No. 27893

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY OF MONTROSE, COLORADO, a Municipal Corporation, Plaintiff-Appellant, v. PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, et al, Defendants-Appellees.	)	Appeal from the District Court of the County of Montrose State of Colorado Honorable Fred Calhoun 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 224 cities and towns located throughout the state of Colorado. At issue in this case is the validity of a Public Utilities Commission (PUC) decision ordering Rocky Mountain Natural Gas Company to surcharge franchise fee payments to the customers in certain municipalities which have entered into franchise agreements with the Company. This Court's determination of the validity of the PUC order is of particular interest to the League and its member municipalities.

Colorado law has long recognized the authority of municipalities to enter into franchise agreements with utility companies desiring to provide service to municipal residents. See, e.g., C.R.S. 1973, 31-15-707 (1975 Supp.); C.R.S. 1973, 31-32-101, et seq. (1975 Supp.)*; Colorado Constitution, Article XX, Section 4; and Colorado Constitution, Article XXV. Pursuant thereto, numerous municipalities throughout Colorado have entered into franchise agreements with a variety of gas and/or electric utility companies. In fact, well over one-half of all municipalities responding to a League survey in 1971 reported having entered into gas and/or electric franchise agreements. Payment by the utility of a franchise fee as part of the agreement was reported by almost all of these municipalities.

Currently, there is no decision of the Colorado Supreme Court specifically ruling on the validity of surcharging or the circumstances--if any--under which utility franchise fees may be surcharged. It appears that the PUC approves generally of the concept of surcharging and that the Court's decision herein likely will determine whether, or to what extent, the Commission applies its surcharging orders to other utilities

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* Applicable to non-home rule cities and towns. See C.R.S. 1973, 31-1-101(2) and (13) (1975 Supp.).

and municipal franchise agreements entered into by such utilities. The Court's decision in this case thus will affect not only the municipalities receiving franchise fee payments from Rocky Mountain Natural Gas Company, but it also likely will affect other municipalities throughout the state which have entered into utility franchise agreements providing for payment of franchise fees.

STATEMENT OF THE ISSUES

The League adopts the statement of the issues appearing in the brief of the City of Montrose.

STATEMENT OF THE CASE

The League adopts the statement of the case appearing in the brief of the City of Montrose.

SUMMARY OF THE ARGUMENT

THE PUBLIC UTILITIES COMMISSION ERRED IN ORDERING ROCKY MOUNTAIN NATURAL GAS COMPANY TO SURCHARGE TO MUNICIPAL CUSTOMERS THE COMPANY'S FRANCHISE FEE PAYMENTS.

A. The Criteria For Judicial Review Of The PUC's Decision Are Set Forth In C.R.S. 1973, 40-6-115.

B. No Substantial Evidence Exists To Support The Commission's Order Requiring Surcharging Of Any Portion, Even Less Surcharging 100%, Of the Franchise Fees Paid By Rocky Mountain Natural Gas Company.

C. The Commission Failed To Regularly Pursue Its Authority In Ordering The Surcharge Since Substantial Evidence In The Record Establishes That Surcharging, And Particularly Surcharging 100%, Of The Municipal Franchise Fee Is Unjust, Unreasonable, And Discriminatory.

D. The Surcharge Order Of The Public Utilities Commission Is An Unconstitutional Impairment Of The City Of Montrose's Contract With Rocky Mountain Natural Gas Company; And The Commission Lacked Legal Authority To Order Surcharging Of The Franchise Fee.

ARGUMENT

THE PUBLIC UTILITIES COMMISSION ERRED IN ORDERING ROCKY MOUNTAIN NATURAL GAS COMPANY TO SURCHARGE TO MUNICIPAL CUSTOMERS THE COMPANY'S FRANCHISE FEE PAYMENTS.

A. The Criteria For Judicial Review Of The PUC's Decision Are Set Forth In C.R.S. 1973, 40-6-115.

The criteria for judicial review of a PUC decision are contained in C.R.S. 1973, 40-6-115. That statute establishes four bases upon which a reviewing court may examine a decision or order of the PUC. Under that statute, a court may determine: whether the Commission "has regularly pursued its authority"; whether "the decision under review violates any right of the petitioner under the constitution of the United States or of the State of Colorado"; whether "the decision of the commission is just and reasonable"; and whether the Commission's "conclusions are in accordance with the evidence". C.R.S. 1973, 40-6-115(3).

This Court has had occasion to interpret the meaning of the

statutory requirements that the PUC "regularly pursue its authority" and that its "conclusions be in accordance with the evidence". In Public Utilities Commission v. Loveland, 87 Colo. 556, 289 P. 1090 (1930), the Court stated that the statutory requirement that a reviewing court determine whether the Commission's "conclusions are in accordance with the evidence" means that orders of the Commission based on propositions of fact not supported by substantial evidence be modified or set aside. See also, Consolidated Freightways Corporations v. Public Utilities Commission, 158 Colo. 239, 406 P.2d 83 (1965).

Additionally, in reviewing a PUC decision or order to determine whether the Commission has "regularly pursued its authority", the Court has stated that:

> "This (review) would involve, among other matters, whether the decision is based upon the evidence introduced before the Commission at the hearing; whether its order is supported by findings of fact...; whether the Commission applied the legislative standards set forth for the guidance of the Commission; and whether the Commission acted within the authority conferred or went beyond it." Public Utilities Commission v. Northwest Water Corporation, 168 Colo. 154, 169, 451 P.2d 266 (1969) (citations omitted). See also, Mountain States Telephone and Telegraph Company v. Public Utilities Commission, 182 Colo. 269, 513 P.2d 721 (1973).

The League submits that application of the statutory criteria for judicial review, as explained in the above court decisions, must result in a determination by this Court that the Commission surcharge order be set aside.

B. No Substantial Evidence Exists To Support The Commission's Order Requiring Surcharging Of Any Portion, Even Less Surcharging 100%, Of The Franchise Fees Paid By Rocky Mountain Natural Gas Company.

The brief of the City of Montrose discusses in depth the apparent

PUC rationale in ordering surcharging of the franchise fees paid by Rocky Mountain Natural Gas Company. In general, the rationale for surcharging seems to be based on decisions from some other jurisdictions that certain municipal taxes levied on a utility should be surcharged rather than treated as a general operating expense, since the tax payments benefit only the levying municipality. Thus, these jurisdictions have reasoned, utility customers located outside the municipalities levying the taxes should not be required to share in the tax payment since they received no benefit therefrom.

However, to apply this rationale to franchise fees contained in franchise agreements negotiated between Colorado municipalities and various utilities, the PUC would have to make two findings: 1) that a franchise fee is a "tax"; and 2) that non-municipal customers receive no benefit from the municipal franchises. Moreover, the record before the PUC must contain some substantial evidence to support these findings. C.R.S. 1973, 40-6-115(3) and Public Utilities Commission v. Loveland, supra.

The League submits that there is no evidence in the record before the PUC to support a conclusion that the franchise fee under consideration is a tax. The League further submits that there is no evidence--certainly no substantial evidence--in the record before the PUC to support a finding that non-municipal customers received no benefits from the franchise at issue herein. In fact, the only evidence in the record appears to be that presented by the City and its witnesses to the effect that non-municipal customers do receive benefits from the franchise.

The Franchise Fee Is Not A Tax

There appears to be no evidence in the record to even suggest,

much less support a conclusion, that the franchise fee paid by Rocky Mountain Natural Gas Company to the City of Montrose is a "tax". In fact, a franchise fee clearly is not a "tax" but is consideration paid to a municipality for the grant of a franchise.

A utility franchise is considered under law to be a contract between the municipality and the particular utility. Public Utilities Commission v. City of Durango, 171 Colo. 553, 469 P.2d 131 (1970); and, City of Denver v. Denver Union Water Company, 41 Colo. 77, 91 P. 918 (1907). In fact, should a municipality seek to repeal the franchise prior to the end of its term, the repeal could be considered an unconstitutional impairment of contract or a taking of property in violation of the due process clause. Pikes Peak Power Company v. City of Colorado Springs, 105 F. 1 (8th Cir. 1900).

While the rights received by a utility pursuant to a municipal franchise are subject to negotiation, they frequently include, among other matters:

1. A grant to operate a particular utility service within the municipality and supply the service to the citizens of the municipality. See, e.g., Public Utilities Commission v. City of Durango, supra.

2. A grant to use and maintain facilities within the public streets, alleys, and other appropriate ways in operating and supplying the service. See, e.g., City of Denver v. Denver Union Water Company, supra; and Englewood v. Mountain States Telephone and Telegraph Company, 163 Colo. 400, 431 P.2d 40 (1967).

3. A lengthy term for the franchise, normally of 20-25 years. See, e.g., Public Utilities Commission v. City of Durango, supra.

The brief of the City of Montrose outlines in detail the benefits received by Rocky Mountain Natural Gas Company and the detriments incurred by the City of Montrose through the specific franchise agreed to by the two parties.

As part of the contract between the municipality and the utility, a franchise fee normally is bargained for--in exchange for the specific benefits received by the utility from the municipality. The franchise fee is part of the contract and is the consideration flowing to the municipality upon which the contract rests. The amount of the fee must, of course, be agreed upon and accepted by the utility, just as the utility must accept other terms of the franchise. See City of Denver v. Denver Union Water Company, supra.

Other courts have recognized that a franchise fee, such as the one under consideration herein, is not a "tax". In Plant City v. Mayo, 337 So.2d 966, 973 (Fla. 1976), the Court stated:

> "...(W)e have absolutely no difficulty in holding that the franchise fees payable by Tampa Electric are not 'taxes'.... (U)nlike other governmental levies, the charges here are bargained for in exchange for specific property rights relinquished by the cities."

And in State v. Department of Public Service, 19 Wash.2d 200, 142 P.2d 498, 537 (1943), the Supreme Court of Washington said:

> "Such payments (franchise fees) differ basically from taxes paid pursuant to excise or similar taxes levied by a municipality. Payments made under franchises such as those here in question are based upon contracts which grant to respondent, inter alia, the right to install portions of its equipment in the public streets...."

The League submits that this Court should find that no evidence in the record exists to support any determination by the PUC that the franchise fee at issue is a "tax".

Benefit to Customers Located Outside the Municipality

There is no evidence--and certainly no substantial evidence--in the record to support a finding by the PUC that customers outside Montrose receive no benefits from the franchise entered into between the utility and the City. Since the PUC ordered that 100% of the franchise fee be surcharged, the League submits that only if there were some substantial evidence in the record to support a finding of "no benefit" from the franchise could the PUC's surcharging decision be upheld. Because the only evidence in the record shows that non-municipal customers are benefitted by the franchise, the PUC could not reasonably and justly have ordered a 100% surcharge. At least some portion of the franchise fee should not have been surcharged.

The League believes it is incumbent upon this Court to reverse the Commission's decision to require surcharging of the franchise fee for the lack of any evidence, and certainly the lack of any substantial evidence, to support the decision. See Plant City v. Mayo, supra.

C. The Commission Failed To Regularly Pursue Its Authority In Ordering The Surcharge Since Substantial Evidence In The Record Establishes That Surcharging, And Particularly Surcharging 100%, Of The Municipal Franchise Fee Is Unjust, Unreasonable, And Discriminatory.

As discussed previously, municipal franchises are contracts entered into between a municipality and a particular utility. The franchise fee is part of the contract, constituting a bargained-for exchange for the specific rights granted by the municipality to the utility. One of the significant rights granted in a franchise is the right of the utility to use and maintain its facilities in the public

streets and other public ways. Essentially, the franchise fee pays right-of-way costs to the municipality. See, e.g., Plant City v. Mayo, supra.

Utilities, of course, must compensate property owners outside municipalities for rights-of-way. To the League's knowledge, these right-of-way costs are treated by the utility as general operating expenses and paid by all customers--municipal and non-municipal alike. By requiring surcharging of a municipality's franchise fee--and particularly by requiring surcharging of 100% of that franchise fee--the PUC is requiring municipal customers to, in effect, grant rights-of-way to the utility free of any charge. Municipal customers served by the utility thus must pay not only for the full cost of the utility's rights-of-way within the municipality, but also a portion of the cost of the utility's rights-of-way acquired outside of the municipal boundaries. Customers residing outside municipalities pay part of the cost of the utility's right-of-way acquisition outside municipal boundaries, but none of the cost of right-of-way acquisition within the municipality. This result, required by the Commission's order to surcharge 100% of the franchise fee, is unjust, unreasonable, and discriminatory as to municipal customers of the utility.

If the Commission is to be permitted to mandate surcharging at all, it should be so permitted only to the extent that some substantial evidence before the Commission establishes that the franchise fee, or a specific portion thereof, is not just and reasonable compensation for the use of public streets, alleys and other public ways. No such evidence existed in the present case.

Finally, the League submits that an order of the PUC requiring 100% surcharging of a franchise fee is unjust, unreasonable, and discriminatory as a matter of law, since it provides no compensation to the municipal

residents for the use of their public streets, alleys and other public ways.

D. The Surcharge Order Of The Public Utilities Commission Is An Unconstitutional Impairment Of The City Of Montrose's Contract With Rocky Mountain Natural Gas Company; And The Commission Lacked Legal Authority To Order Surcharging Of The Franchise Fee.

The League agrees with and hereby adopts arguments III and IV of the brief of the City of Montrose to the effect that the surcharge order of the Public Utilities Commission is an unconstitutional impairment of the City's contract with Rocky Mountain Natural Gas Company, and that the Commission lacked legal authority to order surcharging of the franchise fee.

CONCLUSION

For the reasons stated and the authorities cited, the Colorado Municipal League prays that the Court reverse the PUC's decision ordering franchise fees be surcharged by Rocky Mountain Natural Gas Company.

Respectfully submitted,

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