SUPREME COURT, STATE OF COLORADO

Case No. 81 SC 116

BRIEF OF AMICUS CURIAE, COLORADO MUNICIPAL LEAGUE

UNION RURAL ELECTRIC ASSOCIATION, INC.

Petitioner,

v.

THE TOWN OF FREDERICK, COLORADO, BOARD OF TRUSTEES OF THE TOWN OF FREDERICK, COLORADO, HOLLY HALL, BEULAH MEEKER, JOHN DiGREGORIA, PAUL KiPAOLO, EMILIO RUSCITTI, ERYL COLLIER AND CARMEN DeSANTIS, AS MAYOR AND MEMBERS OF THE BOARD OF TRUSTEES OF THE TOWN OF FREDERICK, COLORADO,

Respondents.

CERTIORARI TO THE COLORADO COURT OF APPEALS, NO. 80CA0511,

Opinion by the Honorable Charles D. Pierce, Coyte and Kelly, J.J., Concur

Susan K. Griffiths, No. 2328
4800 Wadsworth Blvd., Suite 204
Wheat Ridge, Colorado 80033
Telephone: (303) 421-8630

Attorney for the Amicus Curiae
Colorado Municipal League

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES (Continued)

CASES: PAGE:

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

STATEMENT OF THE CASE

The Colorado Municipal League ("League") adopts the statement of the case appearing in the brief of the Town of Frederick ("Town" or "Frederick").

STATEMENT OF THE ISSUES

The League adopts the statement of the issues appearing in the brief of the Town of Frederick. The League's argument will focus on the following issue, central to the case: Does extension of the Town's electric service into annexed areas take Union's property?

SUMMARY OF ARGUMENT

The certificate of convenience and necessity ("certificate") issued to Union Rural Electric Association, Inc. ("Union") by the Public Utilities Commission ("PUC" or "Commission") grants Union an exclusive right to provide electric service within its certificated area only in relation to other utilities also subject to PUC jurisdiction. Since municipal utilities operating within municipal boundaries are not subject to PUC jurisdiction, a PUC certificate provides Union no exclusive right to serve in relation to such municipal utilities. Thus, no property right of Union is taken when Frederick extends its municipal electric service wthin its boundaries to serve new customers in annexed areas.

ARGUMENT

EXTENSION OF THE TOWN'S ELECTRIC SERVICE INTO ANNEXED AREAS DOES NOT TAKE UNION'S PROPERTY.

Identifying what is <u>not</u> at issue in this case helps bring into focus what is at issue. Frederick has not sought to force Union out of any annexed area, it has not sought to prevent Union from serving any of Union's customers existing at the time of annexation, and it has not sought to

compete with Union for any of Union's existing customers. See Valley Water District v. City of Littleton, 32 Colo.App. 286, 512 P.2d 644 (1973), recognizing the right of a utility to continue service existing at the time of annexation.[1] The Town has not sought to take over any of Union's facilities in the annexed area. Frederick does not even seek to restrict Union's ability to expand its service to new customers within the annexed area.[2] All that Frederick seeks to do is provide electric service requested by new customers within areas annexed to the Town.

The League submits that the Town's authority to serve its new citizens in the annexed area, in competition with and without compensation to Union, is firmly founded on existing Colorado law and is supported by other jurisdictions which have considered the issue. The District Court in this case correctly decided in favor of the Town. Its decision was affirmed in a unanimous and soundly-reasoned Court of Appeals' opinion and should likewise be affirmed by this Court.

A. Competition does not constitute a taking of property from the holder of a non-exclusive certificate.

Justice Holmes captured the essence of this case when he stated:

> "An appeal to the Fourteenth Amendment to protect property from a congenital defect must be in vain."

---

[1] See Cady v. City of Arvada, 31 Colo.App. 85, 499 P.2d 1203 (1972) on the right of a public utility to continue servicing existing customers, free of interference from a municipality.

[2] Although the question of the Town's authority to prevent Union from expanding its service within the annexed area in the absence of a franchise is not at issue, that authority is clear under existing Colorado statutes and cases from other jurisdictions. Broad authority is granted municipalities to regulate and control use of their public streets and rights-of-way and to franchise utilities: C.R.S. 1973, 31-15-702, 31-15-707, and 31-32-101 through 31-32-105 (1977 Repl.Vol.). See also Colorado Constitution, Article XXV; and City of Brookings v. Brookings Lake Telephone Co., 85 S.D. 96, 177 N.W.2d 489 (1970); Tri-County Electric Association, Inc. v. City of Gillette, 584 P.2d 995 (Wyo. 1978); and Dixie Electric Membership Corporation v. City of Baton Rouge, 440 F.2d 819 (5th Cir. 1971).

Madera Water Works v. Madera, 228 U.S. 454 (1913). In Madera, a water company sought to enjoin the city from building water works to compete with the company's already established system. The company complained of the potentially ruinous nature of the city's competition and alleged that the competition would constitute a taking of their property. Speaking through Justice Holmes, the United States Supreme Court rejected the company's argument. The "congenital defect" in the water company's property argument there, as in Union's property argument here, was the absence of any exclusive right to serve in relation to service by the municipality.

The decision in Madera followed earlier opinions in which the Court ruled that competition does not constitute a taking of property from the holder of a non-exclusive franchise. See, e.g., Knoxville Water Company v. City of Knoxville, 200 U.S. 22 (1906); and Helena Waterworks Co. v. Helena, 195 U.S. 383 (1904). See also Durham v. State of North Carolina, 395 F.2d 58 (4th Cir. 1968) (and cases cited therein, 395 F.2d at 60); and U.S. Disposal Systems, Inc. v. City of Northglenn, 193 Colo. 277, 567 P.2d 365 (1977). The holder of a non-exclusive franchise cannot complain of competition from a publicly-created utility system even if the competition will impair the value of the franchise, and may not recover damages or prevent the competition by injunction. 2 J.L. Sackman, Nichols on Eminent Domain §5.75[2] (3rd ed. 1980).

Union and its amici seem not to contest these established legal principles, but argue instead that Union's PUC certificate grants Union an absolute monopoly, an exclusive right to serve the certificated area free of competition from every utility whether or not the utility is other-

wise subject to the jurisdiction of the PUC. The Court of Appeals, however, correctly rejected their argument:

> [T]he exclusivity of a utility's certificate only precludes competition from other public utilities operating under the jurisdiction of the Commission, and does not prevent a municipality from providing public utility services within its boundaries. See City of Loveland v. Public Utilities Commission, 195 Colo. 298, 580 P.2d 381 (1978). See generally, Colo.Const. Art. 5, Sec. 35. A municipality may provide electrical service within its boundaries without a certificate of public convenience and necessity, although in doing so it enters into competition with a certificated public utility. People ex rel. Utilities Commission v. City of Loveland, 76 Colo. 188, 230 P. 399 (1924).
>
> Since Frederick extended electrical service within its municipal boundaries, the trial court did not err in denying injunctive relief to plaintiff.

Union Rural Electric Association, Inc. v. Town of Frederick, Colorado Court of Appeals, slip opinion, p. 2.

B. The exclusivity of Union's certificate precludes competition only from other public utilities operating under the jurisdiction of the PUC.

To support their argument of exclusivity as to all utilities, whether or not subject to PUC jurisdiction, Union and its amici rely upon three Colorado cases[3] involving only utilities which were subject to the jurisdiction of the PUC, general policy arguments favoring monopoly service, and distinguishable cases from three other jurisdictions.[4]

---

[3]Town of Fountain v. Public Utilities Commission, 167 Colo. 302, 447 P.2d 527 (1968); Western Colorado Power Co. v. Public Utilities Commission, 163 Colo. 61, 428 P.2d 922 (1967); and Public Utilities Commission v. Home Light & Power Co., 163 Colo. 72, 428 P.2d 928 (1967).

[4]Virginia [Town of Culpeper v. Virginia Electric and Power Co., 215 Va. 189, 207 S.E.2d 864 (1974)]; Mississippi [Kosciusko v. Mississippi Power & Light Co., 370 So.2d 1339 (Miss. 1979); City of Jackson v. Creston Hills, Inc., 252 Miss. 564, 172 So.2d 215 (1965); and Mississippi Power &

(Continued next page)

While these arguments will be discussed in more detail infra, p. 15, they do not respond to the key issue: that the jurisdiction of the PUC limits the scope of rights granted by a PUC certificate.

(1) The jurisdiction of the PUC limits the scope of rights granted through its certificate.

Any certificate of public convenience and necessity granted by the PUC is subject to the constitutional and statutory limits on the PUC's jurisdiction. City of Brookings v. Brookings Lake Telephone Co., 177 N.W.2d at 489. See, e.g., Tri-County Electric Association, Inc. v. City of Gillette, supra; Dixie Electric Membership Corporation v. City of Baton Rouge, supra; and, Homer Electric Association, Inc. v. City of Kenai, 423 P.2d 285 (Alaska 1967). Cf. Citizens' Telephone Co. v. Cincinnati, N.O. & T.P.R. Co., 192 Ky. 399, 233 S.W. 901 (1921) (jurisdiction of the granting authority is a limitation on the extent of the franchise granted). Restated, the PUC cannot grant a PUC regulated utility any greater rights or powers than the PUC has received under Colorado law. The PUC receives its authority solely from the Colorado Constitution and statutes. Snell v. Public Utilities Commission, 108 Colo. 162, 167, 114 P.2d 563, 565 (1941). See Haney v. Public Utilities Commission, 194 Colo. 481, 574 P.2d 863 (1978). Consequently, the scope of rights granted by a PUC certificate can be determined only from a review of the relevant constitutional and statutory limits on the PUC's jurisdiction.

Light Co. v. City of Clarksdale, 288 So.2d 9 (Miss. 1974)]; and Louisiana [Town of Coushatta v. Valley Electric Membership Corporation, 139 So.2d 822 (La. 1961)].

(2) The Colorado Constitution prohibits the PUC from exercising jurisdiction over and from supervising or interfering with a municipally-owned utility operating within municipal boundaries.

Article V, Section 35 and Article XXV of the Colorado Constitution expressly deny the PUC any jurisdiction over and any power to supervise, interfere or otherwise affect the operation of a municipally-owned utility operating within municipal boundaries. Adopted as an amendment to the Constitution in 1954, Article XXV states, as a specific limit on the PUC's authority to regulate services and facilities of public utilities:

> ...provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, further, that nothing herein shall be construed to apply to municipally owned utilities. (Emphasis added.)

The above-emphasized language led the Colorado Supreme Court to conclude that Article XXV prohibits the PUC from exercising any control over a municipally-owned utility operating within municipal boundaries. K.C. Electric Association v. Public Utilities Commission, 191 Colo. 96, 550 P.2d 871 (1976). In City and County of Denver v. Public Utilities Commission, 181 Colo. 38, 46, 507 P.2d 871, 875 (1973), the Court construed the emphasized language of Article XXV as declaring a lack of any intent to grant the General Assembly (or PUC) any authority to regulate municipally-owned utilities operating within their corporate limits.

Additional protection for municipally-owned utilities operating within municipal boundaries is provided by Article V, Section 35 of the Colorado Constitution which states, in relevant part:

> The general assembly shall not delegate to any special commission...any power to make, supervise or interfere with any municipal improvement, money, property or effects...or perform any municipal function whatever.

The PUC is a "special commission" subject to the limits of Article V, Section 35. See Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158 (1924); and City of Lamar v. Town of Wiley, 80 Colo. 18, 248 P. 1009 (1926). Beginning with the Holyoke decision in 1924, the Colorado Supreme Court has consistently interpreted Article V, Section 35 as constitutionally prohibiting PUC regulation of municipal utilities operating within municipal boundaries. See also City of Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965); and City of Loveland v. Public Utilities Commission, 195 Colo. 298, 580 P.2d 381 (1978), in which the Court stated, at 195 Colo. 301, 580 P.2d 383:

> It is clear from our case law interpreting [Article V, Section 35] that the PUC may not constitutionally regulate utilities operated by a municipality within its boundaries. The PUC may not interfere with municipal decisions about purchasing, selling or building public utilities facilities....(Citations omitted.)

Under these long-recognized constitutional limits, the PUC is prohibited from directly interfering with any municipally-owned utility service provided within municipal boundaries. Moreover, the constitutional limits do not permit indirect interference through a PUC-issued certificate.

(3) Colorado statutes prohibit the PUC from exercising jurisdiction over municipally-owned utilities operating within municipal boundaries.

In addition to the constitutional limits, the jurisdiction of the PUC and the scope of rights embodied in a certificate are further limited by Colorado statutes. The PUC's jurisdiction extends only to "public

utilities." See C.R.S. 1973, 40-1-101 and 40-1-103; and Colorado Constitution, Article XXV. Certificates of convenience and necessity are granted only to "public utilities" pursuant to C.R.S. 1973, title 40, article 5. For example, C.R.S. 1973, 40-5-101 provides for issuance of a certificate where the PUC finds that there is or will be a duplication of service by public utilities in any area. Municipal utilities operating within municipal boundaries are not "public utilities" and thus are not subject to the PUC's statutory jurisdiction. See City of Loveland v. Public Utilities Commission, supra; and City of Englewood v. City and County of Denver, 123 Colo. 290, 229 P.2d 667 (1951). While a PUC-issued certificate may determine rights of service between public utilities subject to PUC jurisdiction, it cannot determine the rights of any utilities not subject to PUC jurisdiction.

Moreover, construing the scope of a certificate to prevent municipalities from serving annexed areas unless PUC certificated rights are purchased or condemned frustrates express statutory policies encouraging extension of municipal services into annexed areas. The state annexation statutes, C.R.S. 1973, 31-12-101 through 31-12-122 (1977 Repl.Vol.), contain a legislative declaration encouraging the extension of municipal services into annexed areas. C.R.S. 1973, 31-12-102 (1977 Repl.Vol.) mandates a liberal construction of the annexation laws and declares that their purpose is, in part, to encourage natural and well-ordered development of municipalities, to extend municipal services and facilities to eligible areas which form a part of the whole community, to provide an orderly system for extending municipal regulations into newly annexed areas, and to increase the ability of municipalities in urban areas to

provide their citizens the services they require.

The importance of municipal service extensions into annexed territory is also apparent from C.R.S. 1973, 31-12-104(1)(b) (1977 Repl.Vol.). That statute establishes certain criteria which must be met for property to be annexed, including whether it is physically practicable to extend to the area proposed to be annexed those urban services which the annexing municipality provides in common to all of its citizens, on the same terms and conditions as the services are made available to the other municipal citizens. Indeed, state law establishes a means by which annexed property can be disconnected from a municipality if the municipality "does not, upon demand, provide [to the annexed area] the same municipal services on the same general terms and conditions as the rest of the municipality receives." C.R.S. 1973, 31-12-119 (1977 Repl.Vol.).

Finally, to construe Union's certificate as granting it an exclusive right to serve the annexed area, even in relation to the Town, would suggest that Union could avoid obtaining consent of the Town for extensions within the area, thereby frustrating the purpose and terms of constitutional and statutory provisions. For example, C.R.S. 1973, 31-15-702(1)(a) (1977 Repl.Vol.) grants municipalities the authority to regulate the use of streets and other rights-of-way and prevent encroachments and obstructions therein, and to regulate and prevent the use of streets and other public places for power and communication poles. C.R.S. 1973, 31-15-707 (1977 Repl.Vol.) grants municipalities the power to authorize the erection and operation of electric light and power works by others. C.R.S. 1973, 31-32-101 through 31-32-105 (1977 Repl.Vol.) authorize municipalities to grant franchises for electric systems within municipalities. Even

the public utilities law provides in C.R.S. 1973, 40-5-103 that before a certificate can be issued by the PUC for service within a municipality, the applicant must show that it has received the required consent of the municipality to operate within municipal limits. See also Article XXV of the Colorado Constitution, which provides that the grant of authority to the PUC shall not affect the power of municipalities to grant franchises or exercise reasonable police powers.

Hence, Union's argument that its PUC-issued certificate grants an exclusive property right, immunizing it from competition by Frederick (and, presumably, allowing it to expand its service within Frederick without Frederick's consent), directly conflicts with the previously described constitutional and statutory scheme. On the other hand, that constitutional and statutory scheme is preserved if this Court recognizes, as did the Court of Appeals, that the jurisdiction of the PUC limits the scope of rights granted in a PUC-issued certificate.

C. Union received its certificate with notice of its limitations.

According to the District Court's "Memorandum of Decision and Order" (November 27, 1979), Union entered into an agreement with Public Service Company (PSCo) in 1964 dividing between them the right to serve certain territories. The agreement was approved by the Public Utilities Commission in 1964 and it issued certificates to the parties. Through that agreement, Union obtained the right to serve the area surrounding the Town of Frederick.

By 1964, the year of Union's agreement with PSCo and issuance of its PUC certificate, all of the constitutional limits on the PUC's jurisdiction (Article XXV and Article V, Section 35) had long been in place. Laws permitting municipal annexations were in effect, and in fact, Colorado's

cities and towns have had authority to annex contiguous areas since the General Laws of Colorado were enacted in 1877, during the first session of the General Assembly following statehood. General Laws of Colorado, 1877 at 876-877. The PUC's lack of authority over municipally-owned utilities operating within municipal boundaries had been settled for forty years, since the Supreme Court's 1924 decision in Town of Holyoke v. Smith, supra; and the lack of "public utility" status of such municipal utilities had been established at least since the Supreme Court's 1951 decision in City of Englewood v. City and County of Denver, supra.

Certainly by 1964, when it actively sought and received a certificate to serve the area surrounding Frederick, Union was charged with notice that Colorado municipalities expand their boundaries by annexation and that the PUC lacked jurisdiction over municipally-owned utilities operating within municipal boundaries. Indeed, the District Court's order noted that the 1964 agreement between Union and PSCo contained a clause specifically providing for withdrawal of Union from territory annexed to a municipality in which PSCo held a franchise.

Union must be viewed as accepting its PUC certificate in 1964 with full notice and knowledge of the state of the law at the time.[5] Courts elsewhere have similarly held:

> The normal trend of a city is to build and expand; so, therefore, anyone claiming electric utility rights pertaining only to rural territory entering areas contiguous to a city does so with notice that the

---

[5]A certificate of convenience and necessity is in the nature of a contract, Tri-County Electric Association v. City of Gillette, 584 P.2d 1001, 1005-1006, and laws which subsist at the time and place of making a contract become a part of it as though expressly referred to or incorporated in its terms. Tri-County Electric Association v. City of Gillette, 584 P.2d 1007. See also Cochrane v. Pacific States Life Insurance Co., 93 Colo. 462, 27 P.2d 196 (1933).

> municipality will very likely expand and is subject to that event.

Tri-County Electric Association v. City of Gillette, 584 P.2d 1006.

Likewise, in Town of Coushatta v. Valley Electric Membership Corporation, 139 So.2d 828, the Court stated:

> The defendant acted at its peril and under conditions it was bound to notice when it constructed its lines in an area adjacent to the municipality. In accordance with the history of the growth and expansion of towns and cities, the defendant knew that the area involved would likely be annexed to and become a part of the Town of Coushatta....

See also Calcasieu Sanitation Service, Inc. v. City of Lake Charles, 118 So.2d 179 (La.App. 1960). Similar notice must be imputed to Union in this case.

D. The scope of Union's certificate must be construed strictly against the utility.

In addition to the constitutional and statutory authority requiring denial of Union's due process claim, denial is also mandated by the general principle that public grants, such as Union's certificate, must be construed strictly against the grantee (Union). 3 C.D. Sands, Sutherland Statutory Construction §63.02 (4th ed. 1974), and see the cases cited therein. This rule of strict construction is particularly applicable where, as here, the grant was solicited by the grantee (Union), and where the grant tends to establish an exclusive franchise or monopoly. Id. Even where an exclusive franchise may exist, the extent of its operation is rigidly limited by this rule of strict construction. 3 C.D. Sands, Sutherland Statutory Construction §63.06 (4th ed. 1974).

E. Other cases support the Town's authority to serve new customers in the annexed area, in competition with and without compensation to Union.

Union and its amici argue that various adverse effects will result if Union's monopoly is not recognized and the Town is permitted to compete with Union for new customers[6] in the annexed area. Essentially, their's is an "ought to" argument, that Union and other REA's "ought to" have a monopoly right to serve within their certificated area, even to the exclusion of municipally-owned utilities operating within municipal boundaries. Such an argument, however, would more appropriately be addressed to the people of Colorado in support of a proposed constitutional amendment (which would be necessary to allow the PUC to exercise jurisdiction over municipally-owned utilities operating within municipal boundaries) than to this Court in exercising its responsibility to interpret and apply existing law.

This Court long ago recognized that the policy of regulated monopoly is of no import where a municipal utility is competing with a public utility for service within municipal boundaries. In People ex rel. Public Utilities Commission v. City of Loveland, 76 Colo. 188, 230 P. 399, 400 (1924), the Court ruled that Loveland was not prevented from constructing an electric light and power plant to serve the City even though Public Service Company (then Public Service Corporation of Colorado) owned and operated a plant in Loveland with which the City plant would be in competition:

> We have no criticism to make of counsel who represent a corporation whose business will be in competition with

---

[6]Particularly interesting is the reference in the brief of amicus curiae Poudre Valley Rural Electric Association, Inc., page 4, to an article by W. K. Jones, Origins of Certificates of Public Convenience and Necessity: Development in the States, 1870-1920, 79 Colum. L.Rev. 426 (1979) setting forth five reasons for monopolies in electric distribution utilities. A

(Continued next page)

> that of the city plant. We are not, however, willing to assent to the proposition that, because private capital has invested in a public utility, a municipality may not lawfully and justly provide a like utility for the benefit of its citizens. To hold the contrary would be to assert that no competition in the furnishing of light, power, gas, water, and kindred matters should be allowed, once a plant has been provided to supply any of them.

Although the instant case can be decided on existing Colorado law, nevertheless, several cases from other jurisdictions support the Town's authority to compete for new customers in the annexed area without compensation to Union. See City of Brookings v. Brookings Lake Telephone Co., supra note 2; Tri-County Electric Association, Inc. v. City of Gillette, supra note 2; Dixie Electric Membership Corporation v. City of Baton Rouge, supra note 2;[7] Homer Electric Association, Inc. v. City of Kenai, supra;[8] and Menderson v. City of Phoenix, 51 Ariz. 280, 76 P.2d 321 (1938).[9]

---

reading of the complete article presents an enlightening discussion which is critical of various of the rationales initally identified.

[7]While Brookings, Gillette and Dixie Electric concerned a municipality's authority to prevent the extension of the certificated utility's service within the annexed areas, a fortiorari, the municipalities' authority to compete for new service in the annexed area, without compensation to the certificated utility, would be recognized.

[8]The Court's decision in Homer Electric Association was based on the fact that Alaska municipalities (similar to Colorado municipalities) were not subject to the jurisdiction of that state's public utilities commission. Some time after the decision the state enacted legislation making Alaska municipalities subject to that state's public utilities commission, and a different result followed. See Alaska Public Utilities Commission v. Municipality of Anchorage, 555 P.2d 262 (Alaska 1976).

[9]Subsequent to the opinion in Menderson, the Arizona legislature adopted a statute regulating competitive service between a municipality and a public utility. Later Arizona decisions on the subject relied upon this statute. See City of Mesa v. Salt River Project, 92 Ariz. 91, 373 P.2d 722 (1962).

On the other hand, cases relied upon by Union and its amici are distinguishable. For the proposition that a PUC certificate grants an exclusive right to serve an area, even as to municipal utilities operating within municipal boundaries, Union and its amici rely upon three Colorado cases: Town of Fountain, supra note 3; Western Colorado Power Co., supra note 3; and Home Light & Power, supra note 3. Each case, however, involved only utilities subject to PUC jurisdiction and the breadth of language used by the Court must be considered in light of the facts before it. The only case involving a municipal utility, Town of Fountain v. Public Utilities Commission, supra, concerned service by the municipality outside of its municipal boundaries which is, of course, subject to PUC jurisdiction. City of Loveland v. Public Utilities Commission, supra.

With respect to cases from other jurisdictions relied upon by Union and its amici, supra note 4, the District Court distinguished the Mississippi case [Kosciusko] based on the different regulatory scheme existing in Mississippi. The Virginia case, Town of Culpeper, concerned only the issue of whether a franchised utility can continue its service existing at the time of annexation, an issue not in dispute in the instant case. The opinion in the Louisiana case, Town of Coushatta, is somewhat confusing but the court enjoined extension of the utility's service, after annexation, in the absence of permission from the annexing municipality.

CONCLUSION

Amicus Colorado Rural Electric Assocation explains in its brief (page 3) that in 1936, Congress created the Rural Electrification Administration generally for the purpose of financing the construction

and operation of plants, lines and systems to furnish electric energy to persons in rural areas. The Act authorized the lending of large sums of federal money at a very low interest rate, for a long term, in order to achieve that laudable goal. See State v. Upshur Rural Electric Cooperative Corporation, 156 Tex. 633, 298 S.W.2d 805 (1957).[10] Under this legislation, according to amicus Colorado Rural Electric Association, numerous rural electric cooperative associations were formed in Colorado generally for the purpose of providing their rural members with electrical energy on a cooperative, nonprofit basis, at cost. While this original purpose of REA's may be most worthy, Union and amici Mountain View, Poudre Valley, and the CREA presently are in the anomalous position of attempting to prevent competition for rural cooperatives serving within urban areas where other electric service is available, and attempting to force their services onto urban residents who may or may not wish to receive those services. The REA's desire to obtain, maintain and expand service within urbanized or urbanizing areas might be based, in part, on a recognition that because of the greater population density in urban areas, urban service is less expensive and urban customers may subsidize the more expensive service to rural customers. City of Montrose v. Public Utilities Commission, 197 Colo. 119, 122, 590 P.2d 502, 505 (1979).

As the League pointed out in its motion for permission to appear as amicus, the issues raised in this case are of significance to a number of

---

[10] In fact, the Court in Upshur held that, under the language of the REA Act and the facts of the case, an REA could not expand its services in annexed areas although it could continue to serve its customers in the annexed area at the time of annexation. 298 S.W.2d at 808. See also Caddo Electric Cooperative v. State, 391 P.2d 234 (Okla. 1964), and Pee Dee Electric Membership Corporation v. Carolina Power & Light Co., 253 N.C. 610, 117 S.E.2d 764 (1961).

Colorado municipalities situated similarly to Frederick. The cost to these communities of providing electric or gas service to their citizens would unnecessarily and unjustifiably increase if Union's argument is adopted by the Court. Moreover, adoption of Union's argument would hinder the ability of municipalities to achieve coordinated urban utility services and conflict with express state policies to encourage the orderly growth of municipalities and to increase the ability of municipalities to provide their citizens with the services they require.

The decision of the District Court should be affirmed.

Respectfully submitted,

Susan K. Griffiths

Susan K. Griffiths, No. 2328
Attorney for the
Colorado Municipal League
4800 Wadsworth Blvd., Suite 204
Wheat Ridge, Colorado 80033

Telephone: (303) 421-8630

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief were deposited in the United States mail, first class postage paid, on the 4th day of August, 1981 and addressed to the following:

Walker Miller
P. O. Box 1424
Greeley, Colorado 80632

Leroy Pete Goter
P. O. Box 321
Frederick, Colorado 80530

John J. Conway
4704 Harlan Street, #500
Denver, Colorado 80212

Robert T. James
2167 North Academy Blvd.
Colorado Springs, Colorado 80909

Randolph W. Starr
P. O. Box 642
Loveland, Colorado 80537

Sandra M. Marr

Sandra M. Marr

APPENDIX

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

Constitution of Colorado

ARTICLE V

Section 35. Delegation of power. 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.

ARTICLE XXV

Public Utilities

In addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the State of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or as may hereafter be defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.

Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado; provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, further, that nothing herein shall be construed to apply to municipally owned utilities.

31-12-102. Legislative declaration. (1) The general assembly hereby declares that the policies and procedures in this part 1 are necessary and desirable for the orderly growth of urban communities in the state of Colorado, and to these ends this part 1 shall be liberally construed. The general assembly further declares that it is the purpose of this part 1:

(a) To encourage natural and well-ordered development of municipalities of the state;

(b) To distribute fairly and equitably the costs of municipal services among those persons who benefit therefrom;

(c) To extend municipal government, services, and facilities to eligible areas which form a part of the whole community;

(d) To simplify governmental structure in urban areas;

(e) To provide an orderly system for extending municipal regulations to newly annexed areas;

(f) To reduce friction among contiguous or neighboring municipalities; and

(g) To increase the ability of municipalities in urban areas to provide their citizens with the services they require.

31-12-104. Eligibility for annexation. (1) An area is eligible for annexation if the governing body, at a hearing as provided in section 31-12-109, finds and determines:

(a) That not less than one-sixth of the perimeter of the area proposed to be annexed is contiguous with the annexing municipality. Contiguity shall not be affected by the existence of a platted street or alley, a public or private right-of-way, a public or private transportation right-of-way or area, or a lake, reservoir, stream, or other natural or artificial waterway between the annexing municipality and the land proposed to be annexed.

(b) That a community of interest exists between the area proposed to be annexed and the annexing municipality; that said area is urban or will be urbanized in the near future; and that said area is integrated with or is capable of being integrated with the annexing municipality. The fact that the area proposed to be annexed has the contiguity with the annexing municipality required by paragraph (a) of this subsection (1) shall be a basis for a finding of compliance with these requirements unless the governing body, upon the basis of competent evidence presented at the hearing provided for in section 31-12-109, finds that at least two of the following are shown to exist:

(I) Less than fifty percent of the adult residents of the area proposed to be annexed make use of part or all of the following types of facilities of the annexing municipality: Recreational, civic, social, religious, industrial, or commercial; and less than twenty-five percent of said area's adult residents are employed in the annexing municipality. If there are no adult residents at the time of the hearing, this standard shall not apply.

(II) One-half or more of the land in the area proposed to be annexed (including streets) is agricultural, and the landowners of such agricultural land, under oath, express an intention to devote the land to such agricultural use for a period of not less than five years.

(III) It is not physically practicable to extend to the area proposed to be annexed those urban services which the annexing municipality provides in common to all of its citizens on the same terms and conditions as such services are made available to such citizens. This standard shall not apply to the extent that any portion of an area proposed to be annexed is provided or will within the reasonably near future be provided with any service by or through a quasi-municipal corporation.

31-12-119. Disconnection of territory because of failure to serve. The landowners of any tract or contiguous tracts of land aggregating five acres or more located on a boundary of the municipality at the time of the disconnection action may, three or more years after annexation, petition for disconnection from the municipality if such municipality does not, upon demand, provide the same municipal services on the same general terms and conditions as the rest of the municipality receives. The procedure for such disconnection shall be as set forth in parts 6 and 7 of this article, insofar as consistent with this section. To the extent that such parts are inconsistent with this section, the provisions of this section shall prevail when the action is based on failure of the municipality to serve an annexed area.

31-15-702. Streets and alleys. (1) The governing body of each municipality has the power:

(a) (I) To lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, parks, and public grounds and vacate the same and to direct and regulate the planting of ornamental and shade trees in such streets, parks, and public grounds; to plant trees upon the same; to regulate the use of the same; to prevent and remove encroachments or obstructions upon the same; to provide for the lighting of the same; and to provide for the cleansing of the same;

(II) To regulate the openings therein for the laying-out of gas or water mains and pipes, the building and repairing of sewers, tunnels, and drains, and the erecting of utility poles. Any company organized under the general laws of this state or any association of persons organized for the purpose of manufacturing energy to supply municipalities or the inhabitants thereof with the same has the right by consent of the governing body, but not without such consent, subject to existing rights, to erect factories and lay down pipes in the streets or alleys of any municipality in the state, subject to such regulations as any such municipality by ordinance may impose;

(III) To regulate the use of sidewalks along the streets and alleys and all structures thereunder and to require the owner or occupant of any premises to keep the sidewalks, or along the same, free from snow and other obstructions;

(IV) To regulate and prevent the throwing or depositing of ashes, garbage, or any offensive matter in and to prevent any injury to any street, park, or public ground;

(V) To provide for and regulate crosswalks, curbs, and gutters;

(VI) To regulate and prevent the use of streets, parks, and public grounds for signs, signposts, awnings, awning posts, and power and communications poles, and for posting handbills and advertisements; to regulate and prohibit the exhibition or carrying of banners, placards, advertisements, or handbills in the streets or public grounds or upon the sidewalks; and to regulate and prevent the flying of flags, banners, or signs across the streets or from houses;

(VII) To regulate traffic and sales upon the streets, sidewalks, and public places and to regulate the speed of vehicles, cars, and locomotives within the limits of the municipality;

(VIII) To regulate the numbering of houses and lots and to name and change the name of any street or other public place;

(b) (I) To provide for the construction and maintenance of sidewalks, curbs, and gutters of such material and in such manner as shall be designated and to provide for paying the expenses thereof by special assessments upon the adjacent or abutting property, which assessments shall constitute a lien as provided in section 31-15-401 (1) (d) (I);

(II) To grade, grade or gravel, or otherwise surface or improve streets and alleys and to assess the costs of such improvements upon the lots or lands adjacent to or abutting upon any street or alley or portion thereof so improved, which assessments shall constitute a lien as provided in section 31-15-401 (1) (d);

(c) To grant, by ordinance and upon such terms and conditions as may be prescribed therein, to other municipalities the right-of-way through, over, across, and under streets and alleys for the purpose of laying, constructing, operating, maintaining, and repairing waterworks and all pipelines connected therewith;

(d) To authorize the construction of mills and mill races, irrigating or mining ditches, and feeders on, through, or across the streets of the municipality at such places and under such restrictions as deemed proper.

31-15-707. Municipal utilities. (1) The governing body of each municipality has the power:

(a) (I) To acquire waterworks, gasworks, and gas distribution systems for the distribution of gas of any kind or electric light and power works and distribution systems, including geothermal and solar systems, and all appurtenances necessary to any of said works or systems or to authorize the erection, ownership, operation, and maintenance of such works and systems by others. No such works or systems, except waterworks, shall be acquired or erected by a municipality until the question of acquiring or erecting the same is submitted at a regular or special election and approved in the manner provided for authorization of bonded indebtedness by section 31-15-302 (1) (d) and in accordance with the requirements of law, including requirements of law relating to the acquisition and financing of public utilities by municipalities. The question of acquiring or erecting a waterworks need not be so submitted and approved at an election.

(II) All such works or systems authorized by any municipality to be erected by others or the franchise of which is extended or renewed shall be authorized, extended, or renewed upon the express condition that such municipality has the right and power to purchase or condemn any such works or systems at their fair market value at the time of purchasing or condemning such works or systems, excluding all value of the franchise or right-of-way through the streets and also excluding any value by virtue of any contract for hydrant or private rental or otherwise entered into with the municipality in excess of the fair market value of the works or systems. If, after an election conducted in the manner prescribed in section 31-15-302 (1) (d), the municipality is authorized to acquire any of said works or systems after granting a franchise therefor to any person, the municipality shall purchase or condemn such works or systems within the municipal limits then utilized in serving the inhabitants of such municipality at their fair market value. Nothing in this subparagraph (II) shall require such municipality to purchase or condemn all or any part of such works or systems which is obsolete or which has outworn its usefulness.

(III) If the municipality elects to purchase such works or systems and if the parties in interest cannot agree on the purchase price, they shall enter into a written agreement to arbitrate the matter and to abide by the award of the arbitrators, in which event each party shall choose an arbitrator to determine their fair market value. If the two arbitrators cannot agree on the fair market value, they shall choose a third disinterested arbitrator, and the award of any two arbitrators shall be final and binding upon the parties.

(IV) Nothing in this paragraph (a) shall authorize the condemnation or purchase of any such works or systems within twenty years after the granting of any franchise therefor, except at periods of ten or fifteen years thereafter, without the consent of the owner of the franchise.

(b) To construct or authorize the construction of such waterworks without their limits and, for the purpose of maintaining and protecting the same from injury and the water from pollution, their jurisdiction shall extend over the territory occupied by such works and all reservoirs, streams, trenches, pipes, and drains used in and necessary for the construction, maintenance, and operation of the same and over the stream or source from which the water is taken for five miles above the point from which it is taken and to enact all ordinances and regulations necessary to carry the power conferred in this paragraph (b) into effect;

(c) To make such grant to inure for a term of not more than twenty-five years when the right to build and operate such water, gas, geothermal, solar, or electric light works is granted to a person by said municipality and to authorize such person to charge and collect from each person supplied by them with water, gas, heat, cooling, or electric light such water, gas, heat, cooling, or electric light rent as may be agreed upon between the person building said works and said municipality; and to enter into a contract with the person constructing said works to supply said municipality with water for fire purposes and for such other purposes as may be necessary for the health and safety thereof and also with gas, heat, cooling, and electric light and to pay therefor such sums as may be agreed upon between said contracting parties;

(d) To assess from time to time, when constructing such water, gas, geothermal, solar, or electric light works and in such manner as it deems equitable, upon each tenement or other place supplied with water, gas, heat, cooling, or electric light, such water, gas, heat, cooling, or electric light rent as may be agreed upon by the governing body. Gas, heat, cooling, and electric light shall be charged for according to use. At the regular time for levying taxes in each year, said municipality is empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said municipality. Such tax, with the water, gas, heat, cooling, or electric light rents hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works. If the right to build, maintain, and operate such works is granted to a person by a municipality and the municipality contracts with said person for the supplying of water, gas, heat, cooling, or electric light for any purpose, such municipality shall levy each year and cause to be collected a special tax, as provided for in this paragraph (d), sufficient to pay off such water, gas, heat, cooling, or electric light rents so agreed to be paid to said person constructing said works. The tax shall not exceed the sum of three mills on the dollar for any one year.

(e) To condemn and appropriate so much private property as is necessary for the construction and operation of water, gas, geothermal, solar, or electric light works in such manner as may be prescribed by law; and to condemn and appropriate any water, gas, geothermal, solar, or electric light works not owned by such municipality in such manner as may be prescribed by law for the condemnation of real estate.

31-32-101. Franchise granted by ordinance. No franchise or license giving or granting to any person the right or privilege to erect, construct, operate, or maintain a street railway, electric light plant or system, gasworks, gas plant or system, geothermal system, solar system, or telegraph or telephone system within any city or town or to use the streets or alleys of a city or town for such purposes shall be granted or given by any city or town in this state in any other manner or form than by an ordinance passed and published in the manner set forth in this part 1.

31-32-102. Notice of application - publication. Any person desiring to secure a franchise or license for any of the purposes named in section 31-32-101 shall cause a notice of its intention to apply to the governing body of the city or town for the passage of an ordinance granting such franchise or license. Notice shall be published, in a newspaper of general circulation published in such city or town, once a week for three successive weeks immediately prior to the next regular meeting of the governing body at which it is intended to apply for the passage of the ordinance granting or giving such franchise or license. Such notice shall specify the regular meeting of the governing body at which it is intended to apply for such franchise or license, the name of the applicant therefor, a general description of the rights and privileges to be applied for, and the time for and terms upon which such franchise or license is desired. If there is no newspaper of general circulation published within the city or town, such notice may be published by posting copies thereof in six public places for the same length of time.

31-32-103. Ordinance read twice - publication before passage. Every such ordinance shall be read at least twice in full, once at the time of its introduction and again before the question of its passage is voted upon. No governing body of any city or town shall permit any such ordinance to be introduced or read for the first time at any meeting other than the regular meeting specified in such notice nor unless proof of compliance by the applicant with section 31-32-102 is first presented to such governing body in the form of a publisher's affidavit of publication or a certificate of the clerk of the posting of such notice. When such ordinance has been introduced and read for the first time, the governing body, if it desires to further consider the granting of the rights or privileges sought for thereby, shall order the same to be published daily in a paper of general circulation published in such city or town for a period of not less than two weeks prior to the time such ordinance is again read and put upon its passage. If there is no paper of general circulation published daily in such city or town, such publication shall be made in a paper of general circulation published weekly in such city or town. If there is no such paper published daily or weekly, such publication shall be made by posting copies of such proposed ordinance in at least six public places in such municipality for the same period of time. No such ordinance shall be adopted or passed by the governing body of any city or town unless the same has been previously introduced and read and publication first made as provided for in this section. Such previous introduction and reading of such ordinance and the fact of its publication in a newspaper or by posting shall appear in the certificate and the attestation of the clerk on such ordinance after its adoption.

31-32-104. Majority vote required for passage. Every such ordinance shall require for its passage or adoption the concurrence of a majority of all the members of the governing body of the city or town. The mayor shall not vote in the case of a tie or otherwise upon the passage or adoption of any such ordinance.

31-32-105. Cities or towns may erect utilities. Nothing in this part 1 shall be construed as in any way modifying or restricting the right of cities or towns to purchase or erect electric light works, geothermal systems, solar systems, or gasworks in the manner provided for by law.

40-1-101. Public utilities law. Articles 1 to 7 of this title shall be known and may be cited as the "Public Utilities Law" and shall apply to the public utilities and public services described in said articles 1 to 7 and to the commission referred to in article 2 of this title.

40-1-103. Public utility defined. (1) The term "public utility", when used in articles 1 to 7 of this title, includes every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest, and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission, and to the provisions of articles 1 to 7 of this title. Nothing in articles 1 to 7 of this title shall be construed to apply to irrigation systems, the chief or principal business of which is to supply water for the purpose of irrigation or to exemptions provided for in the constitution of the state of Colorado relating to municipal utilities.

(2) Every cooperative electric association, or nonprofit electric corporation or association, and every other supplier of electrical energy, whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to be affected with a public interest and to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title.

(3) For the purposes of articles 1 to 7 of this title, persons hauling ashes, trash, waste, rubbish, garbage, or industrial waste products or any other discarded materials, except sludge or fly ash, are not considered to be public utilities.

40-5-101. New construction - extension. (1) No public utility shall begin the construction of a new facility, plant, or system or of any extension of its facility, plant, or system without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. Sections 40-5-101 to 40-5-104 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it has theretofore lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, line, plant, or system and not theretofore served by a public utility providing the same commodity or service, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system interferes or is about to interfere with the operation of the line, plant, or system of any other public utility already constructed, the commission, on complaint of the public utility claiming to be injuriously affected, after hearing, may make such order prohibiting such construction or extensions or prescribing such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable.

(2) Whenever the commission, after a hearing upon its own motion or upon complaint, finds that there is or will be a duplication of service by public utilities in any area, the commission shall, in its discretion, issue a certificate of public convenience and necessity assigning specific territories to one or to each of said utilities or by certificate of public convenience and necessity to otherwise define the conditions of rendering service and constructing extensions within said territories and shall, in its discretion, order the elimination of said duplication upon such terms as are just and reasonable, having due regard to due process of law and to all the rights of the respective parties and to public convenience and necessity.

40-5-103. Certificate - application for - issuance. (1) Before any certificate may issue under sections 40-5-101 to 40-5-104, a certified copy of its articles of incorporation or charter, if the applicant is a corporation, shall be filed in the office of the commission. Every applicant for a certificate shall file in the office of the commission such evidence as shall be required by the commission to show that such applicant has received the required consent, franchise, permit, ordinance, vote, or other authority of the proper county, city and county, municipal or other public authority. The commission has power to issue said certificate after hearing, to refuse to issue the same, or to issue it for the construction of a portion only of the contemplated facility, line, plant, or system or extension thereof or for the partial exercise only of said right or privilege and may attach to the exercise of the rights granted by such certificate such terms and conditions as in its judgment the public convenience and necessity may require.

(2) If such public utility desires to exercise a right or privilege under a franchise, permit, ordinance, vote, or other authority which it contemplates securing but which has not yet been granted to it, such public utility may apply to the commission for an order preliminary to the issue of the certificate. The commission may thereupon make an order declaring that it will thereafter, upon application, under such rules and regulations as it may prescribe issue the desired certificate upon such terms and conditions as it may designate after such public utility has obtained the contemplated franchise, permit, ordinance, vote, or other authority. Upon the presentation to the commission of evidence satisfactory to it that such franchise, permit, ordinance, vote, or other authority has been secured by such public utility, the commission shall thereupon issue such certificate.

ARTICLE II.—CONTIGUOUS TERRITORY ANNEXED.

2648. SEC. 7. Whenever any territory shall be laid out and surveyed as an addition to any city or town organized under this act, such territory shall, upon the filing of the map or plat thereof in the office of the county clerk and recorder of the county in which said territory may be situate, and another such map or plat with the clerk or recorder of the city or town to which it is desired to annex such territory, become a part of said city or town, and be included within the limits and jurisdiction thereof; *provided*, that no map or plat of such addition shall be filed for record with said clerk and recorder until the same has been by the owner or owners of such contemplated addition be submitted to the city council or board of trustees of said city or town, and approved by three-fourths of the members elected thereto, and no map or plat of such addition shall be approved by said council or trustees unless the proposed streets and alleys therein are in conformity, as to courses and angles, with the streets and alleys of adjoining portions of said city or town, nor unless such map or plat shall show the topography of such territory as to bluffs, streams, ditches, ravines, etc., nor until all taxes then assessed against said territory are paid, and if the said territory shall have previously been sold for taxes and not redeemed therefrom, the owner or owners thereof shall first redeem the said land from such tax sale; *provided*, that the tax deed has not issued thereon.

2649. SEC. 8. When any municipal corporation shall desire to annex any contiguons territory thereto, not embraced within the limits of any city or town, it shall be lawful for the trustees or council of the corporation, by an ordinance passed for that purpose at least one month before the regular annual election, to submit the question of annexation to the qualified electors of such corporation; and if a majority of the electors of the corporation voting on the question shall vote in favor of such annexation, the council or trustees of such corporation shall present to the county court a petition praying for such annexation, which petition shall describe the territory proposed to be annexed to such municipal corporation, and have attached thereto an accurate map or plat thereof, and like proceedings shall be had upon said petition as are provided in sections two and three of this act so far as the saine may be applicable; and if the result of the election be favorable to the proposed annexation the same record shall be made as provided in said sections, and thereupon the said contiguous territory proposed to be annexed shall be in law deemed and taken to be included in and shall be a part of said municipal corporation, and the inhabitants thereof shall in all respects be citizens thereafter of the said municipal corporation.