guild of America, Inc. v. Illinois Bell Tel. Co., 103 Ill. App. 3d 959, 59 Ill. Dec. 290, 431 N.E.2d 1047 (1st Dist. 1981).

Ind.—Indiana Bell Telephone Co., Inc. v. Friedland,

rates charged by a public utility.[2]

Consistent with this principle, a court cannot issue an injunction effectuating a rate schedule that the public utility commission has not considered or ruled upon.[3] Once rates have been established, however, it is for the courts to interpret the schedules, to determine whether the schedules are applied as the commission established them, and to enforce those schedules.[4]

Generally, a suit to recover excessive charges paid to a public utility may be maintained without first proceeding before the commission,[5] but such a suit is not maintainable where it would necessitate the fixing of a rate by the court.[6]

Where a utility has been paid less than, or has rebated part of, the lawful rate, it may sue to recover the amount of the rebate or underpayment without prior resort to the commission.[7] A court has jurisdiction, and the public utility commission has no jurisdiction, of a suit by a utility to recover charges that have been collected by, and are in the hands

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175 Ind. App. 622, 373 N.E.2d 344 (2d Dist. 1978).

Iowa—Iowa Public Service Co. v. Iowa State Commerce Commission, 263 N.W.2d 766 (Iowa 1978).

Kan.—Denison Mut. Tel. Co. v. Kendall, 195 Kan. 227, 403 P.2d 1011 (1965).

La.—Daily Advertiser v. Trans-La, a Div. of Atmos Energy Corp., 612 So. 2d 7 (La. 1993).

Md.—Spintman v. Chesapeake & Potomac Tel. Co. of Md., 254 Md. 423, 255 A.2d 304 (1969).

Mass.—Massachusetts Elec. Co. v. Doctors Hospital of Worcester, Inc., 11 Mass. App. Ct. 889, 413 N.E.2d 779 (1980).

Mo.—DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 S.W.2d 674 (Mo. Ct. App. 1978).

N.Y.—Van Dussen-Storto Motor Inn, Inc. v. Rochester Tel. Corp., 42 A.D.2d 400, 348 N.Y.S.2d 404 (4th Dep't 1973), order aff'd, 34 N.Y.2d 904, 359 N.Y.S.2d 286, 316 N.E.2d 719 (1974).

Ohio—Kazmaier Supermarket, Inc. v. Toledo Edison Co., 61 Ohio St. 3d 147, 573 N.E.2d 655 (1991).

Okla.—Continental Tel. Co. of Oklahoma, Inc. v. Hunter, 1979 OK 14, 590 P.2d 667 (Okla. 1979).

Pa.—Einhorn v. Philadelphia Elec. Co., 410 Pa. 630, 190 A.2d 569 (1963).

Tex.—Public Utility Commission v. City of Corpus Christi, 555 S.W.2d 509 (Tex. Civ. App. Waco 1977), writ refused n.r.e., 569 S.W.2d 494 (Tex. 1978).

Vt.—Petition of Pfenning, 136 Vt. 92, 385 A.2d 1070 (1978).

Wash.—Tenore v. AT & T Wireless Services, 136 Wash. 2d 322, 962 P.2d 104 (1998).

Implementation of tariff

U.S.—Mississippi Power & Light Co. v. United Gas Pipeline Co., 532 F.2d 412 (5th Cir. 1976).

[2]U.S.—New York State Elec. and Gas Corp. v. New York Independent System Operator, Inc., 168 F. Supp. 2d 23 (N.D. N.Y. 2001); Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc., 535 F. Supp. 225 (S.D. N.Y. 1982); Northern Natural Gas Co. v. Landon, 212 F. Supp. 856 (D. Kan. 1961), judgment aff'd, 338 F.2d 17, 9 Fed. R. Serv. 2d 15A.3, Case 2 (10th Cir. 1964).

Ill.—Consumers Guild of America, Inc. v. Illinois Bell Tel. Co., 103 Ill. App. 3d 959, 59 Ill. Dec. 290, 431 N.E.2d 1047 (1st Dist. 1981).

Iowa—Oliver v. Iowa Power & Light Co., 183 N.W.2d 687 (Iowa 1971).

Md.—Spintman v. Chesapeake & Potomac Tel. Co. of Md., 254 Md. 423, 255 A.2d 304 (1969).

Mich.—Rinaldo's Const. Corp. v. Michigan Bell Telephone Co., 454 Mich. 65, 559 N.W.2d 647 (1997).

Ohio—Milligan v. Ohio Bell Tel. Co., 56 Ohio St. 2d 191, 10 Ohio Op. 3d 352, 383 N.E.2d 575 (1978).

Pa.—Bell Tel. Co. of Pennsylvania v. Uni Lite, Inc., 294 Pa. Super. 89, 439 A.2d 763 (1982).

Proceedings for relief from unreasonable rates, generally, see § 145.

[3]Nev.—Sierra Pac. Power Co. v. Public Service Commission, 92 Nev. 522, 554 P.2d 263 (1976).

[4]U.S.—New York State Elec. and Gas Corp. v. New York Independent System Operator, Inc., 168 F. Supp. 2d 23 (N.D. N.Y. 2001); Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc., 535 F. Supp. 225 (S.D. N.Y. 1982).

N.Y.—Columbia Gas of New York, Inc. v. New York State Elec. & Gas Corp., 56 Misc. 2d 367, 289 N.Y.S.2d 339 (Sup 1968).

[5]Ill.—Cummings v. Commonwealth Edison Co., 64 Ill. App. 2d 320, 213 N.E.2d 18 (1st Dist. 1965).

Purely legal question

Statute providing that person may complain to commission concerning actions of public utility did not deprive court of jurisdiction over ratepayer's claim of overcharge by utility, where resolution of case involved purely legal question of statutory interpretation.

N.H.—Nelson v. Public Service Co., 119 N.H. 327, 402 A.2d 623 (1979).

[6]Kan.—Holton Creamery Co. v. Brown, 141 Kan. 830, 44 P.2d 262 (1935).

[7]Cal.—Gardner v. Rich Mfg. Co., 68 Cal. App. 2d 725, 158 P.2d 23 (2d Dist. 1945).

Mass.—Papetti v. Alicandro, 317 Mass. 382, 58 N.E.2d 155 (1944).

of, a third party.[8]

In various other particular actions concerning the rates or charges of public utilities, it has been held that the complaining party is not required first to seek relief before a public utility commission, as in actions concerning issues with respect to periodic rate adjustments,[9] or where relief is sought in an antitrust action against a public utility for an alleged manipulation of its rate structure in an anticompetitive manner,[10] or in matters involving a question peculiar to the complainant.[11] Likewise, where a ratemaking agency is depriving a party of procedural due process by inordinate delay in rendering an administrative decision, a court may intervene without prior involvement of the public utility commission.[12]

Confiscatory rates.

A utility may bring an action to obtain relief from confiscatory rates without first applying to the public utilities commission for a modification,[13] especially where there has been a long-continued and unreasonable delay in putting an end to the confiscatory rates.[14]

2. *Judicial Review of Public Utility Commission Orders*

§ 246 Statutory and constitutional provisions governing judicial review

The orders of a public utility or similar commission are subject to such judicial review as is authorized by constitutional or statutory provisions.

Research References

West's Key Number Digest, Public Utilities ⇐181, 188, 189, 192, 194

The orders of a public utility or similar commission are subject to such judicial review, by appeal or otherwise, as is authorized by constitutional or statutory provisions,[1] and any right to appeal from, or obtain judicial review of, the orders or regulations of such commission is founded wholly on constitutional or statutory provisions.[2] Consequently, the orders and regulations of a public utility commission may be reviewed only by the court, and in the manner, specified by statute

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[8]Pa.—Bell Telephone Co. v. Philadelphia Warwick Co., 355 Pa. 637, 50 A.2d 684 (1947).

[9]Tex.—Southern Union Gas Co. v. City of Port Neches, 544 S.W.2d 176 (Tex. Civ. App. Beaumont 1976).

[10]La.—South-West Utilities, Inc. v. South Central Bell Telephone Co., 339 So. 2d 425 (La. Ct. App. 1st Cir. 1976).

[11]Ky.—Bee's Old Reliable Shows, Inc. v. Kentucky Power Co., 334 S.W.2d 765 (Ky. 1960).

[12]Mass.—Warner Cable of Massachusetts, Inc. v. Community Antenna Television Commission, 372 Mass. 495, 362 N.E.2d 897 (1977).

[13]La.—Gulf States Utilities Co. v. Louisiana Public Service Com'n, 578 So. 2d 71 (La. 1991).

[14]Tex.—City of Tyler v. Television Cable Service, Inc., 481 S.W.2d 166 (Tex. Civ. App. Tyler 1972).

[Section 246]

[1]U.S.—Hutchison v. Pan Am. Petroleum Co., 388 F.2d 111 (10th Cir. 1968).

Cal.—County of Sonoma v. State Energy Resources Conservation etc. Com., 40 Cal. 3d 361, 220 Cal. Rptr. 114, 708 P.2d 693 (1985).

Ga.—Georgia Power Co. v. Georgia Public Service Commission, 231 Ga. 339, 201 S.E.2d 423 (1973).

Iowa—Kohorst v. Iowa State Commerce Com'n, 348 N.W.2d 619 (Iowa 1984).

Kan.—Pelican Transfer & Storage, Inc. v. Kansas Corp. Commission, 195 Kan. 76, 402 P.2d 762 (1965).

Mich.—Sullivan v. Michigan Public Service Commission, 93 Mich. App. 391, 287 N.W.2d 188 (1979).

Neb.—Application of Neuswanger, 170 Neb. 670, 104 N.W.2d 235 (1960).

N.M.—In re Held Orders of U S West Communications, Inc., 1999-NMSC-024, 127 N.M. 375, 981 P.2d 789 (1999).

N.Y.—Rochester Telephone Corp. v. Public Service Com'n of State of N.Y., 87 N.Y.2d 17, 637 N.Y.S.2d 333, 660 N.E.2d 1112 (1995).

Or.—American Can Co. v. Davis, 28 Or. App. 207, 559 P.2d 898 (1977).

Utah—Silver Beehive Tel. Co., Inc. v. Public Service Commission, 30 Utah 2d 44, 512 P.2d 1327 (1973).

Role of public utility commission as rule-making or adjudicative

Because the role of the Public Utilities Commission (PUC) in a given case dictates the particular statutory procedures required to be followed, threshold question in judicial review of a PUC decision is whether the PUC was acting in a rule-making or adjudicative capacity.

Colo.—City of Aurora v. Public Utilities Com'n of State of Colo., 785 P.2d 1280 (Colo. 1990).

[2]Ala.—Ex parte Alabama Public Service Commission, 268 Ala. 322, 106 So. 2d 158 (1958).

Ill.—Private Tele-Communications v. Illinois Bell Tel. Co., 31 Ill. App. 3d 887, 335 N.E.2d 110 (1st Dist.

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ANNOTATION.

Duress by company furnishing power or the like.

In a number of instances the courts have applied to payments made to companies furnishing power or the like the principle that a payment made to one with no legal right to receive it, and made to prevent injury to the payer's business or property, is considered as made under duress, and may be recovered from the party receiving it. The circumstances set forth in the following cases have been held to constitute duress, or to present a question for the jury in that respect:

Illinois.—Chicago v. Northwestern Mut. L. Ins. Co. 218 Ill. 40, 1 L.R.A. (N.S.) 770, 75 N. E. 803. Compare Koenig v. People's Gaslight & Coke Co. (1910) 153 Ill. App. 432.

Indiana.—Indiana Natural Illuminating Gas Co. v. Anthony (1900) 26 Ind. App. 307, 58 N. E. 868.

Kansas.—See the reported case (MANHATTAN MILL. CO. v. MANHATTAN GAS & E. Co. ante, 176).

Massachusetts.—Boston v. Edison Electric Illuminating Co. (1922) 242 Mass. 305, 136 N. E. 113.

Minnesota.—Panton v. Duluth Gas & Water Co. (1892) 50 Minn. 175, 36 Am. St. Rep. 635, 52 N. W. 527.

Missouri.—Westlake v. St. Louis (1882) 77 Mo. 47, 46 Am. Rep. 4; St. Louis Brewing Asso. v. St. Louis (1897) 140 Mo. 419, 37 S. W. 525, 41 S. W. 911; American Brewing Co. v. St. Louis (1904) 187 Mo. 367, 86 S. W. 129, 2 Ann. Cas. 821.

North Carolina.—Piedmont Power & Light Co. v. L. Banks Holt Mfg. Co. (1922) 183 N. C. 327, 111 S. E. 623.

Pennsylvania.—See Barnes Laundry Co. v. Pittsburgh (1920) 266 Pa. 24, P.U.R.1920D, 569, 109 Atl. 535.

In Chicago v. Northwestern Mut. L. Ins. Co. (Ill.) supra, an action to recover water charges paid to the city of Chicago under protest, the court said: "Appellant and appellee did not stand upon the same footing, as appellant had the power and means to deprive appellee of its water supply, and had threatened to exercise this power, and had in some instances actually shut off the water. The various pieces of property were occupied as residences and stores, which required water, and to shut the water off from them would entail great damages to appellee, as it had no other means of supplying them. The bills were not contracted by appellee, and it was under no more obligation to pay them than it was to pay any other bills of any other person. The back tax was not a lien upon the premises, and appellee had in no way, as required by law, promised to pay the same. It is the well-settled rule of this state that where one is compelled to make payment of money which the party demanding has no legal right to receive, in order to prevent injury to his person, business, or property, such payment is, in law, made under duress, and may be recovered from the party receiving it; and it makes no difference that the payment was made with full knowledge of all the facts, provided it was made under duress. Appellee, at the time of payment, expressly stated that it was made under protest and to avoid trouble and damage to its property. The payment was illegally exacted, and appellee had a right to recover in an action of assumpsit." It was also held that the municipal corporation, having wrongfully exacted and held money, was liable for interest thereon.

In Indiana Natural & Illuminating Gas Co. v. Anthony (Ind.) supra, the second paragraph of the complaint averred that the company had charged a greater rate for gas than it was entitled to charge, which it "wrongfully, illegally, and extortionately" compelled the appellee to pay under threats of turning off the gas, there being no other means to heat the appellee's house. The court said: "It is further argued that appellant should have had judgment on the second paragraph, on the answers, be-

cause the jury say that appellant did not threaten, unless the excessive charges were paid, to disconnect the dwelling-house stove, and also answered that there is no evidence that it threatened to disconnect the office stove. Evidence admissible under the second paragraph would not necessarily be limited to a direct threat. Appellee averred that he had no other means or appliances for heating, and, to prevent the gas from being turned off, he paid the illegal and excessive charges under protest. The answers of the jury do not negative the fact that there may have been evidence of such conduct on the company's part that appellee could rightfully conclude that if he did not pay the charges demanded the gas would be disconnected, although no direct threat to that end was made. Besides, if appellee paid the excessive rate as a matter of necessity, to obtain what he was justly entitled to, he may recover it back, although he knew at the time of the payment that the demand was unjust. If appellant had the right to turn off the gas unless appellee complied with its demands, the parties were not treating upon equal terms. Such would not be a case of payment, upon a mere demand, of money, unaccompanied with any power to enforce the demand except by an action at law." And reviewing a controversy between the appellee and appellant concerning the gas rate, wherein the latter asserted that the former could pay the rate charged or cease to burn the gas, it was declared that this amounted to a statement that gas would not be furnished if the rates were not paid.

And in Boston v. Edison Electric Illuminating Co. (Mass.) supra, an action brought to recover overcharges for electricity, wherein it appeared that the city was dependent on the defendant for light and power to perform its corporate functions, it was declared that a jury could find that, under the circumstances, payment was necessary as the only means of immediate relief, and that where money was paid under compulsion the law implied an obligation to refund it. It did not appear in this case that the payments were made under protest.

Panton v. Duluth Gas & Water Co. (1892) 50 **Minn.** 175, 36 Am. St. Rep. 635, 52 N. W. 527, was an action to recover an alleged excess of water rent paid by the plaintiffs under threat of having their water supply cut off. The court said: "The question is presented, and may be expected to again arise upon a second trial, whether the circumstances under which the plaintiffs made the payment were such that the payment may be regarded as having been so far compulsory or necessary that an action will lie to recover it back. We are of the opinion that it is to be so regarded. In buildings as now constructed in populous cities, where there is an adequate supply of water, and especially in buildings occupied by so many persons as are shown to have been employed in the plaintiffs' store, water-closets may well be regarded as reasonably necessary. The closets provided for use on these premises, and comprising a part of the building, would have been useless unless supplied with water; and there was no other practicable source of supply save that afforded by the defendant. The defendant was under legal obligation to supply water at the proper price. It was the plaintiffs' right to have it thus supplied. The defendant, of its own will merely, and without any legal determination as to the disputed fact upon which the exercise of such a power depended, was about to cut off the whole water supply from these premises. This was a kind of execution in advance of judgment. The plaintiffs would be compelled to submit to being deprived of the use of water on their premises until, by such legal proceedings as they might institute for that purpose, they could legally establish the fact that the charge was excessive. Their only alternative was to pay what was demanded of them. We think that such a case falls within the class in respect to which it may be said that the payment is virtually compulsory, and not voluntary, in the

sense that the party is concluded by it."

In Westlake & Button v. St. Louis (1882) 77 Mo. 47, 46 Am. Rep. 4, the court, holding that money paid for a water license and sought to be recovered had not been voluntarily paid, said: "Here the parties who paid objected and protested from the first. They vainly called the attention of the officers appointed to assess and collect the amount of the water license, to the fact that such amount was in excess of that allowed by the ordinance; they in vain appealed to the board of water commissioners. The only answer returned in each instance was, 'Pay, or we will turn off the water.' It is easy to see that in such circumstances the payments were not made voluntarily. They were made under what has been aptly termed 'moral duress;' the parties paying the excessive amount, and those receiving it, were not on equal terms. The city officials possessed the power, and they threatened to exercise it, of cutting off the water supply of Westlake & Button, unless the illegal demands already mentioned met with immediate compliance. If this conditional threat had been carried into execution, the foundry of the applicants for license would have been forthwith closed, and from sixty to one hundred hands thrown out of employment. The payment of the excess was, therefore, as much under compulsion as if the city officials had been armed with a warrant for the arrest of the person or the seizure of goods, in which case, but one opinion would be entertained as to the nature of the payment, if made." And it was pointed out that a tender of a sum smaller than that demanded was unnecessary where it was apparent that such tender would be a nugatory act.

And in St. Louis Brewing Asso. v. St. Louis (1897) 140 Mo. 419, 37 S. W. 525, 41 S. W. 911, the court, following the Westlake decision, held that an excessive water charge paid under compulsion might be recovered.

In American Brewing Co. v. St. Louis (1904) 187 Mo. 367, 86 S. W. 129, 2 Ann. Cas. 821, a somewhat similar case, the court said: "From the fact that the plaintiff is wholly dependent upon the city for its supply of water, the fact that it will have to close its business unless it gets water from the city is logically inferable, for it is a matter of common knowledge that beer is composed mostly of water and cannot be made without it. If the city requires water licenses to be paid for six months in advance, it is a fair inference that it will refuse to let plaintiff have water, or, in other words, will shut off its water supply, if it is not so paid; and if the collector exacted 1½ cents per 100 gallons, when he was only entitled to charge the plaintiff 1 cent per 100 gallons, be true, as the petition alleges, it follows that the petition states such facts as bring this case within the rules laid down in the cases of Westlake & Button v. St. Louis, and St. Louis Brewing Asso. v. St. Louis (Mo.) supra, and, this being true, the learned trial court should have overruled the demurrer to the petition."

In Piedmont Power & Light Co. v. L. Banks Holt Mfg. Co. (1922) 183 N. C. 327, 111 S. E. 623, the defendant sued for charges made for electricity furnished, the defendant filing, as a counterclaim, the amount collected by the plaintiff between November, 1918, and June, 1920, in excess of 1½ cents per kw. hr., which rate the defendant had agreed to pay, although the original power contract provided for a rate of 1 cent per kw. hr., for five years from April, 1916. The defendant, so it appeared, relying on this contract, had sold its steam-power plant, and, although assenting to an increase to 1½ cents per kw. hr., did not agree to a further increase to 2 cents per kw. hr., although it paid such rate for some eighteen months. The court declared that if the extra half-cent rate was paid under duress it might be recovered, and that within this rule are payments made under apprehension that the payer's business will be stopped on the failure to pay the money. It was said: "The manufacturing company had scrapped

its steam plant, and the court must take judicial notice that, at this time, there was a chaotic condition in industry, so that it was practically impossible for the defendant to arrange for power elsewhere, and, in view of the testimony that in 1919 the protest was so vigorous that the defendant was trying to get power elsewhere, and that in June, 1920, it positively refused to pay this price, the matter should be referred to the jury upon the instructions asked and refused, whether the payment was made under duress or not. It was useless to protest, and the law does not require the doing of a vain thing."

In Koenig v. People's Gaslight & Coke Co. (1910) 153 Ill. App. 432, the court stressed the fact that the recovery of money paid depended upon the payee's right to retain it. That case was an action brought to recover a payment of $144.60 for gas, made by the appellee when the appellant threatened to cut off the former's gas at a place other than that where the gas in dispute was consumed. The court said: "Counsel predicated the right to recover upon the fact that the money was paid under protest and there was 'a sort of moral duress' which coerced the payment. The contention of counsel for appellee, being admitted, showed no cause of action and no right of recovery. The right to recover rested upon appellee's showing by his proofs that the money sued for was money which appellant, in equity and good conscience, had no right to retain. If the money was rightfully due, the fact that the elements of protest and duress were present when it was paid vests no right to recover it back." It was declared that if the company was supplying gas at the appellee's place of business under a contract, it might cut off the supply of gas at that place for failure of the appellee to pay for gas consumed elsewhere. In conclusion it was said: "As the evidence stood at the close of all the proofs, it may be said it was for the jury to say by their verdict whether the money sued for was illegally exacted, and therefore in equity and good conscience ought not to be retained. But this right of the jury must be environed with instructions correctly stating the legal principle which should guide them in arriving at a conclusion as to the fact. Appellant tendered and the court refused to give this instruction: 'The court instructs the jury that the burden of proof is on the plaintiff to prove that he did not owe the defendant the amount which he paid the defendant, and if you believe from the evidence that the plaintiff owed the defendant substantially the amount paid by the said plaintiff, then your verdict should be for the defendant, People's Gaslight & Coke Company, even though the payment was made by the plaintiff under protest and compelled by the fear that his gas would be shut off.' This instruction should have been given, and its refusal was reversible error."

In State ex rel. Chadron v. Intermountain Light & P. Co. (1923) — Neb. —, 194 N. W. 793, a case not within the scope of the annotation, it was held that a surcharge to the maximum rates for electricity could not be justified on the ground that the city and public had consented thereto by paying the same, where it was clear that such consent and payment were the result of a threat to discontinue the service to those not paying.

In a few cases the courts have held that the circumstances thereof were not such as to constitute duress within the principle set forth above, warranting recovery of payments made thereunder. See the reported case (MANHATTAN MILL. Co. v. MANHATTAN GAS & E. Co. ante, 176); Bray v. Philadelphia (1881) 11 W. N. C. (Pa.) 202; Slater v. Burnley Corp. (1888) 59 L. T. N. S. (Eng.) 636, 36 Week. Rep. 831, 53 J. P. 70.

In Bray v. Philadelphia (1881) 11 W. N. C. (Pa.) 202, an action to recover delinquent water rents paid by the plaintiff, judgment was entered for the defendant on the ground that the threat of the city to cut off the water unless the money was paid did not constitute duress entitling re-

covery as for a payment not voluntarily made.

It appeared in the reported case (MANHATTAN MILL. CO. v. MANHATTAN GAS & E. Co.) that a manufacturing plant, with a term contract for a supply of electricity for power, was confronted, as a result of conditions arising from the war, with a choice of paying a much higher rate or of closing down for lack of power, and chose the former course. The court points out that, while payment under duress requires unlawful coercion, it is sufficient that the constraint relied on should have destroyed free agency to pay or not to pay. And it is held that, as to the payments made in 1918, the plaintiff was under moral duress in view of the fact that it might have been ruined by closing its mill and consequently failing to fulfil contracts for the acceptance of wheat and the delivery of flour. However, a different conclusion is reached by the court with respect to the payments made by the plaintiff for electricity consumed after the receipt of the defendant's letter, expressing the intention to furnish power on a cost-plus basis, than as to those made earlier. This answer to the plaintiff's demand for electricity to be furnished under the contract provisions was in understandable terms, says the court, and the defendant soon thereafter began to charge accordingly, the plaintiff permitting the installation of the repaired motor and disconnecting his steam plant. And the court holds that since the plaintiff, with knowledge of the facts, took the risk of facing an emergency, the payment to the defendant was voluntary, and not one made without a choice in the matter. The payment of the bills under protest was a mere gesture, says the court, unless duress in fact existed, in which event protest would be unnecessary.

R. S.

STATE OF KANSAS
v.
S. J. PRATT, Appt.

Kansas Supreme Court — November 10, 1923.

(114 Kan. 660, 220 Pac. 505.)

Appeal, § 570 — jury — competency — foreign-born person.

1. Whether a person of foreign birth, who has lived in this country many years, who speaks English with his English neighbors, understands the common English words, and reads English "some," is sufficiently familiar with the English language to be a competent juror, is ordinarily a question for the trial court. His decision thereon will not be disturbed, unless clearly erroneous.

[*See note on this question beginning on page* 194.]

Witnesses, § 58 — cross-examination — irrelevant matters.

2. The rule that upon cross-examination the whole of a conversation may be brought out in regard to which there has been any evidence in chief does not authorize testimony concerning matters not relevant to the issues on trial, even though a part of the same conversation.

[See 28 R. C. L. 604.]

Embezzlement, § 4 — felonious intent.

3. The "felonious intent," constituting in part the crime of embezzlement, is the intent to take or appropriate, convert or use, the property of the principal by the agent in violation of his duties, and it is none the less embezzlement if at the time he has an intention or hope, or desires, to restore it at a later date.

[See 9 R. C. L. 1279; 2 R. C. L. Supp. 959.]

Headnotes by HARVEY, J.