- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Formal Complaint of Richard and Colleen Flinspach against South Central Utah Telephone Association, Inc. dba South Central Communications	DOCKET NO. 17-052-01 ORDER

ISSUED: May 23, 2017

I. Procedural history.

On February 28, 2017, Richard and Colleen Flinspach (the Flinspachs) filed with the Public Service Commission of Utah (PSC) a formal complaint against South Central Utah Telephone Association, Inc. (SCUTA), a public utility. The Flinspachs alleged that, following severe weather, SCUTA failed to repair their landline, leaving them without telephone service.

On March 20, 2017, SCUTA filed a motion to dismiss the complaint, arguing that the broken line was owned by the Flinspachs. SCUTA further argues that, under its current tariff, a customer who owns a line is solely responsible for its maintenance.

The parties briefed the motion to dismiss and, on April 28, 2017, the PSC issued an order denying it. In its order, the PSC stated that the Flinspachs had raised "a legal dispute as to ownership of the landline."

An administrative law judge for the PSC held the formal hearing in this docket on May 16, 2017. The Flinspachs appeared telephonically and represented themselves. SCUTA was represented by counsel Kira Slawson. Kerry Alvey, Weston Bishop, and Duncan Reed appeared as witnesses for SCUTA.

II. **Findings of fact.** The following facts are undisputed and/or supported by substantial record evidence.

1. In 1977, the Flinspachs and representatives of SCUTA arranged for a landline to connect the Flinspachs' residence to the SCUTA network. The connection required approximately 5.2 miles of open aerial line.
2. SCUTA provided the physical line, and the Flinspachs arranged for volunteer labor to install it.
3. The line was attached to electrical poles owned by Dixie Escalante Rural Electric Association, d/b/a Dixie Power. There is no record evidence that SCUTA or the Flinspachs entered into a formal pole attachment agreement with Dixie Power. Dixie Power's current tariff does not contain language requiring or governing pole attachment agreements. According to proffer at hearing by SCUTA's counsel, Dixie Power has a non-tariffed policy prohibiting a pole attachment unless an agreement is in place.
4. In order to reach the Flinspachs' residence, the line has to cross land owned by the Bureau of Land Management (BLM). There is no record evidence that SCUTA or the Flinspachs obtained rights-of-way to enter or use that land.
5. To connect the line to the Flinspachs' residence, SCUTA provided two pieces of equipment. One was attached to the pole on the Flinspachs' property, and the other was attached to the Flinspachs' home.
6. SCUTA did not charge the Flinspachs for the line or for the equipment it provided to and for them.
7. SCUTA representatives observed the installation of the line on occasion, but did not oversee the installation on a continuous basis.

8. SCUTA's tariff as in effect in 1977 is not available for the record. Therefore, there is no record evidence to establish that, as early as 1977, SCUTA recognized the concept of customer-provided equipment (CPE) or had tariff provisions regarding such equipment.
9. In 1977, telephone utilities owned every aspect of their networks, up to and including the wiring and physical telephones within their customers' homes. There was no industry-wide concept of "customer-provided equipment" until 1982, in which year the industry underwent significant changes due to a consent decree that resulted in the divestiture of the Bell System (AT&T).
10. The earliest SCUTA tariff available for the record went into effect on September 1, 1988, eleven years following installation of the line to the Flinspach residence and six years following the regulatory changes that resulted in telephone utilities creating the concept of CPE.
11. SCUTA's 1988 tariff defined CPE as "[d]evices, apparatus and their associated wiring *provided by* a subscriber for use with facilities furnished by the Company." (Emphasis added.)
12. SCUTA's 1988 tariff also states the following policies:

    a. "All equipment and lines *furnished by* the Company are the property of the Company even though located on the subscriber's premises." (Emphasis added.)

    b. "Line extension charges are applied to subscriber applicants with abnormally long extension requirements to prevent unreasonable burdening the general body of existing subscribers. *All line extensions will be owned and maintained by the Company*." (Emphasis added.)

    c. "In lieu of the charges otherwise applicable, the applicant, if he so elects, may initially clear the right of way, furnish and set the required poles in accordance

with the normal construction standards of the Company. *In all instances the ownership of facilities shall be entirely vested in the Company*." (Emphasis added.)

d. "The Company shall not be responsible for the installation, operation maintenance [sic] of any CPE. The customer *shall be responsible for the payment of all Company charges* for visits by the Company to the customer premises where a service difficulty or trouble report results from customer-provided equipment or facilities." (Emphasis added.)

13. SCUTA has never assessed the Flinspachs a line extension charge or charged the Flinspachs for a visit to their premises.

14. SCUTA performed all maintenance on the line to the Flinspachs' residence from 1977 until approximately 1997 without charge to the Flinspachs and without discussion or argument as to ownership of the line.

15. Since 1996, Weston Bishop, who works for SCUTA as a technician, has maintained the line on notice from the Flinspachs that there is a problem, but has not performed any type of routine maintenance. SCUTA has never charged the Flinspachs for Mr. Bishop's work.

16. In approximately 1997, the SCUTA technician who had been maintaining the line began to complain about doing so. Mr. Flinspach therefore began to assume the maintenance. Mr. Flinspach was not given any financial credit for doing so. Nor did SCUTA prepare any agreement to modify or limit the service to which the Flinspachs were entitled.

17. After assuming maintenance of the line, the Flinspachs still relied on SCUTA to check and maintain the termination equipment on their property and at their home, which SCUTA did regularly and without charge or argument prior to January of 2017.

18. To date, all necessary repairs to the line have been accomplished with materials left over from 1977 or with supplies furnished by SCUTA.

19. On December 24, 2016, a storm broke the line to the Flinspachs' home. The Flinspachs, who are now elderly, are no longer physically capable of repairing such a break. Therefore, they reported it to Duncan Reed, an employee of SCUTA, when they happened to see him in town. Mr. Reed stated that he would add the repair job to SCUTA's maintenance schedule. Mr. Reed did not state that the Flinspachs would be charged for the repair.

20. Approximately two weeks later, when no work had been done, the Flinspachs visited the maintenance office and learned that Mr. Reed had not scheduled the repair. When the Flinspachs questioned Mr. Reed, he stated that he had forgotten. Still no maintenance was performed.

21. On January 25, 2017, Mr. Flinspach again asked Mr. Reed for assistance and was assured that maintenance staff would be sent out immediately. However, no assistance arrived.

22. The next day, Mr. Flinspach met with two representatives of SCUTA, who essentially declined to perform the work necessary to restore telephone service to the Flinspachs'

residence. Mr. Flinspach lost his temper, and SCUTA has refused to deal with him since.

23. At hearing, SCUTA's representatives stated that the free maintenance they have provided to the Flinspachs over the past 40 years constitutes an ongoing courtesy, not evidence of ownership. They stated that they have always "assumed" and "considered" the line to be owned by the Flinspachs and that—simply out of a desire to be neighborly—they have been willing to maintain the line.

24. SCUTA's representatives also testified at hearing that they have declined to charge the Flinspachs for maintenance of the line because the Flinspachs have agreed for the maintenance to occur at SCUTA's convenience. SCUTA's representatives testified that they would have assessed service charges had the Flinspachs insisted on scheduling the maintenance. SCUTA's tariff does not allow for waiver of CPE-related maintenance costs on consideration of customer patience.

25. The Flinspachs have been paying their regular monthly charges to SCUTA since the date on which service was discontinued due to the broken line.

26. SCUTA currently has customers with CPE. As to those customers, SCUTA testifies it has never provided service on facilities located on the customer's side of the point of demarcation.

III. Analysis and conclusions of law.

A. The Flinspachs' belief regarding whether they own the line is not relevant to whether the line is CPE.

We conclude that the Flinspachs did not concede that they own the line when, in response to SCUTA's motion to dismiss, they stated, "[SCUTA has] accepted our payments for almost forty (40) years with no discount because of their non-ownership of the telephone line." Throughout this docket, the Flinspachs have consistently maintained that SCUTA acknowledged their right to free and full maintenance for at least 20 years. The Flinspachs have also consistently questioned when SCUTA's policies changed to deprive them of their right to free and full maintenance. The sentence simply states the Flinspachs' belief that they should have received a discount if, at some point, they lost their right to maintenance.

Nevertheless, at hearing, some of the Flinspachs' answers on cross-examination indicate a belief by the Flinspachs that they enjoy some ownership rights to the line.[1] At the very least, the record evidence concerning the Flinspachs' opinion about ownership contains contradictions. We conclude that the Flinspachs' opinion about ownership is neither relevant nor controlling. That opinion requires a legal analysis, one in which the Flinspachs could not appropriately provide in testimony and which we conduct in this order. The facts that are relevant to that legal analysis are the actions of the Flinspachs and SCUTA, not the Flinspachs' opinion.

[1] The PSC acknowledges that it erred in limiting SCUTA's ability to ask leading questions of the Flinspachs on cross-examination, but concludes that error to be harmless error because, as discussed in this order, the Flinspachs' beliefs about ownership are not controlling.

B. The record facts regarding rights-of-way and pole attachment agreements do not establish that the line is CPE.

SCUTA argues that it cannot be considered to own the line because, if it had intended to own the line, then it would have obtained the necessary rights-of-way and entered into the necessary pole attachment agreements. The record evidence does not support SCUTA's argument or suggested conclusion.

The evidence presented fails to demonstrate that SCUTA operated in strict conformity with all applicable regulations, policies, and tariffs. SCUTA serviced the line after 1988 without following the tariff provisions related to CPE, and without the existence of rights-of-way or pole attachment agreements. We conclude that SCUTA's noncompliance with tariff provisions, and the absence of rights-of-way and pole attachment agreements, do not establish that the line is CPE.

C. SCUTA's 1977 tariff most likely did not include any provision to define or govern CPE.

As established at hearing, in 1977 there was no industry-wide concept of CPE. To the contrary, telephone companies asserted ownership over every aspect of their networks, including the telephones inside customers' homes. It was not until 1982 that telephone companies, in response to significant changes in regulation, began to distinguish between company-owned network assets and customer-owned network assets.

Given this history, and where SCUTA's 1977 tariff is not available for the record, we decline to assume that SCUTA defined and distinguished CPE prior to 1982. Rather, we

conclude that, in 1977, SCUTA's tariff or practices more likely than not established all interconnected facilities to be the exclusive property of the utility under its line extension policies. We presume that the 1977 line extension policies bore some similarity to those that were demonstrated to have existed in 1988. We conclude that both the industry practice in 1977, and SCUTA's line extension policies in 1988, provide support for our conclusion that the line at issue was not CPE.

D. SCUTA never transferred to the Flinspachs legal ownership of the telephone line at issue.

SCUTA has not testified or provided documentary evidence that it took steps to classify the line to the Flinspach property as CPE after it adopted CPE-related language in its 1988 tariff. Rather, SCUTA asks us to find that the line became CPE when—and because—the Flinspachs installed it. Such finding would be contrary to SCUTA's 1988 tariff regarding both CPE and line extensions.

SCUTA's 1988 tariff defines CPE as "[d]evices, apparatus and their associated wiring provided by a subscriber for use with facilities furnished by the Company." The tariff does not define the verb "to provide." We therefore turn to the dictionary to ascertain the commonly understood meaning of the term, which is "to supply or make available (something wanted or needed)" or "to make something available to." Under this definition, we conclude that SCUTA "supplied" and "made available" the physical line. Therefore, the line could not have been considered CPE, even under the 1988 tariff.

As to line extensions, SCUTA's 1988 tariff states, "All equipment and lines furnished by the Company are the property of the Company even though located on the subscriber's premises." The tariff does not define the verb "to furnish," so we again turn to the dictionary, which defines "to furnish" as meaning "to provide with what is needed." The Flinspachs furnished labor, but there is no dispute in the record that SCUTA furnished the lines and terminating equipment, which therefore remained SCUTA's property under the tariff. Further, the 1988 line extension tariff policies state that a customer may avoid a line extension charge by clearing rights-of-way and/or setting needed poles, but nevertheless asserts, "In all instances the ownership of facilities shall be entirely vested in the Company." We read this language to mean that, even if a customer provides non-financial assistance in completing a line extension, SCUTA retains exclusive ownership of the facilities. We see no mechanism in the tariff by which ownership may be transferred.

Finally, we find that the 1988 tariff requires a customer who owns CPE to pay a charge for any maintenance services it requires from SCUTA. There is no mechanism in the tariff that allows SCUTA to waive the maintenance fee. According to SCUTA's testimony, it has complied with this tariff provision regarding all customers whom it considers to own CPE—except the Flinspachs.

We conclude that the facts demonstrate SCUTA has not historically considered the line to the Flinspach property to constitute CPE. We conclude that SCUTA has provided maintenance as needed, during most of the time the line has been in operation, in a manner both consistent

with SCUTA's ownership of the line and inconsistent with the way SCUTA should have treated CPE.

ORDER

We order that SCUTA treat the 5.2 miles of open aerial line to the Flinspachs, and all relevant equipment provided by SCUTA in connection with that line, as equipment owned by SCUTA.

DATED at Salt Lake City, Utah, May 23, 2017.

/s/ Jennie T. Jonsson
Administrative Law Judge

Approved and confirmed May 23, 2017 as the Order of the Public Service Commission of Utah.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Commissioner

/s/ Jordan A. White, Commissioner

Attest:

/s/ Gary L. Widerburg
Commission Secretary
DW#294146

Notice of Opportunity for Agency Review or Rehearing

Pursuant to Utah Code Ann. §§ 63G-4-301 and 54-7-15, a party may seek agency review or rehearing of this order by filing a request for review or rehearing with the PSC within 30 days after the issuance of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the PSC fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the PSC's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on May 23, 2017, a true and correct copy of the foregoing was served upon the following as indicated below:

By U.S. Mail:

Richard and Colleen Flinspach
8598 North Modena Canyon Road
Beryl, UT 84714

By Electronic-Mail:

Michael Flinspach (mike.flinspach@gmail.com)

Kira Slawson (kiram@blackburn-stoll.com)
Blackburn & Stoll, L.C.

Alan Torgersen (alant@socen.com)
South Central Utah Telephone Association

Brett N. Anderson (bretta@blackburn-stoll.com)

Vicki Baldwin (vbaldwin@parsonsbehle.com)

Sharon Bertelsen (bertelsens@ballardspahr.com)

Larry Bowman (larry.bowman@charter.com)

Brian W. Burnett (bburnett@kmclaw.com)

(cflregulatory@chartercom.com)

Eddie L. Cox (ecox@cut.net)

William J. Evans (bevans@parsonsbehle.com)

James Farr (james.farr@centurylink.com)

Amy Gross (agross@tminc.com)

Alan Haslem (ahaslem@mleainc.com)

Ray Hendershot (ray.hendershot@beehive.net)

William Huber (william.huber@questar.com)

Bill Hunt (williamp.hunt@dish.com)

David R. Irvine (drirvine@aol.com)

Kristin L. Jacobson (Kristin.l.jacobson@sprint.com)

Brock Johansen (bjohansen@emerytelcom.com)

Dawn Kubota (kubotad@ballardspahr.com)

Jasen Lee (jlee@desnews.com)

Kirk Lee (kirk.lee@ftr.com)

Shirley Malouf (srmalouf@stoel.com)

Jennifer H. Martin (jhmartin@stoel.com)

Steve Mecham (sfmecham@gmail.com)

Roger Moffitt (roger.moffitt@att.com)

Gregory Monson (gbmonson@stoel.com)

Sharon Mullin (slmullin@att.com)

Thorvald Nelson (tnelson@hollandhart.com)

Janice Ono (Janice.ono@att.com)

Sheila Page (spage@utah.gov)

Mike Peterson (mpeterson@utahcooperatives.org)

Pam Pittenger (pam.pittenger@ftr.com)

Jenny Prescott (jenny.prescott@allwest.com)

Bruce Rigby (bruce@ucmc-usa.com)

Gary Sackett (gsackett@joneswaldo.com)

Alan L. Smith (alanakaed@aol.com)

Ted D. Smith (tsmithlaw@earthlink.net)

Kendra Thomas (kthomas@kfrservices.com)

Bruce H. Todd (btodd@stratanetworks.com)

Jake Warner (jakew@beehive.net)

James H. Woody (jwoody@union-tel.com)
John Woody (jowoody@union-tel.com)
Union Telephone Company

Patricia Schmid (pschmid@agutah.gov)
Justin Jetter (jjetter@agutah.gov)
Steven Snarr (stevensnarr@agutah.gov)
Robert Moore (rmoore@utah.gov)
Assistant Utah Attorneys General

Erika Tedder (etedder@utah.gov)
Division of Public Utilities

By Hand-Delivery:

Office of Consumer Services
160 East 300 South, 2nd Floor
Salt Lake City, Utah 84111

_____
Administrative Assistant