SUPREME COURT, STATE OF COLORADO

CASE NO. 86SC203

OPENING BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

THE CITY AND COUNTY OF DENVER; THE DEPARTMENT OF PUBLIC WORKS AND DIVISION OF WASTEWATER MANAGEMENT THEREOF,

Petitioner,

v.

THE MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, a Colorado Corporation,

Respondent.

CERTIORARI TO THE COLORADO COURT OF APPEALS NO. 85CA0006
Denver District Court No. 83CV3786

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TABLE OF CONTENTS

Page

Table of Authorities ii

I. Statement of Issue 1

II. Statement of Case 1

III. Statement of Facts 1

IV. Summary of Argument 1

V. Argument 2

THE COURT OF APPEALS ERRED IN ADOPTING THE GOVERNMENTAL-PROPRIETARY EXCEPTION TO THE COMMON LAW RULE THAT A UTILITY FORCED TO RELOCATE FROM A PUBLIC RIGHT-OF-WAY AS A CONSEQUENCE OF REASONABLE ACTS OF MUNICIPAL REGULATION MUST DO SO AT ITS OWN EXPENSE.

A. The common law requires the utility to bear the expense of relocation required as a consequence of reasonable acts of municipal regulation. 2

B. No governmental-proprietary exception to the common law rule should be applied. 7

C. The Colorado Constitution and statutes neither direct nor imply any exception to the common law doctrine 9

VI. Conclusion 11

TABLE OF AUTHORITIES

Cases

Page

Clark v. Town of Estes Park, 686 P.2d 777 (Colo. 1984) 7

Englewood v. Mountain States Telephone and Telegraph Company, 163 Colo. 400, 431 P.2d 40 (1967) 11

Evans v. Board of County Commissioners, 174 Colo. 97, 482 P.2d 968 (1971) 7

Garcia v. San Antonio Metro, 469 U.S. _____, 105 S. Ct. 1005 (1985)..... 8

Indian Towing Company v. United States, 350 U.S. 61, 76 S. Ct. 122 (1955) 8

Moffat v. City and County of Denver, 57 Colo. 473, 143 P. 577 (1914)..... 4

Mountain States Telephone and Telegraph Co. v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980) 5

Mountain States Telephone and Telegraph Co. v. Horn Tower Construction Co., 147 Colo. 166, 363 P.2d 175 (1961)... 4

New Orleans Gaslight Company v. Drainage Commission, 197 U.S. 453, 25 S. Ct. 471 (1905) 2,3,6

New York v. U.S., 326 U.S. 572, 66 S. Ct. 310 (1946)..... 8

Norfolk Redevelopment Housing Authority v. Chesapeake & Potomac Telephone Co., 464 U.S. 30, 104 S. Ct. 304 (1983). 3

Northwest Natural Gas Company v. City of Portland, 711 P.2d 119 (Or. 1985) 6,9

Port of New York Authority v. Hackensack Water Company, 41 NJ 90, 195 A.2d 1 (1963) 6,9

State v. Idaho Power Company, 346 P.2d 596 (Idaho, 1959)..... 5

Washington Township v. Ridgewood Village, 26 N.J. 578, 141 A.2d 308 (1985) 8

Constitutional Provisions

Page

Colorado Constituion, Art. XX 9

Statutes

Section 2-4-211, C.R.S. 5

Section 24-10-101 et seq, C.R.S. 7

Section 31-15-702, C.R.S. 10

Section 31-15-707, C.R.S. 10

Section 31-15-708, C.R.S. 10

Section 31-15-709, C.R.S. 10

Section 38-5-108, C.R.S. 10,11

I. STATEMENT OF ISSUE

Whether the Court of Appeals erred in adopting the governmental-proprietary exception to the common law rule that a utility forced to relocate from a public right-of-way as a consequence of reasonable acts of municipal regulation must do so at its own expense.

II. STATEMENT OF THE CASE

The League hereby adopts and fully incorporates by reference the statement of the case in the opening brief submitted by petitioner, City and County of Denver, Colorado.

III. STATEMENT OF FACTS

The League hereby adopts and fully incorporates by reference the statement of facts in the opening brief submitted by petitioner, City and County of Denver, Colorado.

IV. SUMMARY OF ARGUMENT

The common law doctrine requiring utilities to bear their costs of relocation should be applied in this case. The Court of Appeals erred in adopting a governmental-proprietary exception to that doctrine. No legislative intent to abrogate the doctrine was indicated, and the relocation was required as a result of reasonable municipal regulation of public rights-of-way, which regulation was contemplated by the Colorado Constitution and statutes.

V. ARGUMENT

THE COURT OF APPEALS ERRED IN ADOPTING A GOVERNMENTAL-PROPRIETARY EXCEPTION TO THE COMMON LAW RULE THAT A UTILITY FORCED TO RELOCATE FROM THE PUBLIC RIGHT-OF-WAY AS A CONSEQUENCE OF REASONABLE ACTS OF MUNICIPAL REGULATION MUST DO SO AT ITS OWN EXPENSE.

A. The common law requires the utility to bear the expense of relocation required as a consequence of reasonable acts of municipal regulation.

At issue in this case is whether the Court of Appeals was correct in adopting an exception to the common law rule regarding utility relocation costs. The courts have consistently held that, when the public welfare requires relocation of utility facilities, the costs of the relocation must be borne by the utility. The leading expression of the common law rule used by courts today is the decision of the United States Supreme Court in New Orleans Gaslight Company v. Drainage Commission, 197 U.S. 453, 25 S. Ct. 471 (1905). In that case, a gas company holding a franchise for distribution of gas within the City of New Orleans was required to relocate some of its lines as a consequence of the construction of a municipal drainage system. The United States Supreme Court upheld the decision of the Supreme Court of Louisiana denying the right of the company to recover its costs to change the location of its gas pipes and mains. The Supreme Court rejected the company's arguments of impairment of contract rights and taking of property without due compensation. The

company was required to bear its own relocation costs. The Court expressed the public policy as follows:

> The need of occupation of the soil beneath the streets and cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage; and every reason of public policy requires that grants of rights in such subsurface shall be held subject to such reasonable regulation as the public health and safety may require. . . . we think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities. (Citing cases)
>
> 25 S. Ct. at 474.

The common law rule announced in New Orleans Gaslight Co. was reiterated by the Supreme Court 80 years later in Norfolk Redevelopment Housing Authority v. Cheasapeake and Potomac Telephone Company, 464 U.S. 30, 104 S. Ct. 304 (1983), in which the Court stated:

> We hold that the Relocation Act did not change the long-established common law rule that a utility forced to relocate from a public right-of-way must do so at its own expense.
>
> 104 S. Ct. at 307

This common law rule requiring the utility to bear its own relocation costs as a consequence of reasonable acts of municipal regulation has been recognized by this Court and other state appellate courts. The rule should have been applied by the Court of Appeals in this case.

A review of cases decided by this Court and state appellate courts across the country, and of telephone utility relocation cases in particular, discloses that the common law rule described above is being followed; not the governmental-proprietary exception which the Court of Appeals has embraced in its opinion in this case. Interestingly, a number of these cases arise in the context of the vacation of public rights-of-way in order to accommodate redevelopment, a regulation potentially more severe than the construction of sewer facilities at issue in this case.

In two cases, this Court was held that relocation costs must be borne by the utility, not by the municipality. In Moffat v. City and County of Denver, 57 Colo. 473, 143 P. 577 (1914), this Court held that a water company's right to use public streets were subordinate to the rights of the city, stating:

> Consequently the water company is not entitled to be compensated for the expense incurred... Refusing reimbursement for such expenses is not taking property for a public use without just compensation.
>
> 143 P. at 579.

Moffat, supra, was relied upon by the Court in Mountain States Telephone and Telegraph Company v. Horn Tower Construction Company, 147 Colo. 166, 363 P.2d 175 (1961), in which the Court affirmed the district court decision holding the telephone company's right subordinate to the municipality's right to make changes in the right-of-way.

Mountain States Telephone and Telegraph v. Boise Redevelopment Agency, 101 Idaho 30, 607 P.2d 1084 (1980), is of particular interest in the similarity in theory advanced by the displaced utility. Mountain States Telephone and Telegraph in Idaho was required to relocate its lines as a result of an urban renewal project for which the City of Boise had vacated road rights-of-way. The utility had argued that the city's action deprived it of (franchise) property rights without compensation. The Idaho Supreme Court applied the common law rule and required the telephone company to bear its own relocation costs, quoting from its own decision in State v. Idaho Power Company, 346 P.2d 596 (Idaho 1959):

> Long before the adoption of our Constitution, the people adopted the common law as the rule of decision in all cases not otherwise provided by law. Such applicability in our system of judicial interpretation remained unchanged upon adoption of our Constitution...
>
> Under the common law a utility, placing its facilities along streets and highways, gains no property right and upon demand must move its facilities at its expense.
>
> 607 P.2d at 1086.

It should be noted that the Colorado legislature has expressly incorporated the common law of England as the rule of decision in this state, unless repealed by legislative action. See, section 2-4-211, C.R.S. As shown infra at C., the legislature has not abrogated the common law rule at issue here.

The Oregon Supreme Court rejected the distinction and applied the common law rule requiring the utility to bear its own expenses of relocation in Northwest Natural Gas Company v. City of Portland, 300 Or 291, 711 P.2d 119 (1985). In that case, the Oregon Supreme Court specifically adopted the common law rule on relocation costs announced in New Orleans Gaslight Co. v. Drainage Commission, supra. At issue in the Oregon case was the authority of the City of Portland to order natural gas, electricity, and telephone utilities to make uncompensated relocation of their existing facilities to accommodate construction of a light rail transit system.

Finally, in Port of New York Authority v. Hackensack Water Company, 41 NJ 90, 195 A.2d 1 (1963), the New Jersey Supreme Court reaffirmed its commitment to the common law doctrine, holding that water, electric, gas and telephone utilities should pay their costs of relocation, necessitated because of improvements undertaken by the Port Authority. The court rejected the utilities' argument that they had a vested right in the streets which could not be taken except by condemnation. The court held that, in the absence of specific legislative enactments demonstrating an intention to create an exception to the common law rule, that rule would apply and utilities would be forced to bear their own relocation costs.

B. No governmental-proprietary exception to the common law rule should be applied.

The governmental-proprietary distinction was first criticized by this Court in Evans v. Board of County Commissioners, 174 Colo. 197 42 P.2d 968 (1971), a negligence case in which Colorado's common law doctrine of sovereign imunity was prospectively abrogated. The state legislature then acted to abolish the doctrine and reinstate it in a limited fashion, with what is now known as the Governmental Immunity Act, §24-10-101, et seq., C.R.S.

While the governmental-proprietary distinction continues to enjoy credence in the context of governmental liability, its extension into other areas, including zoning matters and utility relocation cases, has been refused. In Clark v. Town of Estes Park, 686 P.2d 777 (Colo. 1984), this Court disapproved the use of the governmental-proprietary distinction outside the law of torts, in a zoning case involving compliance by a municipality with its zoning ordinances. In Clark, this Court recognized that the governmental-proprietary distinction originated in tort law, and went on to note that "the distinction is often an arbitrary and unpredictable means of resolving disputes." Clark v. Town of Estes Park, supra, at 779. This Court denied application of the distinction and went on to list decisions in which the same function had been deemed proprietary by one court and governmental by another, concluding that at least one court had declared the governmental-proprietary distinction to be entirely

illusory, citing Washington Township v. Ridgewood Village, 26 NJ 578, 141 A.2d 308 (1958).

Washington Township v. Ridgewood Village, supra, concerned whether the construction of a water tank by one village within the boundaries of another was a proprietary or a governmental activity. The New Jersey Supreme Court dismissed the "governmental-proprietary distinction" in the following manner:

> We cannot agree that the distinction between governmental and proprietary functions is relevant to this controversy. The distinction is illusory; whatever local government is authorized to do constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as a government and not as a private entrepreneur. The distinction has proved useful to restrain the ancient concept of municipal tort immunity, not because of any logic in the distinction, but rather because sound policy dictated that governmental immunity should not envelop the many activities which government today pursues to meet the needs of the citizens.
>
> 141 A.2d at 311 (emphasis supplied).

The United States Supreme Court has expressed similar dismay with the use of the governmental-proprietary distinction, rejecting it in the tax immunity case of New York v. U.S., 326 U.S. 572, 66 S. Ct. 310 (1946). In Indian Towing Co. v. United States, 350 U.S. 61, 76 S. Ct. 122 (1955), a Federal Tort Claims Act case, the Supreme Court described the distinction as a "'non-governmental'-'governmental' quagmire that has long plagued the law of municipal corporations." 76 S. Ct. at 124. In Garcia v. San Antonio Metro, 469 U.S. ___, 105 S. Ct. 1005 (1985), Justice Blackmun reached a similar conclusion.

C. The Colorado Constitution and statutes neither direct nor imply any exception to the common law doctrine.

Under the cases described above, the common law rule on relocation costs is held to apply unless the legislature has specifically acted to set it aside. Port of New York Authority v. Hackensack Water Company, supra, Northwest Natural Gas Company v. City of Portland, supra. Rather than imposing any such limitations on the common law doctrine, the Colorado Constitution and statutes strengthen municipal authority in this area. They contain no legislative intent to impose the governmental-proprietary distinction embraced by the Court of Appeals in this case.

At Article XX, section 6, the Colorado Constitution guarantees to all home rule mmunicipalities the powers set out in section 1 of that article, which in turn grants full authority, within or without the territorial limits, to "construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate [listed functions], and any other public utilities or works or ways local in use or extent, . . . " (emphasis supplied). This constitutional authority imposes no limits upon the common law; the power to construct and operate public works is not conditioned by any obligation to pay utility relocation costs made necessary as a consequence of the municipality's exercise of the authority.

Colorado municipalities are authorized by statute to take all manner of regulatory actions with regard to public streets. Section 31-15-702, C.R.S., enumerates those powers at length. Of particular interest is subsection (1)(a)(II) of that section which provides as follows:

> (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. . . .

Municipalities are authorized to acquire and operate municipal utilities pursuant to §31-15-707, C.R.S., water and water systems pursuant to §31-15-708, C.R.S., and sewer and sewer systems pursuant to §§ 31-15-709 and 710, C.R.S. Each of these grants is broad in scope and evidences no intent to abrogate the common law.

Completing the statutory framework under which municipalities have authority to make necessary regulations for the use of public rights-of-way is §38-5-108, C.R.S.:

> **Consent necessary to use of streets.** Nothing in this article shall be construed to authorize any person, partnership, association, corporation, or city or town to erect any poles, construct any telegraph, telephone, electric light powerline, or pipeline, or extend any wires or lines along, through, in, upon, under, or over any streets or alleys of any city or incorporated town without first obtaining the consent of the municipal authorities having power to give the consent of such city or incorporated town.

Section 38-5-108, C.R.S. was addressed by this Court in Englewood v. Mountain States Telephone and Telegraph Company, 163 Colo. 400, 431 p.2d 40 (1967). The decision reaffirmed that the city could impose, under its police power, "reasonable regulation of objects which may be placed in its streets and alleys." Englewood, supra, 431 P.2d at 43.

By virtue of the Colorado Constitution, applicable Colorado statutes, and its home rule charter, the City and County of Denver, acting by and through its Department of Public Works and Division of Wastewater Management thereof, had the authority to construct the publicly-acquired municipal improvement in this case - a sewer system - which necessitated relocation of respondent's facilities.

Rather than expressing a legislative intent to abrogate the common law doctrine requiring utilities to bear their own relocation costs, the constitutional and statutory provisions relied upon by the City reinforce the authority of municipalities in Colorado to impose municipal regulations which could result in uncompensated relocation costs of other utilities.

VI. CONCLUSION

The common law requires utility companies to bear their own costs of relocation when that relocation is required as a result of reasonable municipal regulation. In this case, the City's actions were a reasonable exercise of constitutional, statutory and charter authority to regulate its public rights-of-

way and to construct and operate public works. The legislature, in granting statutory authority to Colorado municipalities, has expressed no intention to qualify them with a governmental-proprietary exception to the common law rule. No such exception should be implied by this Court. The decision of the Court of Appeals should be reversed.

Respectfully submitted this 10th day of November, 1986.

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CERTIFICATE OF MAILING

I hereby certify that on the 10th day of November, 1986, a true and correct copy of the foregoing Opening Brief of Colorado Municipal League as Amicus Curiae was placed in the United States Mail, first class postage prepaid, addressed to:

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