NO. 22002

# IN THE SUPREME COURT OF THE STATE OF COLORADO

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| CITY OF ENGLEWOOD, COLORADO, a Municipal corporation, | ) | Error to the District Court of the |
| Plaintiff in Error, | ) | County of Arapahoe State of Colorado |
| v. | ) | |
| MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation, | ) | HONORABLE MARVIN W. FOOTE Judge |
| Defendant in Error. | ) | |

## BRIEF OF AMICUS CURIAE

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## BRIEF OF AMICUS CURIAE

## INTRODUCTION

The undersigned attorney appearing on behalf of the Colorado Municipal League, Amicus Curiae, respectfully urges this Honorable Court to uphold the power of cities and towns to grant franchises to public utilities. The undersigned attorney, through the Colorado Municipal League, represents 218 member cities and towns throughout the State of Colorado,

including 31 cities operating under home rule charters adopted pursuant to Section 6, Article XX of the Colorado Constitution.

It should be stated that all of the other home rule cities are involved in transactions with the Mountain States Telephone and Telegraph Company similar to that of the Plaintiff in Error, the City of Englewood. While none of these home rule cities currently have in effect formal franchise agreements with the Mountain States Telephone and Telegraph Company, the utility relations of each home rule city are directly affected by the issues raised in this proceeding.

The remaining statutory cities and towns of this state are authorized by statute, Colorado Revised Statutes 1963, 139-41-1 through 139-41-5, to enter into franchise relations with public utilities such as the Mountain States Telephone and Telegraph Company. Some of these communities have in existence franchise agreements with said Telephone Company and the status and validity of such agreements may be directly affected by the court's decision herein. In those municipalities, both home rule and statutory, which do not have formal franchise agreements, the Telephone Company occupies municipal streets under informal memoranda of agreement, implied understandings, either

with or without police regulation, or mere acquiescence by the municipal authority of the Company's occupancy of their streets.

It should also be stated by way of introduction that many municipalities, both home rule and statutory, have entered into franchise agreements with other public utilities operating under the same statutory provisions as those brought into issue by the parties to this proceeding, Colorado Revised Statutes, 50-5-1 through 50-5-8. Included are franchise agreements with private companies for such basic municipal utility services as electricity and gas. The validity of these agreements is threatened by the arguments raised herein.

The Colorado Municipal League is actually intervening in this case on behalf of the Plaintiff in Error, the City of Englewood. But it should be hastily noted that we take a different view of the issues and the law involved in this case than that expressed in the briefs filed with the Court by both the Plaintiff in Error and the Defendant in Error. We consider the issues raised by both parties to have important implications on the power of municipal corporations to regulate and control public utilities, and also on their right to protect municipal streets and rights-of-way. The arguments raised by

the briefs previously filed extend far beyond the simple question of whether the lower court acted properly in dismissing the City's complaint against the Telephone Company. What is fundamentally at stake in this proceeding is the basic power of cities and towns to franchise public utilities. Furthermore, we believe this case has potential revenue implications to Colorado municipalities.

As stated in the motion to appear amicus curiae, the petitioner is limiting his argument to one issue relative to the municipal authority to regulate and franchise public utilities, to-wit:

> Is the exercise of the power of a home rule city to exact franchises of public utilities, as granted by Article XX and Article XXV of the Constitution of Colorado, one of discretion with the municipality or is it mandatory that such franchises be required before the utility may operate within municipal limits?

In directing ourselves to this issue, Amicus Curiae will agree with some of the arguments offered by both parties, and disagree with others. In summary, it is our position that the granting of public utility franchises is a discretionary power with the municipality, and that it is not necessary that such franchises be in existence before a utility may lawfully operate within municipal limits.

## STATEMENT OF THE CASE

Amicus curiae petitioner adopts the Statement of the Case as set forth on pages 1 through 5 of the original brief of the Plaintiff in Error.

## SUMMARY OF THE ARGUMENT

I. THE STATE HAS NOT BY STATUTE GRANTED TO THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY OR ANY OTHER UTILITY THE PRIVILEGE TO USE MUNICIPAL STREETS WITHOUT MUNICIPAL CONSENT.

II. A MUNICIPALITY MAY MANIFEST TO A PUBLIC UTILITY THE CONSENT REQUIRED BY COLORADO REVISED STATUTES, 50-5-8 IN SEVERAL DIFFERENT WAYS: A FRANCHISE GRANT IS NOT THE EXCLUSIVE METHOD OF EXPRESSING CONSENT OR THE ONLY WAY BY WHICH THE MUNICIPAL INTEREST IN ITS STREETS MAY BE PROTECTED.

III. UPON THE TERMINATION OF AN EXISTING FRANCHISE AGREEMENT, A CITY HAS THE OPTIONAL RIGHT TO OUST THE PUBLIC UTILITY FROM ITS STREETS AND PUBLIC PLACES PENDING THE NEGOTIATION OF A NEW FRANCHISE.

## ARGUMENT

### I. THE STATE HAS NOT BY STATUTE GRANTED TO THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY OR ANY OTHER UTILITY THE PRIVILEGE TO USE MUNICIPAL STREETS WITHOUT MUNICIPAL CONSENT.

The Telephone Company attempts to construe Colorado Revised Statutes, 50-5-1 to the effect that the Company is vested with a legislative franchise from the state to use and occupy municipal streets, notwithstanding the absence of municipal consent. It is difficult to understand how the Company can contend that this statute grants to Mountain States broader privileges than are granted by this provision to other types of public utilities, i.e., gas, electric, rail, etc. The only support offered for this distinction is the statement in the answer brief that the Company is part of a nation-wide telephone system operating throughout the state. We fail to see how mere bigness can entitle the Company to such a construction; or indeed, how the Telephone Company is any different than other private gas and electric utility companies which are also connected with national distributors and suppliers. The only distinction which we can perceive is that the telephone business is less competitive.

The section relied upon by the Company for this sweeping grant must be read in light of the consent requirement vested in municipal authorities in Colorado Revised Statutes, 50-5-8. The general rule of statutory construction as previously enunciated by this Court in the case of Kirschwing v. O'Donnell, 120 Colo. 125, 207 P.2d 819 (1949), is:

> ". . .(A) question of legislative intent is presented which must be ascertained by consideration of language in connection with the context of the statute in which the language is used in its entirety, the object which the statute was designed to attain, and the obvious consequences which would follow a construction either way."

The Court also held in National Surety Co. v. Schafer, 57 Colo. 56, 140 Pac. 199 (1914), that in case of doubt as to the meaning of the statute, the court should consider the results of the construction urged. It is to be presumed that the legislature intended a reasonable operation of the statute.

The general rule with respect to construction of statutes similar to the one here involved is stated in 12 McQuillin, Municipal Corporations 41, §34.10 (3d Ed. 1950), as follows:

> "It is sometimes difficult, however, to determine whether the charter of a

> company or a statute actually confers authority to use the streets without the consent of the municipality; the statutes granting a franchise to a public utility and including therein a general right to use the streets and alleys of the municipality or municipalities, should not be construed as an express grant of the right to use such streets or alleys without the consent of the municipality, unless it is clearly apparent that such was the intention of the legislature" (emphasis supplied).

We agree with the City that the cases cited by Mountain States to support their contention do not involve a statute or ordinance where the grant to the Company was accompanied by a simultaneous requirement that consent of the municipality involved was necessary. The case of Vermillion v. Northwestern Tel. Exch. Co., 189 Fed. 289 (8th Cir. 1911)--cited by the City -- seems much more analogous to the statute involved here.

If, as the Company contends, Colorado Revised Statutes, 50-5-1 grants a state legislative franchise to the Company to use municipal streets without their consent, why did the Company negotiate a franchise with the City of Englewood in 1943? Sections 50-5-1 and 50-5-8 were enacted as part of the same Act by the General Assembly in 1907. A review of the legislative history of Article 5, Chapter 50 reveals no pertinent

changes or amendments to either section since the original act was passed in 1907.

How then can the Company now presume to find such a sweeping change in legislative intent? The only new expression on the subject of municipal franchise authority during the period that the Company's previous franchise was in existence occurred in 1954 when Article XXV of the Colorado Constitution was adopted. And this provision specifically reserved to municipalities ". . .their power to grant franchises." Indeed, a harmonious construction of these two statutory references in conjunction with Article XXV leads to the conclusion that no state-wide franchise grant for the use of municipal streets without municipal consent was extended by the legislature in enacting this legislation.

The Company's attempted distinction between the language contained in 50-5-1 and 50-5-8 leads to reducto absurdum. Mountain States suggests that municipal consent is required in the first instance only. We submit that logic cannot be stretched to this conclusion. Otherwise, the Company would have us believe that it need only obtain one franchise or other similar expression of consent from a city and it is then free to use municipal streets thereafter without municipal consent.

It would be idle to indulge at length in the sophistry of the Company's construction as to the time of consent required by 50-5-8. Mountain States contends that the consent provision applies only to the right to operate in the first instance, and not to the maintenance of facilities already constructed. Yet, the Company continues to construct new poles, new wires, and new lines every time there is a new subdivision or a change in city boundaries. This is equally true for all other growing municipalities in which Mountain States serves and in which the Company continually replaces and adds new poles and lines. Surely the Company does not request this Court to find that the consent required by 50-5-8 extends only to new facilities and not to those already constructed within municipal limits. This line of reasoning would only result in a perversion of the obvious legislative intent in enacting the consent requirement of Section 50-5-8.

It would seem that the consent proviso of 50-5-8 indicates a clear legislative reservation on the authority of public utilities to use municipal streets. It matters not when the consent is effective. What is important is the consent itself and the manner in which such consent is manifested.

II. A MUNICIPALITY MAY MANIFEST TO A PUBLIC UTILITY THE CONSENT REQUIRED BY COLORADO REVISED STATUTES, 50-5-8 IN SEVERAL DIFFERENT WAYS: A FRANCHISE GRANT IS NOT THE EXCLUSIVE METHOD OF EXPRESSING CONSENT OR THE ONLY WAY BY WHICH THE MUNICIPAL INTEREST IN ITS STREETS MAY BE PROTECTED.

We take issue with the argument of the City that a franchise is the exclusive method by which a home rule municipality may express its consent to a public utility for the use of its streets and alleys. "Consent" is defined by 2C Oxford English Dictionary, p. 851 (1961), as follows:

> "Voluntary agreement to or acquiescence in what another proposes or desires; compliance, concurrence, permission. Voluntarily to accede to or acquiesce in what another proposes or desires; to agree, comply, yield."

There are a number of similar judicial constructions which support our contention that consent can be manifested by voluntary allowance, acceptance, or even acquiescence. Citizens State Bank of Sabetha v. Burner, 131 Kan. 286, 291 Pac. 739 (1930); Hill v. Cabral, 66 R.I. 145, 18 A.2d 145 (1941); In re Hudson County, 106 N.J.L. 62, 144 Atl. 169 (1928); and to the effect that consent may be spoken, acted, or implied is Hightower v. City of Tyler, 134 S.W.2d 404 (Tex. Civ. App. 1939).

There is nothing in Colorado Revised Statutes 50-5-8 which implies that the necessary consent for use of its municipal streets by a utility must be expressed through a franchise grant. Neither are we able to construe Articles XX and XXV to require a home rule city to express its consent through a franchise grant. We agree completely with the City that Article XXV is controlling in spelling out the present jurisdictional relationship between home rule municipalities and public utilities.

This amendment specifically preserves the power to grant franchises. It also preserves other forms of municipal regulation by specifically mentioning ". . .reasonable police and licensing powers. . ." It is submitted that the exercise of any of these powers by a municipality could under appropriate circumstances manifest the consent required by 50-5-8. Similarly, a public utility can lawfully use municipal streets by mere acquiescence of the municipality Wakefield v. Theresa, 125 App. Div. 38, 109 N.Y.S. 414 (1908).

The Company indicates on page 11 of its answer brief that a franchise is a contract requiring the voluntary consent of both parties. There can be no argument that a franchise agreement requires mutual consent. However, a Colorado municipality has the inherent

power to grant franchises notwithstanding the failure of a utility to accept or agree to the terms and conditions contained in the franchise grant. Rhyne in his excellent one volume edition on Municipal Law states the rule on page 509 as follows:

> "A municipality in granting a franchise acts in its governmental capacity and may do so on its own terms and conditions, which the utility company may accept or reject, but the municipality may not subsequently impose an unreasonable burden or condition, even if it could do so in granting the franchise, since the franchise on acceptance becomes a contract and is thereby protected by the Constitution" (emphasis supplied). See, 64 C.J.S., Municipal Corporations, §1733 (1950).

In other words, we believe the City is correct in asserting that a franchise grant is an expression of consent to the occupancy of its streets. By the same token, the Company is correct in its assertion that a Colorado city can unilaterally regulate a utility's use of its streets and alleys by ordinances enacted under its general police power. Furthermore, we contend that a city can by acts expressed or implied acquiesce in the occupancy of its streets by failing to take any affirmative action to deny its consent.

Under such circumstances, the consent is effective until revoked, as in the case at bar.

A franchise agreement differs from a license or other form of police regulation in that it tends to make permanent the relationship between a municipality and a utility for the specified period of the franchise. This distinction is ably perceived by Mountain States on page 38 of their brief:

> "A franchise fixes and stabilizes the relationship between the utility for a fixed period. The franchise may specify a method of construction and impose conditions in the nature of safety regulations that would otherwise be left to the power of the city, under its police power, to regulate by ordinance from time to time as it thought appropriate. A franchise may fix a payment to be made to the city in lieu of occupation or privilege taxes -- a matter that would otherwise be left to such tax ordinances that the city might enact from time to time."

The distinction is a significant one. Because of the stability offered to both parties by a franchise agreement, it has advantages to both. But it is not the exclusive method of regulation contemplated by Article XXV. Nor, does

Article XX specifically require a home rule city to grant a franchise or to enter into a franchise agreement. We can find no authority for the proposition that a utility may not lawfully occupy municipal streets and public ways without a franchise agreement. The cases cited by the City, i.e., Baker v. Denver Tramway Co., 72 Colo. 233, 210 Pac. 845 (1922), were decided prior to the adoption of Article XXV in 1954 and can no longer be considered controlling. In light of the new language in Article XXV, it is unreasonable to construe Article XX in a way which would deny the inhabitants of a home rule city the benefits of utility services without a prior formally-approved franchise agreement. But it is not unreasonable to construe these provisions together with Colorado Revised Statutes, 50-5-8 to require some form of municipal consent, franchise or otherwise.

It is conceded by both the City and the Telephone Company that an actual franchise grant by a home rule city must be submitted to its taxpaying electors for approval. But underlying this agreed procedural requirement is the essence of this litigation. Article XX, Section 4, provides:

"No franchise relating to any street, alley or public place of the said city

> and county shall be granted except upon the vote of the qualified taxpaying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of such submission by the applicant for said franchise."

It is this provision which places the parties to this case in the dilemma they find themselves before this Court. Why should the City submit a telephone franchise grant to a vote of its taxpaying electors if the Company does not wish to have a franchise and refuses to post the cost of the election? To do so without agreement to the franchise grant by Mountain States would, from the City's viewpoint, be a wasted effort and of no contractual value to either the City or the Company.

We submit that this provision in Article XX means simply that any franchise grant, whether agreed to by the utility or not, must be submitted to and approved by the taxpaying electors of a home rule city. In no way does Article XX imply that a franchise grant is the only method by which municipal consent can be rendered under Colorado Revised Statutes, 50-5-8. The framers of the home rule article obviously intended that the voters must approve any grant of privileges to use municipal streets for a period of fixed duration.

This was intended to protect the municipal police power and to avoid binding future legislative bodies of the city to a contract for the use of municipal streets for an extended duration without the approval of the body electorate.

III. UPON THE TERMINATION OF AN EXISTING FRANCHISE, A CITY HAS THE OPTIONAL RIGHT TO OUST THE PUBLIC UTILITY FROM ITS STREETS AND PUBLIC PLACES PENDING THE NEGOTIATION OF A NEW FRANCHISE.

The above rule is fundamental case law and supported by considerable legal authority. Bowers v. Kansas City Pub. Serv. Co., 328 Mo. 770, 41 S.W.2d 810 (1931); Detroit v. Detroit United Ry., 172 Mich. 136, 137 N.W. 645 (1912); Louisville v. Louisville Home Tel. Co., 279 Fed. 949 (6th Cir. 1922); Pella v. Fowler, 215 Iowa 90, 244 N.W. 734 (1932); 12 McQuillin, 178-181, §34.51; Rhyne, Municipal Law 513, §24-7 (1957); see also 64 C.J.S., Municipal Corporations, §1739 (1950).

This fundamental rule has the following significance in the case at hand: A franchise agreement did in fact exist between the Mountain States Telephone and Telegraph Company and the City of Englewood from 1943 to 1963.

Within a timely period from the termination date of this franchise, the City advised the Company of its desire and intent to renegotiate another franchise agreement. The Company refused to negotiate such a franchise. Whereupon the City filed this action, thereby giving notice of a revocation of its consent to the Company for the use of municipal streets and alleys. In other words, the City is exercising its option to oust the Company from its streets. In this way, the City apparently attempts to force a negotiation between the parties for another franchise agreement.

The Company perceptively raises in its brief (pp. 12-15) the "ultimate problem" presented by the City's argument that the Company should be required to negotiate a franchise. It is asked what the position of the two parties would be if they were to negotiate in good faith and be unable to agree on the terms of the franchise. Indeed, what would the City's remedy be in this situation?

Although it may be premature to raise this question when considering the propriety of the lower court's dismissal of the City's complaint, this question places in focus the respective rights of both parties to this proceeding. It is submitted that in this situation the City could proceed

in exactly the same way as it has thus far proceeded. It could act to oust the Company from its streets and require removal of all utility facilities.

The Company appears to make much ado over the fact that the City failed to demand removal of these facilities and base its complaint on such a demand. It apparently misconstrues the relief pursued by the City by suggesting that the Company is being asked to perfect a franchise agreement. This is clearly not the case. In no way does the City's complaint ask the court to make a contract in which the Company does not approve. Englewood's complaint seeks only that relief which would prompt Mountain States to negotiate with the City on the very matters which the Company in its answer brief asserts that the City can do unilaterally under its general police powers (control pole locations, regulate street excavations, levy taxes, etc.).

It is conceded that the City might have proceeded more directly if its complaint had specifically requested an ouster of the Company's facilities from municipal streets. However, the City's second claim for relief requests in the alternative a cessation of service by Mountain States. This is tantamount to asking for an ouster and should logically be given such interpretation

under the liberal spirit embodied in Rule 54(c), Colorado Rules of Civil Procedure, Thus, we agree with the Plaintiff in Error that the relief requested by the City's complaint does not affect the sufficiency of its substantive allegations and constitutes proper relief to request from the Court.

## CONCLUSION

Amicus curiae considers the issues raised in this case to be far more important than the technical sufficiency of the City's complaint. Very simply, we consider the response of the Defendant in Error to be a direct assault upon the traditional municipal power to grant public utility franchises. The validity of numerous existing franchise agreements between public utilities and cities and towns should not be jeopardized by the Company's strained interpretations of Colorado Revised Statutes, 50-5-1 and 50-5-8.

The granting of utility franchises is one weapon in the arsenal of municipal powers preserved by Article XXV. No public utility has been vested by any similar constitutional provision or statutory enactment with the authority to use municipal streets and public places without the consent of municipal authorities. A municipal franchise grant is one method of manifesting the

consent required by Colorado Revised Statutes, 50-5-8. Franchise grants by home rule cities must be submitted to and approved by their taxpaying electors. A franchise grant becomes a franchise agreement when it is accepted by the utility. Upon the termination of such a franchise agreement, a city may move to oust the utility from the streets pending the negotiation of a new franchise.

We urge this Court to reaffirm these basic principles of franchise law. In the case at bar, Mountain States is now occupying the streets of the City of Englewood without municipal consent. Inasmuch as the Company appears unwilling to negotiate a franchise with the City, it should not be allowed to vitiate this lack of consent by concluding now that it has a state franchise grant to operate on municipal streets without such consent. The City has an adequate legal remedy under well-established principles of franchise law and should be allowed to enforce its remedy through the judicial process.

Respectfully submitted,

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