No. 27444

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY OF LOVELAND, Plaintiff-Appellee, vs. THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO AND EDWIN R. LUNDBORG, HENRY E. ZARLENGO, AND EDYTHE S. MILLER, as members of said Commission, Defendants-Appellants.	Appeal From the District Court of the County of Larimer State of Colorado Honorable John A. Price Judge

BRIEF OF THE COLORADO MUNICIPAL LEAGUE

AS AMICUS CURIAE

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INTEREST OF THE
COLORADO MUNICIPAL LEAGUE

The Colorado Municipal League is a non-profit association of 228 cities and towns located throughout the state of Colorado. Over the years, the Colorado Supreme Court has decided a number of cases involving the jurisdiction of the Public Utilities Commission (P.U.C.) over various municipal services provided within and outside municipal boundaries. At least two consistent rules evolved from these cases. First, Article V, Section 35 of the Colorado Constitution prohibits the P.U.C. from exercising jurisdiction over rates and services provided by a municipality within its boundaries. Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158 (1924). Second, Article V, Section 35 of the Colorado Constitution prohibits the P.U.C. from exercising jurisdiction over municipal water rates charged customers located outside the municipality's boundaries, and it prohibits the P.U.C. from exercising jurisdiction over municipal water or sewer improvements located inside or outside the municipality's boundaries. Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965); and, Englewood v. Denver, 123 Colo. 290, 229 P.2d 667 (1951).

The instant case squarely presents to the Court another aspect of the P.U.C. jurisdictional controversy: whether, under Article V, Section 35 of the Colorado Constitution, the P.U.C. may constitutionally exercise jurisdiction over electric rates charged by a municipality to customers residing outside its boundaries. While approximately 16 Colorado municipalities provide electric and/or gas services outside their boundaries, numerous municipalities provide outside water and sewer service. A 1977 survey of the League's member municipalities indicates that approxi-

mately 70% of the municipalities responding to the survey provided some degree of water service outside their boundaries, and approximately 45% of the responding municipalities provided some degree of sewer service outside their boundaries.

Because a decision in this case is likely to consider earlier decisions of the Court with respect to water and sewer services in particular, and because the Court's decision may affect the scope of protection afforded municipalities by Article V, Section 35 of the Colorado Constitution, the issues presented herein are of particular concern to the League and its member municipalities.

STATEMENT OF THE ISSUES

The League adopts the statement of the issues appearing in the brief of the Plaintiff-Appellee City of Loveland. The League's brief is directed solely to the constitutional issue presented by this case as indicated in the League's summary of argument and argument.

STATEMENT OF THE CASE

The League adopts the statement of the case appearing in the brief of the Plaintiff-Appellee City of Loveland.

SUMMARY OF THE ARGUMENT

Article V, Section 35 of the Colorado Constitution Prohibits The Colorado Public Utilities Commission From Exercising Jurisdiction Over A Municipality In Setting Rates For Electric Services Provided Outside Its Municipal Boundaries.

ARGUMENT

ARTICLE V, SECTION 35 OF THE COLORADO CONSTITUTION PROHIBITS THE COLORADO PUBLIC UTILITIES COMMISSION FROM EXERCISING JURISDICTION OVER A MUNICIPALITY IN SETTING RATES FOR ELECTRIC SERVICES PROVIDED OUTSIDE ITS MUNICIPAL BOUNDARIES.

Article V, Section 35 of the Colorado Constitution reads, in full, as follows:

> "The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever."

The question presented to this Court is whether the above-quoted constitutional language prohibits the P.U.C. from exercising jurisdiction over a municipality in establishing rates for electric services provided outside its municipal boundaries. Under the above-quoted language, the P.U.C. is a "special commission". Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158 (1924); People v. City of Loveland, 76 Colo. 188, 230 P. 399 (1924); Englewood v. Denver, 123 Colo. 290, 229 P.2d 667 (1951); and, Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965). See Milheim v. Moffat Tunnel Improvement District, 72 Colo. 268, 211 P. 649 (1922). The operation of an electric light plant by a municipality is a municipal function within the meaning of the above-quoted language. Town of Holyoke v. Smith, supra. And, the fixing of rates to be charged by an electric plant owned and operated by a municipality is the performance of a municipal function. Town of Holyoke v. Smith, supra. Thus, it seems apparent that the language of Article V, Section 35 of the Colorado Constitution prohibits the P.U.C. from exercising jurisdiction over a municipality in setting rates for electric services provided outside its municipal boundaries.

The P.U.C. and Amicus Colorado Rural Electric Association, however, argue otherwise--pointing to a series of cases which, they argue, stand for the proposition that Article V, Section 35 does not prevent the P.U.C. from regulating rates charged by municipalities for outside electric service. Neither the P.U.C. nor the Amicus Colorado Rural Electric Association, however, challenge the holding of Town of Holyoke v. Smith, supra, that the P.U.C lacks jurisdiction under Article V, Section 35 to regulate municipally owned and operated electric utilities with respect to service provided and rates charged to customers within the territorial boundaries of the municipality. Thus, both apparently interpret the language of Article V, Section 35 as containing a subtle distinction between municipal services provided inside and outside municipal boundaries--as permitting P.U.C. interference with municipal functions to the extent the functions are exercised within municipal boundaries, but prohibiting such interference to the extent the functions are exercised outside municipal boundaries. On its face, however, the language of Article V, Section 35 permits no such distinction. Where the language of a constitutional provision is plain and the words create no absurdity, the provision must be enforced as written and the courts must presume that the people intended what they said:

> "This is a fundamental principle of American constitutional law....[T]he constitution is the solemn final exercise of the sovereignty which belongs to the People of the State of Colorado. Neither executive order, nor legislative enactment, nor judicial decision can be permitted to render futile this expressed will of the People." Colorado State Civil Service Employees v. Love, 167 Colo. 436, 447, 448 P.2d 624 (1928). See In Re Interrogatory HJR 1011, 177 Colo. 215, 217, 493 P.2d 346 (1972); and, Four-County Metropolitan Capital Improvement District v. Board of County Commissioners of Adams County, 149 Colo. 284, 310, 369 P.2d 67 (1962).

The arguments presented by the P.U.C. and Amicus Electric Association in support of an exemption from Article V, Section 35 for P.U.C. regu-

lation of municipally owned electric utilities with respect to outside services rest upon a line of cases beginning with Town of Holyoke v. Smith, supra, and continuing through City of Lamar v. Town of Wiley, 80 Colo. 18, 248 P. 1009 (1926); Denver v. Public Utilities Commission, 181 Colo. 38, 507 P.2d 871 (1973); and, K.C. Electric Association v. Public Utilities Commission, _____ Colo. _____, 550 P.2d 871 (1976). A close analysis of these cases, however, read in conjunction with the language of Article V, Section 35 and other cases decided directly on the constitutional provision, does not support the exemption sought.

Town of Holyoke v. Smith, supra, is the first case in which the Colorado Supreme Court directly considered the application of Article V, Section 35 language to P.U.C. regulation of municipal services. The Court concluded that Article V, Section 35 prohibited the P.U.C. from exercising jurisdiction over electric rates charged by the Town to its citizens. The latter part of the Court's opinion in Holyoke does contain policy language heavily relied upon by the P.U.C. and Amicus Electric Association--language stating that the only parties affected by the electric rates were the Town and its citizens and, since the Town's government is chosen by its citizens, they need no protection of an outside body. This language, however, was intended to justify the result reached by the Court on alternative non-constitutional grounds. The Court reasoned that there would be no police power justification for legislative control over municipal operation of a power plant because of the political control which could be exercised by the residents of the municipality. The Court's conclusion points out that its constitutionally-based Article V, Section 35 discussion was not related to its police power, policy considerations:

> "It is clear that if the act be construed as giving the Public Utilities Commission the right to fix the rates in this case, it would to that extent be invalid, because in violation of the section of the Constitution above discussed (Article V, Section 35).

> Moreover, it is being manifest that the fixing of rates to be charged by the town of Holyoke for electric current is not an exercise of the police power, it would seem that the Public Utilities Commission would have no authority in the premises, even were there no specific constitutional provisions involved." Town of Holyoke v. Smith, supra, 226 P. at 162.

Shortly after the Holyoke decision was announced, People v. City of Loveland, 76 Colo. 188, 230 P. 399 (1924) determined that the P.U.C. lacked jurisdiction under the language of Article V, Section 35, to prevent the City from constructing a municipal electric plant. The Court concluded again that the P.U.C. was a special commission within the language of Article V, Section 35:

> "That fact being established, it follows that any attempt by the Commission 'to interfere with any municipal improvement, money, property or effects' was prohibited. An attempt by the Legislature to grant to the Utilities Commission any power which it is thus prohibited from exercising is futile."

People v. City of Loveland, supra, 230 P. at 400.

The next case of importance is City of Lamar v. Town of Wiley, supra. While the Lamar case involved facts which should have compelled a thorough discussion of Article V, Section 35, it cannot be viewed as a decision interpreting that constitutional language. In Lamar, the Court resolved on policy grounds the question of whether the P.U.C. had jurisdiction to regulate rates charged by a municipally owned and operated electric utility to customers located outside the municipality's boundaries. The Court indicated that it was necessary to give the P.U.C. jurisdiction, that outside consumers "should be protected by a state commission." City of Lamar v. Town of Wiley, supra, 248 P. at 1010. The closest the Court came to directly addressing the limitation of Article V, Section 35 was through references to the Holyoke opinion. These references, however, cannot be considered interpretive of Article V, Section 35 since the Court in Lamar referred only to that portion of the Holyoke opinion which discussed

(in dictum) whether the state, in the exercise of its police power, could justify regulating municipal utility rates in the absence of an applicable constitutional provision.

The extent to which the Lamar Court overlooked the constitutional mandate of Article V, Section 35 is revealed by the following statement of the Court:

> "When a municipality, whether in its operation of its own public utility it acts in its municipal or governmental, or in its proprietary, or quasi public, capacity, or partly in one and partly in the other, and as such furnishes public service to its own citizens, and in connection therewith supplies its products to consumers outside of its own territorial boundaries, the function it thereby performs, whatever its nature may be, in supplying outside consumers with a public utility, is and should be attended with the same conditions, and be subject to the same control and supervision, that apply to a private public utility owner who furnishes like service. City of Lamar v. Town of Wiley, supra, 248 P. at 1010. (Emphasis added.)

In view of Article V, Section 35's prohibition against any special commission being delegated the power to perform "any municipal function whatever", the Lamar opinion overlooks the mandate of the people as expressed in the Constitution and substitutes a policy judgment therefor.

The next relevant case decided by the Court was Englewood v. Denver, supra. In the Englewood opinion, the Court directly considered (as the Lamar court did not) the language of Article V, Section 35, and concluded that this constitutional language prohibited the P.U.C. from exercising jurisdiction over the rates charged by Denver to customers located outside its boundaries. The Court distinguished the Lamar opinion:

> "It is contended by counsel for Englewood that the case of City of Lamar v. Town of Wiley, 80 Colo. 18, 248 Pac. 1009, is here controlling in all respects. With this contention we cannot agree, because in that case the city of Lamar had invoked the jurisdiction or control of the Public Utilities Commission and the question of whether Lamar was a public utility in furnishing electricity beyond its border was not an issue, while in the present case, Denver has consistently held itself free from submission to supervision and control

> of its utilities operations, including the supplying of water to consumers beyond its territorial limits. Further, the Lamar case involved the furnishing of electric current to the neighboring town of Wiley. While we do not pause to explore the field of distinction between supplying water and that of supplying electric current, it may be said that a great distinction would be found to exist. Another Colorado case frequently cited by counsel is that of Town of Holyoke v. Smith, 75 Colo. 286, 226 Pac. 158, in which the municipality resisted the control of the Public Utilities Commission on the ground that Section 35 of Article V of the Colorado Constitution prohibited supervision or interference with municipal property to the end that the Public Utilities Commission did not have jurisdiction over the internal rates of a municipally owned electric plant, and this court sustained that contention." Englewood v. Denver, supra, 123 Colo. at 296. More importantly, the Englewood Court considered itself bound by the language of Article V, Section 35 once it determined that Denver's excess water was held as municipal property. The Court stated:

> "We find, and so determine, that Denver holds such water as is not needed by it for immediate use in its proprietary capacity, in which it has a well defined property right; and Section 35 of Article V of the Colorado Constitution, supra, withholds from the legislature all power to dedicate to any commission any supervision of this property right, thus precluding any jurisdiction of the Public Utilities Commission." Englewood v. Denver, supra, 123 Colo. at 300, 301.

The Court's decision in Englewood was considered determinative in City of Colorado Springs v. Public Utilities Commission, 126 Colo. 265, 248 P.2d 311 (1952), where the Court decided that outside water services provided by Colorado Springs were not subject to P.U.C. jurisdiction. See Parrish v. Public Utilities Commission, 134 Colo. 192, 301 P.2d 343 (1956).

An attempted assertion of P.U.C. jurisdiction over municipally-owned utilities was again rejected by the Court in Thornton v. Public Utilities Commission, supra. In deciding Thornton, the Court adopted the same approach as adopted by the Courts in Holyoke and Englewood, analyzing the language of Article V, Section 35, and applying that language to the facts before it. The Court determined that the water and sewer facilities acquired by Thornton were municipal improvements within the meaning of

the language of Article V, Section 35 and that, by force of that constitutional limitation:

> "[T]he legislature could not, by any law, vest in the Public Utilities Commission or any agency with like powers and duties jurisdiction to interfere with the municipal improvements such as the water and sewage facilities acquired by Thornton."

Thornton v. Public Utilities Commission, supra, 157 Colo. at 194.

Two cases decided subsequent to Thornton are cited by the P.U.C. and Amicus Electric Association as supporting P.U.C. jurisdiction over electric rates charged by municipalities to outside consumers: Denver v. Public Utilities Commission, supra; and, K.C. Electric Association, Inc. v. Public Utilities Commission, supra. But neither of these cases support the proposition that the language of Article V, Section 35 of the Colorado Constitution permits such jurisdiction. In Denver v. Public Utilities Commission, supra, the Court did not directly analyze the language of Article V, Section 35 or its application to the facts presented by the case. Rather, the opinion of the Court was directed primarily to the question of whether the 1954 adoption of Article XXV of the Colorado Constitution was intended to and did alter P.U.C. jurisdiction with respect to municipally-owned utilities. The Court concluded it did not. The only consideration given to Article V, Section 35 was by implication through references to Englewood v. Denver, supra, and City of Lamar v. Town of Wiley, supra, and the statement of the Court that both were still correct statements of the law. Additionally, in K.C. Electric Association, Inc. v. Public Utilities Commission, supra, the only service provided by the municipality was within its own boundaries and the Court's language regarding P.U.C. jurisdiction over outside services was dictum.

From the previously discussed cases, it is apparent that P.U.C. jurisdiction has been denied each time the Court specifically reviewed the language of Article V, Section 35 and applied that language to the facts

before it. Town of Holyoke v. Smith, supra; People v. City of Loveland, supra; Englewood v. Denver, supra; and, Thornton v. Public Utilities Commission, supra. In the only cases in which P.U.C. jurisdiction over municipal utilities has been upheld, the specific language of Article V, Section 35 was not discussed by nor applied to the facts before the Court. City of Lamar v. Town of Wiley, supra; and, Denver v. Public Utilities Commission, supra. The League submits that the language of Article V, Section 35 permits no distinction between municipal services provided outside and inside municipal boundaries. A service provided by a municipality is one unit, and supervision of any part of the unit must result ultimately in supervision of the whole. The constitutional limitation set forth in Article V, Section 35 is not predicated upon the location of the service, but upon the municipal status of the improvement, money, property, effects or function.

Much emphasis has been placed on the necessity for state protection of municipal customers located outside municipal boundaries. Municipalities, however, are not motivated by a drive to maximize profits. They are aware of the importance of the surrounding territory and its residents to their welfare. And, even absent P.U.C. jurisdiction, the outside consumers are not without remedy. Courts may provide redress in proper cases; the state legislature has direct power, absent constitutional limitations, to regulate and limit municipal powers and services; and, if all of these means fail, and it appears that only a state commission can protect the rights of the outside consumers, the Constitution may be amended by the citizens of Colorado at any time to permit the jurisdiction herein sought to be exercised.*

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*In fact, amendments to Article V, Section 35 of the state constitution specifically permitting state agency regulation of municipally-owned utilities have been considered but rejected by the General Assembly in past years. (See, e.g., H.C.R. 1009, 49th General Assembly, 1973.)

CONCLUSION

For the reasons stated and the authorities cited herein, the decision of the District Court denying P.U.C. jurisdiction over the rates charged by the City of Loveland for electric services provided to customers residing outside City boundaries should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief have been served upon the following listed parties of record by first class mail, postage prepaid, this 16th day of March, 1977.

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