COURT OF APPEALS, STATE OF COLORADO
Case No. 94CA1102

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE IN SUPPORT OF APPELLEE, CITY OF LONGMONT

US WEST COMMUNICATIONS, Inc., a Colorado Corporation

Plaintiff-Appellant

v.

CITY OF LONGMONT, A Colorado Municipal Corporation

Defendant-Appellee

COLORADO MUNICIPAL LEAGUE
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January 10, 1995

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COMES NOW the Colorado Municipal League as amicus curiae through its undersigned counsel and submits this amicus brief in support of Appellee, the City of Longmont (hereafter, the "City").

I. STATEMENT OF FACTS

The Colorado Municipal League hereby adopts and fully incorporates by reference the statement of facts in the City's Answer Brief (hereafter, "City's Brief").

II. ISSUES PRESENTED

The Colorado Municipal League hereby adopts and fully incorporates by reference the statement of issues presented in the City's Brief.

III. INTRODUCTION

In Article XXV of the Colorado Constitution, the Public Utilities Commission, (PUC, or the Commission) is given broad authority over utility regulation. However, the people of Colorado expressly limited their delegation of authority to the PUC in order to assure that the Commission, in the exercise of its authority, does not encroach upon municipalities' exercise of their police powers. Article XXV provides that nothing in the people's grant of authority to the Commission "shall affect the power of municipalities to exercise reasonable police and licensing powers." Colo. Const., Article XXV.

This appeal involves a challenge to a reasonable police power ordinance of the City of Longmont, a home rule city (the City). The ordinance in question follows the long established common law rule, by requiring utilities to relocate their infrastructure in public streets at their own expense. See: New Orleans Gas Light Co. v. Drainage Commission of New Orleans, 197 U.S. 453, 462 (1905); Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Company, 464 U.S. 30, 35 (1983); City and County of Denver v. Mt. States Telephone and Telegraph Company, 754 P.2d 1172, 1176 (Colo. 1988). The ordinance is not aimed at regulating utilities' rates. Rather, the purpose of the ordinance at issue is to improve the safety of City streets by removing utility poles and to improve the aesthetics of the community.

US WEST Communications, Inc. (the Company) argues that it's tariff conflicts with the City's ordinance, and, under the "filed rate doctrine," the police power authority is eliminated to the extent of the conflict. Alternatively, the Company argues that, even in the absence of a conflict with a tariff, any exercise of municipal police power that might affect a utility's rates is preempted by the delegation of rate making authority to the Commission in its statutes.

What this appeal is about is whether the police power authority that the people of Colorado reserved in their municipal governments against PUC encroachment in Article XXV can be incrementally extinguished by the PUC through approval of utility tariffs, or by the General Assembly, through the Commission's rate making enabling statutes.

It is noteworthy that the people's reservation of municipal power in Article XXV is not qualified by language such as "unless and until the Commission approves a tariff on the same subject," or "unless the exercise of the police power may affect the tariffed rates of the utility." Since virtually any exercise of municipal police power might, it could be argued, affect the utility's rates, such a qualification would swallow up and destroy any reservation of police power. If the PUC could eliminate municipalities' police power authority by simply approving a tariff addressing a likely subject of the police power, this would vest in the Commission the power to extinguish the power that the people clearly wished would remain with their municipal governments. Such a result would be contrary to the obvious division of powers between municipalities and the Commission contemplated by the people in Article XXV. This would be akin to authorizing the General Assembly to preempt the prerogatives that the people reserved to home rule municipalities in Article XX by simply declaring a given matter of "statewide concern" -- something that our Supreme Court has appropriately refused to permit. See, e.g.: City and County of Denver v. State, 788 P.2d 764, 768, n.6 (Colo. 1990).

IV. SUMMARY OF ARGUMENT

In Article XXV of the Colorado Constitution, the people gave to the PUC extensive regulatory authority over utilities, but reserved against PUC encroachment reasonable municipal police power authority over such utilities. The City ordinance here at issue is a reasonable exercise of traditional police power authority to require utilities to remove dangerous and unsightly obstructions from the public rights-of-way at their own expense. Since virtually any

reasonable exercise of municipal police power over a utility could arguably affect the utility's rates, this Court should not accept the Company's argument that in such a case municipal authority is preempted, either by reason of conflict with specific tariffs or the Commission's statutory authority to establish rates. Such a finding would render the people's reservation of municipal police power authority in Article XXV a practical nullity.

Beyond being contrary to the evident wishes of the people and the public interest, such a finding is not compelled by the facts in this case. The manner of removal of obstructions from the public streets is appropriately and traditionally a matter of local and municipal concern. Thus, the City's ordinance controls in the event of any conflict between it and a tariff or the Commission statutes. However, as the District Court correctly determined, there is in this case no conflict between the ordinance and the Company's tariff, and there can be no "field preemption" of municipal authority pursuant to the Commission's enabling statutes, given the express preservation of municipal authority in Article XXV. Accordingly, even if this ordinance relates to a matter of mixed state and local concern, it is not preempted. This Court should affirm the decision of the District Court that this reasonable exercise of traditional municipal police power over a utility is not preempted.

V. ARGUMENT

The League hereby adopts and incorporates herein by reference the arguments presented by Appellee, the City of Longmont, in its briefs to this Court. In addition, the League makes the following argument.

A. **The City's ordinance is a reasonable exercise of its police power; neither Company's tariff nor the Commission statutes preempt the ordinance.**

1. **The City's ordinance is a reasonable exercise of its traditional police power.**

As noted above, in Article XXV of the Colorado Constitution, the people expressly preserved against PUC encroachment their local municipal governments' "reasonable police . . . powers." The Longmont ordinance here at issue is a classic exercise of those powers.

The City's ordinance was adopted, among other things, to promote the safety of those using City streets and to improve the aesthetics of the City. These are appropriate objectives of the police power.

> It is well settled that a municipal regulation, having a fair relation to the protection of human life and the protection of public convenience and welfare, constitutes a reasonable application of the police power.

U.S. Disposal Systems v. City of Northglenn, 193 Colo. 277, 280, 567 P.2d, 365, 367 (1977). See also: City of Leadville v. Rood, 600 P.2d 62, 63 (Colo. 1979).

In Veterans of Foreign Wars v. City of Steamboat Springs, 195 Colo. 44, 575 P.2d 835 (1978), the Supreme Court considered a challenge to a sign code ordinance that required removal of signs visible from any public right-of-way. The Court recognized that it was a legitimate exercise of the City's police power to require removal of such distracting signs in an effort to improve traffic safety. Like Longmont's ordinance here at issue, in addition to its public safety objectives, the Steamboat Springs ordinance was:

> . . . adopted to promote aesthetic values in the interest of the general welfare. Efforts by cities and towns to enact reasonable regulations designed to preserve and improve their physical environment have long been upheld by courts as being within the legitimate scope of a municipality's police power. Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98, 99 L.Ed. 27 (1954 [additional citations omitted]).

Ibid. 195 Colo. at 575 P.2d at 840-841.

It is a recognized incident of the municipal police power that a municipality may engage in "reasonable regulation of objects which may be placed in its streets and alleys." Englewood v. Mt. States Telephone and Telegraph Co., 163 Colo. 400, 407, 431 P.2d 40, 43 (1967). The municipal powers article of the Colorado Revised Statutes confers express authority upon municipalities: to "prevent or remove encroachments upon" public streets, Section 31-15-702(1)(a)(I), C.R.S.; to "regulate . . . the erecting of utility poles," Section 31-15-702(1)(a)(II), C.R.S.; "to regulate the use of sidewalks along the streets and alleys and all structures thereunder," Section 31-15-702(1)(a)(III), C.R.S.; and, most significantly, "to regulate and prevent the use of streets . . . for . . . power and communications poles," Section 31-15-702(1)(a)(VI), C.R.S. Thus, our case law and statutes recognize the widely accepted notion that:

> Municipal corporations ordinarily may and do exercise police power over the erection and maintenance of poles, wires, pipes and similar apparatus of utility companies or others in streets, alleys, and public ways. They can, in this respect, where they act reasonably, compel all generally accepted improvements which tend to decrease the obstruction of the streets or increase the safety or convenience of the public in their use.

7A McQuillin, The Law of Municipal Corporations, Section 24.588 (3rd Edition, 1989).

In addition to being clearly within the City's traditional and statutory police powers, the ordinance is manifestly reasonable.

The Company principally objects to that portion of the City's ordinance which requires that the Company pay the cost of relocating its lines underground. (Company's Brief at 11) This requirement in the City's ordinance is appropriate and reasonable, particularly because the benefits of the ordinance flow not just to the residents of the City, but to the Company and its customers.

Section 14-34-010 of the City's ordinance recites the reasons for its enactment (see Appendix A). In addition to the health, safety and aesthetic considerations are protection of utility facilities from damage due to vehicle collisions with poles, snagged lines, inclement weather and damage from adjacent property maintenance. Further objects of the ordinance include a reduction in service outages and an opportunity for utilities to reduce their costs by making use of a common trench excavated and backfilled by the City at taxpayer expense.

Thus, a major objective of the ordinance was to protect the Company's property and service from injury or disruption, while also protecting the health and safety of those using municipal streets and assuring aesthetic improvement of the community. This serves the interest of the Company as a whole, by enabling its customers, both inside and outside of the City, to originate and complete calls without interruption. The Company's costs associated with repairs and service calls would presumably be reduced.

The City concluded that relocation of aboveground utilities underground at the utilities' expense was in the public health, safety and aesthetic interest of its citizens. Absent a

demonstration that the City acted arbitrarily or capriciously, the City's conclusions in this regard are binding upon this Court. U.S. Disposal Systems Inc. v. City of Northglenn, supra, 193 Colo. at 280, 567 P.2d at 367; See also: Lyman v. Town of Bow Mar, 188 Colo. 216, 225, 533 P.2d 1129, 1135 (1975) An ordinance enacted for these purposes is presumably reasonable, U.S. Disposal Systems, supra, and the party challenging an ordinance as unreasonable must bear the burden of proving it so. See: Haney v. City Court in and for City of Empire, 779 P.2d 1312, 1315 (Colo. 1989; Houpt v. Town of Milliken, 128 Colo. 147, 150, 260 P.2d 735, 736 (1953).

The test of reasonableness is whether an ordinance bears a "rationale relationship" to public health, morals, safety or general welfare, and "if any state of facts can be reasonably conceived in justification of the ordinance, it will not be judged as unreasonable." 5 McQuillen, The Law of Municipal Corporations, Section 1806 (3rd Edition 1989). Given the City's determination that the utility poles and lines in its streets were dangerous to street users and an aesthetic blight, and given that benefits of undergrounding these facilities accrue to the utilities, as well as to City residents, it was entirely reasonable for the City to require utilities to bear the cost of undergrounding.

2. The City's ordinance reflects the applicable common law rule and is not preempted either by the statutes defining the Commission's responsibilities or by the Company's tariffs.

The most recent statement of the applicable Colorado common law rule was by the Supreme Court in City and County of Denver v. Mt. States Telephone and Telegraph, supra,

wherein the Court held that:

> [A] municipality may compel public utilities to relocate their facilities from the public right-of-way at their own cost whenever such relocation is necessitated by the municipality's reasonable exercise of police power to regulate the health, safety, or welfare of its citizens.

Ibid. 754 P.2d at 1176.

As developed above, the City's ordinance was clearly a reasonable exercise of it's traditional police power. This is the power that the people sought to preserve from PUC encroachment by expressly limiting the Commission's authority in Article XXV of the Colorado Constitution.

The Company invites this Court to accept the notion that any police power ordinance that might potentially affect the Company's rates or service involves a matter of "statewide" or "mixed state and local" concern, and that any authority to enact such ordinances is thus extinguished through preemption, either by the statutes granting certain regulatory authority to the Commission or by a conflicting Commission-approved tariff directly. (Company's Brief, at pages 7 - 18) The Company's invitation should be declined.

Amicus respectfully urges this Court to be particularly hesitant to find a reasonable exercise of municipal police power with respect to utilities as implicating a matter of statewide or mixed state and local concern. The practical affect of such a finding is to vest in the General Assembly, or even in the Commission itself, the power to eliminate, through the enactment of

"conflicting" Commission enabling statutes or Commission approved tariffs respectively, the police power that the people reserved for their municipal governments in Article XXV.

If the reservation in Article XXV is to continue to have any real viability and meaning, it must be protected from the sort of evisceration proposed in this appeal. Again, virtually any exercise of reasonable police powers could be argued to somehow, potentially, affect a utility's rates or service. Will these utilities, by virtue of the Commission enabling statutes or the "filed rate doctrine," enjoy an unfortunate and ironic immunity from the municipal police power, notwithstanding the express language of Article XXV, unless it can be demonstrated that the municipal ordinance at issue in no way might affect rates or service? Building code requirements might affect rates. Fire code requirements might affect rates. A requirement that utility trucks pay parking meters, or that the utility pay street cut permit fees or building permit fees might affect rates. A requirement that a utility remove weeds, brush and rubbish from its property might affect rates. Requirements that a utility connect to a municipal sewer system, control stormwater runoff from its facilities, observe certain environmentally sound practices in its motor vehicle maintenance facilities, and comply with other environmental protection ordinances might affect rates. Preemption of municipal police power in these and other areas would be contrary to the Constitution and the public interest, and this appeal should not, and as will be developed below, need not permit such a result.

a. The City's ordinance addresses a matter of local and municipal concern; there is no preemption of the City's authority.

The City's ordinance establishes a mechanism for assuring removal of dangerous and aesthetically blighting utility poles and lines from the City's streets. The ordinance provides that this relocation will not be done at City expense. As the District Court correctly observed "the regulation of objects in the public right-of-way is traditionally a matter of local concern." (citing: Moffat v. City and County of Denver, 57 Colo. 473, 143 P.577 (1914); Appendix B, page 7) It is well established that "in a matter of purely local concern an ordinance of a home rule city supersedes a conflicting state statute." Lundvall v. Voss, 830 P.2d 1061, 1066 (Colo. 1992).

The District Court nonetheless found the City's ordinance to involve a matter of mixed state and local concern, since in People ex. rel. Public Utilities Commission v. Mt. States Telephone and Telegraph Company, 125 Colo. 167, 243 P.2d 397 (1952) (Mt. States) the Supreme Court, in the words of the District Court "found the regulation of the business and rates of telephone companies to be a matter of statewide concern." (Appendix B, page 7)

Mt. States involved a direct effort by the City and County of Denver to regulate the rates of the telephone company. That case is factually distinct from the one at bar. The City of Longmont is not regulating rates, it is regulating dangerous, ugly obstructions in its rights-of-way. That the City's ordinance requires the utility responsible for an obstruction to pay for its removal does not make this a Mt. States-style rate setting ordinance. The ordinance may or may not cause the Company to incur additional net costs; these costs may or may not be recoverable through the Company's rates. Questions of whether additional net costs (if any) are recoverable,

and how they are to be recovered are appropriately considered by Public Utilities Commission in rate making; such matters are beyond the jurisdiction of this Court. PUC v. District Court, 186 Colo. 278, 257 P.2d 233 (1974).

The City's ordinance should not be viewed as involving other than a matter of local and municipal concern, notwithstanding the fact that, to some indeterminate extent, it might (or might not) somehow "affect" the Company's rates. As our Supreme Court has said:

> To state that a matter is of local concern is to draw legal conclusion based on all the facts and circumstances presented by a case. *In fact, there may exist a relatively minor state interest in the matter at issue but we characterize the matter as local to express our conclusion that, in the context of our constitutional scheme, the local regulation must prevail.* Thus, even though the state may suggest a plausible interest in regulating a matter to the exclusion of a home rule municipality, such an interest may be insufficient to characertize the matter as being even of "mixed" state and local concern.

City and County of Denver v. State, 788 P.2d 764, 767 (Colo. 1990) (emphasis added).

In the context of our constitutional scheme, this exercise of reasonable police power in a matter traditionally viewed as of local and municipal concern should be sustained. Any conflict between the City's ordinance here at issue and a Company tariff or the Commission's enabling statutes should be resolved in favor of the ordinance. When, as here, no conflict exists, the Company's tariff can provide useful structure and guidance to local governments and the Company's customers concerning payment of relocation costs. See: R.E.N. v. City of Colorado Springs, 823 P.2d 1359 (1992) (In matters of local concern, both home rule cities and the state may legislate, with local ordinance superseding conflicting state statute as to local

matter).

b. Even if the City's ordinance addresses a matter of mixed state and local concern, the ordinance is not preempted by state law.

At the outset, Amicus respectfully reiterates its argument that this Court should be hesitant to find that a reasonable exercise of municipal police power as to an otherwise local and municipal matter involves "statewide" or "mixed state and local" concerns, based upon the Company's suggested "might effect rates" preemption theory. As noted above, adoption of this approach would open the door to complete elimination of most municipal police power authority over utilities, notwithstanding the express language in Article XXV of our Constitution.

The League agrees with, and urges this Court to adopt, the District Court's finding that Company tariff 4.6.A (Appendix C) does not conflict with the City's ordinance, for the reasons set forth in the District Court's decision (Appendix B, at pages 9 -11). The League will not repeat that analysis here. Since there is no conflict between the tariff and the City's ordinance, this Court should sustain the ordinance against the Company's preemption challenge, even if this Court finds that the ordinance involves a matter of mixed state and local concern.

This Court should also reject the Company's "field preemption" challenge to the City's ordinance (Company's Brief, at pages 14 - 16). The argument here is essentially that even if the ordinance doesn't conflict with the tariff, the ordinance intrudes into the "domain of the PUC," Ibid. at 16, since this exercise of the police power might affect rates. This "field

preemption" argument illustrates in stark clarity what the League is most anxious about in this appeal. The argument suggests the present appeal as a device to effectively amend most of the people's reservation of reasonable municipal police power authority over utilities out of Article XXV. The District Court was right to summarily reject this suggestion, and the League respectfully urges this Court to do likewise. Such a result would serve the public interest and be in accord with the well established rule of constitutional construction which presumes that "the language and structure of a provision in a constitution were adopted by choice, and that discrimination was exercised in the language and structure used." White v. Anderson, 155 Colo. 291, 298, 394 P.2d 333, 336 (1964). Particularly instructive in responding to the Company's field preemption argument, in light of the express language of Article XXV, is the Supreme Court's statement in Colorado State Civil Service Employees Association v. Love, 167 Colo. 436, 448 P.2d 624 (1968) that:

> In interpreting a constitutional amendment which has been adopted by popular vote, the Court must presume that the words were used in their ordinary meaning and that the people intended what they have said. This is a fundamental principal of American constitutional law. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 . . . An amendment to the Constitution is the solemn final exercise of the sovereignty which belongs to the People of the State of Colorado. Neither executive order, nor legislative enactment, nor judicial decision can be permitted to render futile this express will of the people.

Ibid. 167 Colo. at 447, 448 P.2d at 628. See also: People v. City Council, 60 Colo. 370, 153 P. 690 (1915).

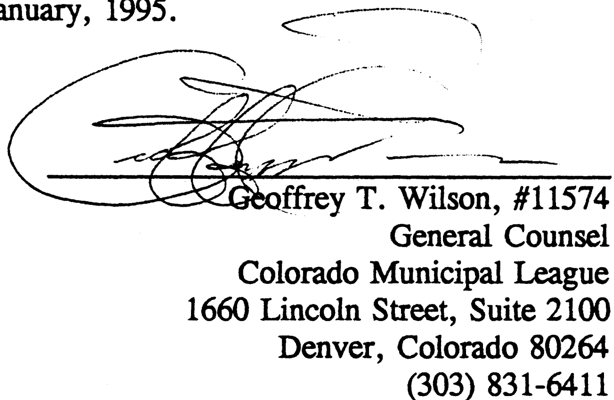
CONCLUSION

This Court should not accept the Company's argument that any exercise of reasonable municipal police power over utilities that might affect rates is preempted. Such a finding would

render the express reservation of municipal authority in Article XXV a nullity, since virtually any exercise of municipal police power could, arguably, affect rates. Furthermore, this Court should avoid a ruling that would permit the PUC, through the simple expedient of adopting a conflicting tariff, to eliminate the police power that the people sought to protect from PUC encroachment in Article XXV. This Court should instead find that the City ordinance is not preempted, because the ordinance concerns a matter of local and municipal concern (control of municipal streets, and the manner of removing unsightly, dangerous obstructions therefrom) and because, in any case, there is no conflict between the ordinance and Company tariff 4.6.A.

WHEREFORE, the League urges this Court to affirm the decision of the District Court for the reasons set forth herein.

Respectfully submitted this 10th day of January, 1995.



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing brief was sent by U.S. postal service, postage prepaid, on the 10th day of January, 1995, to the following:

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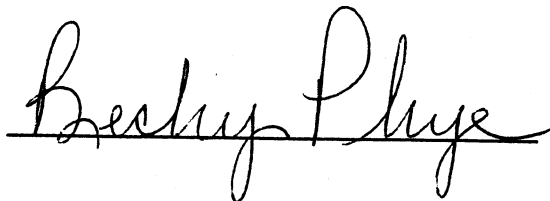


APPENDIX A

OFFICE OF THE CITY CLERK

CIVIC CENTER COMPLEX
350 KIMBARK STREET
LONGMONT, COLORADO 80501
(303) 651-8649

April 9, 1993

TO WHOM IT MAY CONCERN:

I, Valeria L. Skitt, City Clerk of the City of Longmont, hereby certify that the attached is a true, full, and correct copy of Ordinance 0-93-02 passed, approved and adopted at a regular meeting of the City Council of the City of Longmont, Colorado, held on February 9, 1993, and is now in full force and effect.

Sincerely,

CITY OF LONGMONT, COLORADO

(S E A L)

Valeria L. Skitt, CMC
City Clerk

/jlr

1 ORDINANCE 0-93-02

2

3 A BILL FOR AN ORDINANCE AMENDING TITLE 14 OF THE LONGMONT MUNICIPAL
4 CODE BY THE ADDITION OF A NEW CHAPTER 34 PERTAINING TO RELOCATION
5 UNDERGROUND OF OVERHEAD FACILITIES USED FOR DISTRIBUTION OF
6 ELECTRICITY AND TRANSMISSION OR DISTRIBUTION OF COMMUNICATIONS

7 ---

8

9

10 THE COUNCIL OF THE CITY OF LONGMONT, COLORADO, ORDAINS:

11

12 SECTION 1

13

14 That Title 14 of the Longmont Municipal Code is hereby amended by the addition of a
15 new Chapter 34 pertaining to relocation underground of overhead facilities used for distribution
16 of electricity and transmission or distribution of communications, as follows:

17

18 Chapter 14.34

19

20 RELOCATION UNDERGROUND OF OVERHEAD ELECTRICITY AND
21 COMMUNICATIONS FACILITIES

22

Sections:

14.34.010 Findings.
14.34.020 Definitions.
14.34.030 Facility relocation.
14.34.040 Exceptions to relocation requirements.
14.34.050 Notice to owner or operator.
14.34.060 Cooperation with other owner or operator.
14.34.070 Variance--opportunity for hearing.
14.34.080 City to pay for relocation of its electric lines and facilities.
14.34.090 Penalty for violation of this chapter.

14.34.010 Findings. The City Council of Longmont finds:

A. That relocation underground of overhead facilities used for distribution of electricity and transmission or distribution of communications, hereinafter referred to as "overhead facilities," improves the aesthetics of a community by keeping unsightly poles, lines and related above ground appurtenances out of the view of the public; and

B. That relocation underground of overhead facilities generally provides better protection from damage due to accidents with vehicles, inclement weather or other causes;

1 this includes cars and trucks hitting poles or pedestals, snagging of overhead facilities by
2 high profile vehicles, knocking down of overhead facilities due to high winds or heavy
3 snows, and reduction of service outages; and
4
5 C. That relocation underground of overhead facilities better protects the safety
6 of the citizenry of Longmont because of less likelihood of involvement of overhead
7 facilities in vehicular mishaps, and improvement of visibility along public rights of way,
8 which improves the operational safety of roads; and
9
10 D. That relocation underground of overhead facilities makes them less
11 vulnerable to damage from adjacent property maintenance by the citizenry; and
12
13 E. That owners or operators of overhead facilities may realize a savings by
14 using a common trench when relocating them underground; and
15
16 F. That relocation underground of overhead facilities will facilitate
17 implementation of the following goals of the Longmont Area Comprehensive Plan:
18
19 Goal 5: Promote an attractive appearance from roadways and other public
20 places, and encourage harmonious relationships with natural land forms.
21

1 Goal 11: Maintain and enhance the environment of the existing residential
2 neighborhoods of Longmont.
3
4 Goal 15: Make provisions for public improvements in a manner appropriate
5 for a modern, efficiently functioning city; and
6
7 G. That pursuant to council's direction, the city's electric department has
8 embarked on a program to relocate underground existing overhead electric main feeder
9 lines at a reasonable pace; and
10
11 H. That the Municipal Charter grants the city the power of local self-
12 government and home rule and it is a reasonable exercise of this power to require
13 relocation of overhead facilities when the city relocates an electric utility line; and
14
15 I. That after the date given by the city in a notice to relocate underground,
16 unless acting pursuant to a specific exception or a written grant of variance in accordance
17 with this chapter, it shall constitute a nuisance for an owner or operator to attach, affix,
18 place, install, use, operate or maintain a facility within the street area identified in the
19 notice, which area shall be part of the electric main feeder underground work plan, as the
20 council may update and approve; and
21

1 J. That this chapter is reasonably necessary to protect, enhance and preserve
2 the public health, safety and welfare of the citizenry within the city.
3
4
5 14.34.020 Definitions. Whenever the following words or terms are used in this
6 chapter; they shall have the meanings herein ascribed to them:
7
8 A. "City," "code," "council," "nuisance" and "operator" shall have the meanings
9 ascribed in Section 1.04.010 of the Longmont Municipal Code.
10
11 B. "Electric utility line" means main feeder electric utility wires, cables and
12 other equipment for the distribution of electrical current impulses which are owned by the
13 city and designated as part of the electric main feeder underground work plan as updated
14 and approved by the council.
15
16 C. "Facility" means all wires, cables, poles or other equipment for the
17 transmission or distribution of electrical current impulses, sounds, voices or
18 communications, other than an electric utility line, within a street.
19
20 D. "Owner" means any person, firm, corporation, association, partnership, or
21 any other form of association or organization, which has an ownership or leasehold interest
22 in a facility.

1 E. "Street" means the surface of and the space above any alley, avenue,
2 boulevard, circle, court, drive, lane, place, road, street, way, sidewalk, easement or right-of-
3 way in the city for public travel or the location of wires, cables, poles or other equipment
4 for the transmission or distribution of electrical current impulses, sounds, voices or
5 communications.
6
7
8 14.34.030 Facility relocation. On expiration of the date given in a notice under
9 Section 14.34.050 to relocate underground, it shall be unlawful for any owner or operator
10 to attach, affix, place, install, use, operate or maintain a facility within the street area
11 identified in the notice, unless pursuant to a specific exception under Section 14.34.040,
12 or a written grant of variance in accordance with Section 14.34.070. Each day a violation
13 continues shall constitute a separate offense.
14
15
16 14.34.040 Exceptions to relocation requirements. If otherwise in conformance with
17 the intent of this chapter and all applicable provisions of the zoning, development
18 procedures, subdivision regulations, utility rules and regulations, and other provisions of
19 the code, the following shall constitute exceptions to the requirements of the foregoing
20 section:
21

1 A. A facility designed for transmission or distribution of electric energy at
2 voltages in excess of fifteen thousand volts.
3
4 B. Transformers, pull boxes, service terminals, meters, pedestal terminals, ducts,
5 splice closures, apparatus cabinets, substations, and other similar equipment necessary for
6 the transmission or distribution of electrical current impulses, sounds, voices or
7 communications, which are not attached to an overhead pole.
8
9 C. Temporary wires and cables or other equipment for the transmission or
10 distribution of electrical current impulses, sounds, voices or communications required for
11 construction purposes.
12
13 D. A facility for which the owner or operator has given a written commitment,
14 approved by the city attorney and electric director, to relocate underground, remove, or
15 reroute, in conformance with the intent of this chapter and all applicable provisions of the
16 zoning, development procedures, subdivision regulations, utility rules and regulations, and
17 other provisions of the code, within two years from the date given in the notice under
18 Section 14.34.050.
19
20
21 14.34.050 Notice to owner or operator. Where, pursuant to an electric main feeder
22 underground work plan approved by council, the city plans relocation underground of an

1 electric utility line within a street, the city shall give a minimum of one hundred twenty
2 days advance notice of the street area and date by which each owner or operator of a
3 facility must relocate its facility underground.
4
5
6 14.34.060 Cooperation with other owner or operator. After giving notice under
7 Section 14.34.050, the city shall attempt to work with the owner or operator of a facility
8 so all may relocate underground in a common trench. The city shall pay for excavation
9 and back fill of a common trench if, within sixty days of mailing of the notice under
10 Section 14.34.050, the owner or operator makes a written commitment, approved by the
11 city attorney and electric director, to relocate its facility in a common trench in a manner
12 that will not delay the relocation of the electric utility line.
13
14
15 14.34.070 Variance--opportunity for hearing. A. An owner or operator may
16 request a variance from the strict application of this chapter and have a hearing before the
17 city manager, or his designee. All requests must be in writing and filed with the city
18 manager within sixty days of mailing by the city of the notice under Section 14.34.050.
19 The request must contain the name and address of the owner or operator, and specify the
20 nature of and reasons for the request. The city manager, or his designee, shall then hold
21 a hearing within fourteen days of receipt of the written request, at which the owner or

1 operator and the city may present testimony and evidence. A record of the hearing shall
2 be made by electronic or stenographic means.
3
4 B. The city manager, or his designee, shall have authority to grant a variance
5 from the strict application of this chapter on terms and conditions he deems sufficient to
6 preserve its intent, but only upon making the following affirmative findings:
7
8 1. The request will not negatively impact the health, safety, or welfare
9 of the residents of the city; and
10 2. One of the following:
11 a. Extreme technological difficulty in relocation underground of
12 the facility;
13 b. Potential for significant land development adjacent the subject
14 street area justifies not relocating underground the facility until development occurs.
15
16 C. The city manager, or his designee, shall notify the owner or operator making
17 the request of the decision, in writing, within ten days of the hearing. Review of the
18 decision of the city manager, or his designee, shall be pursuant to Rule 106(a)(4), Colorado
19 Rules of Civil Procedure. Any party aggrieved by the decision, including the city through
20 its electric director, may initiate review pursuant to Rule 106(a)(4).
21
22

1 14.34.080 City to pay for relocation of its electric lines and facilities. Except as
2 otherwise provided, this chapter shall not require that the city pay for relocation
3 underground of a facility of an owner or operator.
4
5
6 14.34.090 Penalty for violation of this chapter. A. An owner or operator violating
7 any provision of this chapter shall, upon conviction, be punished by a fine not exceeding
8 nine hundred ninety-nine dollars or by imprisonment not exceeding one hundred eighty
9 days, or both such fine and imprisonment.
10
11 B. After the date given in a notice under Section 14.34.050 to relocate
12 underground, it is a nuisance for an owner or operator to attach, affix, place, install, use,
13 operate or maintain a facility within the street area identified in the notice, unless acting
14 pursuant to a specific exception under Section 14.34.040, or a written grant of variance in
15 accordance with Section 14.34.070. Any court of competent jurisdiction shall, upon proper
16 complaint of the city attorney, enjoin or abate the nuisance.
17
18 C. In addition to the penalties in this section, the city attorney may seek any
19 appropriate remedy for damages or equitable relief to secure compliance with this chapter
20 and to preserve the city's interest in public property.
21
22

1 SECTION 2

2

3 That all ordinances or parts of ordinances in conflict herewith are hereby repealed,

4 but only to the extent of such conflict.

5

6 Introduced this 12th day of JANUARY, 1993.

7

8 Passed and adopted this 9 day of FEBRUARY, 1993.

9

10

11

12 ______________________

13 Mayor

14

15 Attest:

16

17

18

19 Valeria L. Skitt

20 City Clerk

21

1 Notice: Public hearing on the above ordinance will be held on the 26th day of

2 January, 1993, in Council Chambers at 7:00 p.m.

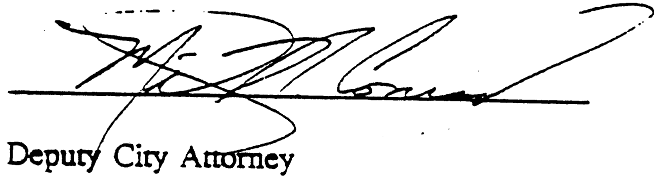
3

4 Approved as to form:

5

6

7



8

9 Deputy City Attorney

APPENDIX B

DISTRICT COURT, COUNTY OF BOULDER, STATE OF COLORADO
Action No. 93 CV 281 Division 2

U S WEST COMMUNICATIONS, INC., a Colorado corporation,
Plaintiff,

v.

CITY OF LONGMONT, a Colorado municipal corporation,
Defendant.

DOCKETED

I. INTRODUCTION

This case comes before the court on the defendant's motion to dismiss and for summary judgment. The plaintiff has filed a cross-motion for judgment on the pleadings and/or summary judgment. The parties have responded and replied accordingly. Having considered the briefs, exhibits, and case law, the court enters the following ruling and order.

II. FACTS

On February 9, 1993, the defendant City of Longmont ("Longmont") passed Ordinance 0-93-02 ("the ordinance") amending Title 14 of the Longmont Municipal Code to add Chapter 34, entitled "Relocation Underground of Overhead Electricity and Communications Facilities." Longmont is currently engaged in a program to relocate underground certain existing overhead electric main feeder facilities in the city streets and rights of way.[1] Under the ordinance, when Longmont plans the underground relocation of an existing electric line within a city street, owners and operators of overhead facilities are required to relocate existing overhead facilities in the same area at their own cost.[2] Failure to comply with the ordinance subjects owners and operators of overhead facilities to penalties.

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[1] Longmont owns and operates an Electric Department which distributes electricity to customers within the city.

[2] Longmont is required to attempt to coordinate with owners and operators of overhead facilities so that facilities may be relocated in a common trench. If, within sixty days of notice, the owner or operator makes a written commitment to relocate in a common trench, Longmont will pay for the cost of excavation and back fill of the common trench. However, the owner or operator is required to pay any other costs of relocation.

The ordinance requires Longmont to give at least 120 days advance notice of the street area and date by which overhead facilities must be relocated underground. The ordinance provides a specific exception for owners or operators who have given a written commitment, approved by the city attorney and electric director, to relocate underground, remove, or reroute overhead facilities within two years from the date given in the notice. Finally, an owner or operator may make a written request for a variance within sixty days from the date of notice, and if such request is made, the owner or operator is entitled to a hearing on the request within fourteen days.

The Longmont City Council findings which are pertinent to resolution of the present motions are contained in § 14.34.010, which states in pertinent part:

> The City Council of Longmont finds:
>
> A. That relocation underground of overhead facilities used for distribution of electricity and transmission or distribution of communications, hereinafter referred to as "overhead facilities," improves the aesthetics of a community by keeping unsightly poles, lines and related above ground appurtenances out of the view of the public; and
>
> B. That relocation underground of overhead facilities generally provides better protection from damage due to accidents with vehicles, inclement weather or other causes; this includes cars and trucks hitting poles or pedestals, snagging of overhead facilities due to high winds or heavy snows, and reduction of service outages; and
>
> C. That relocation underground of overhead facilities better protects the safety of the citizenry of Longmont because of less likelihood of involvement of overhead facilities in vehicular mishaps, and improvement of visibility along public rights of way, which improves the operational safety of the roads; and
>
> D. That relocation underground of overhead facilities makes them less vulnerable to damage from adjacent property maintenance by the citizenry...

At this time, the only owners or operators of overhead facilities in Longmont are U S West Communications and Longmont Cable Communications. U S West has filed suit against the City of Longmont, challenging the ordinance on several grounds. Longmont has filed a motion to dismiss U S West's first two claims for relief for failure to state a claim and a motion for summary judgment on the remaining claims for relief. U S West filed cross-motions for judgment on the pleadings and/or summary judgment.

III. LONGMONT'S MOTION TO DISMISS

Standard

A motion to dismiss for failure to state a claim is viewed with disfavor and should be granted only if it clearly appears that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Davidson v. Dill, 180 Colo. 123, 503 P.2d 157 (1972); Patel v. Thomas, 793 P.2d 632 (Colo. App. 1990). In determining whether the motion is to be granted, all matters well pleaded must be taken as true, and the trial court can consider only those matters stated in the complaint. Colorado National Bank v. F.E. Biegert Co., 165 Colo. 78, 438 P.2d 506 (1968).

Merits

Longmont seeks to dismiss U S West's first two claims for relief pursuant to C.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted. The first two claims for relief, labeled "Lack of jurisdiction/Pre-emption" and "Abuse of Discretion" respectively, invoke the jurisdiction of this court under C.R.C.P. 106(a)(4), which provides that relief may be obtained in the district court:

> Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law...

Review under this provision is limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record. Id.

Longmont contends that the actions of the city council were not quasi-judicial in nature, and that therefore review is not available under C.R.C.P. 106(a)(4). A determination of whether particular governmental action is quasi-judicial or quasi-legislative requires consideration of the nature of the decision rendered and the process by which the decision is reached. State Farm v. City of Lakewood, 788 P.2d 808 (Colo. 1990); Cherry Hills Resort v. Cherry Hills Village, 757 P.2d 622 (Colo. 1988).

Quasi-judicial action usually involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts. The existence of a statute or ordinance mandating notice and a hearing is evidence that the governmental action is quasi-judicial, but the absence of

such a statute or ordinance is not determinative of the issue. Id.

In contrast, legislative or quasi-legislative action usually involves determinations of public policy relating to matters of a permanent or general character. It is not normally restricted to identifiable persons or groups, but is of general application, and is usually prospective in nature. Legislative or quasi-legislative action requires the balancing of questions of judgment and discretion, and concerns an area traditionally governed by legislation. Id.

In the present case, the action of the Longmont City Council involved characteristics of both quasi-legislative and quasi-judicial action. Although there is no statute or local law expressly mandating notice and a hearing before the council could pass the ordinance in question, public notice and a public hearing were provided and the primary interested party, U S West, was given ample opportunity to be heard. Although the statute is of general application on its face, applying to "owners and operators" of overhead facilities, it is undisputed that there are only two such owners or operators in the City of Longmont. These facts might indicate that the council was acting in a quasi-judicial capacity when it passed the ordinance.

However, other facts point to the contrary. Passage of the ordinance did not involve the application of existing legal criteria to past or present facts.[4] The council's decision to underground certain overhead facilities for aesthetic and safety reasons clearly involved determinations of public policy relating to matters of a permanent or general character. The ordinance is of general application on its face; if the ordinance applies only to U S West and one other entity, that is due to the nature of the subject matter and the fact that U S West enjoys a territorial monopoly in Longmont. The ordinance is prospective in nature, as it identifies action which must be taken by owners and operators in the future and sets forth penalties for non-compliance. Finally, regulation of objects in the right of way of city streets is traditionally governed by legislation. On balance, the council's action was characteristically legislative or quasi-legislative.

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[3] Longmont relies on the test set out in Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975). However, Snyder was subsequently clarified in Cherry Hills Resort v. Cherry Hills Village, 757 P.2d 622 (Colo. 1988). In Cherry Hills, the court made it clear that the three criteria set out in Snyder were not necessary for a finding of quasi-judicial action for purpose of C.R.C.P. 106(a)(4) review.

[4] A review of the record of the city council's meetings and the hearing held in conjunction with the passage of the ordinance supports this conclusion.

166

Because the council was not acting in a quasi-judicial capacity in passing the ordinance, review pursuant to C.R.C.P. 106(A)(4) is not available. However, U S West has also requested relief in the form of a declaratory judgment pursuant to C.R.C.P. 57 as to these claims for relief. Legislative acts are subject to review under Rule 57. *See* Two G's Inc. v. Kablin, 666 P.2d 129 (Colo. 1983); Snyder v. Lakewood, 189 Colo. 421, 542 P.2d 371 (1975); Price Haskel, Inc. v. Denver Department of Excise and Licenses, 694 P.2d 364 (Colo. App. 1984). Such relief is also available where mere review of the record would not afford adequate relief to the parties, as here, where the ordinance is being challenged on constitutional grounds and as being in conflict with state law. Id. For that reason, the first two claims for relief should not be dismissed. However, the court will proceed under Rule 57, and not under Rule 106(a)(4).[5]

IV. LONGMONT'S MOTION FOR SUMMARY JUDGMENT AND U S WEST'S CROSS MOTION FOR SUMMARY JUDGMENT

Standard

Summary judgment is a drastic remedy which is warranted only upon a clear showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Ellerman v. Kite, 625 P.2d 1006 (Colo. 1981). The trial court must resolve all doubts as to the existence of an issue of fact against the moving party. Jones v. Dressel, 623 P.2d 370 (Colo. 1981). Once the movant makes a convincing showing that genuine issues of fact are lacking, the opposing party cannot rest on the mere allegations or denials in his or her pleadings, but

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[5] Even if the court were to proceed under Rule 106(a)(4) on the first two claims for relief, the result would not be different. The fact that constitutional challenges are raised does not preclude Rule 106 review, and Rule 57 claims may be joined with Rule 106 claims. Two G's Inc. v. Kalbin, 666 P.2d 129 (Colo. 1983). Therefore, the court would in any case be addressing the Rule 57 claims. Nor would the standard of review alter the outcome. To the extent that U S West is seeking review of legislative decisions which are discretionary, the court cannot substitute its judgment for that of the council unless it is shown that the decision was arbitrary, capricious, or an abuse of discretion. *See* Beacom v. Board of County Commissioners, 657 P.2d 440, 446 (Colo. 1983); Tihonovich v. Williams, 196 Colo. 144, 582 P.2d 1051 (Colo 1978); Bruce v. School Dist. No. 60, 687 P.2d 5098 (Colo. App. 1984); *compare* C.R.C.P. 106(a)(4). To the extent that U S West seeks constitutional or statutory review of the council's decision, the relevant standard of review will be determined by the nature of the challenge.

must demonstrate by specific facts that a controversy exists. Sullivan v. Davis, 172 Colo. 490, 472 P.2d 218 (1970).

Merits

Both parties have moved for summary judgment on all claims. The record indicates that there is no genuine issue of material fact which requires resolution, and the parties agree. Therefore, the issues in this case may be resolved as a matter of law. U S WEST challenges the ordinance on several grounds, and some of the claims for relief are overlapping. To simplify, the court will address the claims as follows: the preemption challenge, the constitutional challenges, the breach of contract claim, and the estoppel claim.

The General Rule

In challenging the ordinance, U S West does not deny that a municipality may require relocation of utilities in the public right of way; the contention is that U S West cannot be required to pay for the cost of such relocation.[6] This issue was addressed in Denver v. Mountain States Tel. & Tel. Co., 754 P.2d 1172 (Colo. 1988), where the court stated:

> In the absence of a contract, franchise agreement, or statute to the contrary, we believe the better rule is to require a utility to pay the cost of relocating its facilities from a public street whenever the municipality requires it in the exercise of its police power to protect the public health, safety, or convenience.

Id. at 1176.[7] This is the general rule. *See also* Moffat v. City and County of Denver, 57 Colo. 473 (1914). However, the rule is qualified by the inclusion of the phrase "in the absence of a contract, franchise agreement, or statute to the contrary." Hence, the more difficult question presented by U S West is whether the ordinance conflicts with state law.

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[6] U S West's challenge to the reasonableness of the ordinance will be discussed at a later point in the opinion, under the heading "The Constitutional Challenges."

[7] Denver v. Mountain States involved the issue of whether the governmental/proprietary distinction should apply in the context of utility relocation law, in order to override the common law rule that utilities are required to pay for the cost of relocation whenever required to relocate as a consequence of reasonable municipal regulation. The court rejected the proprietary/ governmental distinction and affirmed the common law rule as stated above.

The Preemption Challenge

U S West seeks summary judgment declaring the ordinance invalid and enjoining its enforcement on the basis that it is preempted by state law. There are essentially four parts to this argument. U S West first argues that the regulation of telecommunications is a matter of statewide concern, and that therefore, any regulation by local authorities is preempted. Second, U S West argues that the ordinance is preempted by the general authority of the Public Utilities Commission (the "PUC"), as evidenced by the power vested in the PUC by the Colorado Constitution and C.R.S. § 40-1-101 *et seq.* Third, U S West argues that the ordinance is preempted by C.R.S. § 29-8-101 *et seq.*, "Underground Conversion of Utilities." Finally, U S West argues that the ordinance is preempted by § 4.6.A, of U S West's PUC tariff sheet, which governs charges for "special types of construction."

U S West argues that telecommunications is a matter of statewide concern, and that therefore, regulation by local ordinance is prohibited. Longmont argues that the location of facilities on its streets is purely a matter of local concern, and that therefore its ordinance supersedes conflicting state statutes. While it is true that the Colorado Supreme Court has found the regulation of the business and rates of telephone companies to be a matter of statewide concern, *see* People ex rel. Public Utilities Commission v. Mountain States Tel. and tel. Co., 125 Colo. 167, 243 P.2d 397 (1952), it is also true that the regulation of objects in the public right of way is traditionally a matter of local concern. Id.; *See also* Moffat v. City and County of Denver, 57 Colo. 473 (1914).

Clearly, then, the relocation of utilities in the public right of way is a matter of mixed local and statewide concern. *See* City and County of Denver v. State of Colorado, 788 P.2d 764 (Colo. 1990); Denver & Rio Grande Western R. Co. v. Denver, 673 P.2d 354 (Colo. 1983). Therefore, it must be determined whether there is a conflict between the ordinance and state law. If there is no conflict, the local ordinance may coexist with state law. If, on the other hand, there is a conflict, the local ordinance will be preempted by state law. Id.

U S West argues that the ordinance is preempted by the general authority of the PUC. The authority of the PUC is established in the Colorado Constitution, Article XXV, which states in pertinent part:

> 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

[those] within home rule cities and home rule towns, of every ... public utility ... 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, that nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises...

By its very terms, the authority of the PUC is limited by the power of municipalities to exercise reasonable police powers. Therefore, the ordinance is not preempted by the general authority of the PUC under the Colorado Constitution.

U S West argues that C.R.S. 40-1-101 *et seq.*, which governs the PUC's regulation of utilities (the "Public Utilities Law"), indicates an intent to "occupy the field" of utility regulation, and that Longmont's ordinance is thereby preempted. However, while the Public Utilities Law is comprehensive, it does not indicate an intent to "occupy the field" to the exclusion of all local regulation of public utilities.[8] Furthermore, such a construction would be directly contrary to the language of Article XXV of the Colorado Constitution. The ordinance is not preempted the Public Utilities Law.

U S West next argues that the ordinance is preempted by C.R.S. § 29-8-101 *et seq.* (the "Underground Conversion Act"). The Underground Conversion Act provides a mechanism for the creation of special districts to provide for the conversion of existing

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[8] Nor does the ordinance directly contradict any portion of the Public Utilities Law; the act simply does not address the issue of costs of relocation when required by local ordinance. The only section which addresses relocation at all is C.R.S. § 40-4-102, which states in pertinent part:

> (1) Whenever the commission, after a hearing upon its own motion or upon complaint, finds the additions, extensions, repairs, or improvements to or change in the existing plant, equipment, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made ..., the commission shall make and serve an order directing that such additions, [etc.] be made...

Notably, this provision, which contemplates improvements ordered by the PUC, also contemplates that costs of such improvements will be paid by the utility. *See* C.R.S. § 40-4-102 (2).

overhead facilities to underground facilities. The cost of such conversion is to be paid by special assessments on the benefitted landowners as well from money "from any other source." C.R.S. § 29-8-105. If the act were the exclusive means by which to accomplish the undergrounding of overhead facilities, there would be a clear conflict.[9]

However, nothing in the act indicates such an intent. The legislative declaration states:

> The general assembly finds that landowners, cities, towns, counties, and public utilities in many areas of the state desire to convert existing overhead electric and communication facilities to underground locations by means of improvement district proceedings. The general assembly declares that a public purpose will be served by providing a procedure to accomplish such conversion and that it is in the public interest to provide for such conversion by proceedings taken under his article...

C.R.S. § 29-8-102. The act merely provides a procedure for those landowners, cities, towns, etc. who desire to convert existing overhead facilities by meansof improvement district proceedings. Nothing in the act indicates that improvement districts are to be the exclusive means by which the undergrounding of facilities can be accomplished. The ordinance is not preempted by the Underground Conversion Act.

Finally, U S West argues that the ordinance is preempted by § 4.6.A of U S West's tariff filed with the PUC, which governs costs for "special types of construction." As a preliminary matter, it is clear that the tariff has the force of state law, and a properly filed tariff, like legislation, extinguishes inconsistent common law. Shoemaker, v. Mountain States Tel. & Tel. Co., 38 Colo. App. 321, 559 P.2d 721 (1976). Therefore, if the ordinance is in conflict with the tariff, U S West may be required to pay the costs of relocation in spite of the common law rule stated in Denver v. Mountain States.

The tariff provides in pertinent part:

> 1. Where a special type of construction is desired by a customer, such as where underground construction is requested in locations where aerial construction would be regularly used, or where conditions imposed by the

[9] Longmont argues that the Underground Conversion Act applies only to private persons, not municipalities, and that the act applies only to facilities located on private easements, not public easements. Neither argument is supported by the language of the act.

customer involved excessive costs, or where underground construction is legally required by ordinance, covenant, tract restriction or otherwise, the customer or customers served by such facilities or the tract developer shall be required to pay the difference between the cost of the underground or other special type of construction and the average cost of construction normally used by the Company.

2. Where existing aerial facilities are requested to be relocated underground in an area where the Company would not, except for such request, relocate its facilities underground, the Company may charge the cost of such relocation to the persons requesting the relocation of such facilities.

U S West contends that the tariff requires Longmont to bear the cost of relocation and that therefore the ordinance is in conflict with the tariff.

The second paragraph applies where existing aerial facilities are requested to be relocated underground, and provides that in such cases, the Company may charge the cost of such relocation to the persons requesting the relocation. U S West contends that this section clearly applies to the instant case, noting that the section refers to "persons," in contrast to the reference to customers and tract developers in the first section. Since a municipal corporation is a "person," U S West argues, Longmont is required to pay for the cost of relocation in the instant case.

In order to interpret the meaning of the language, the court must read the tariff as a whole. The tariff is not artfully drafted; however, it is reasonably clear that the first paragraph applies to new construction, not relocation of existing facilities. Therefore, the first paragraph does not apply in the instant case. However, examination of that paragraph informs the reading of the second paragraph, which does expressly refer to underground relocation of facilities. When special types of new construction are requested or when underground construction is legally required by ordinance, covenant, tract restriction or otherwise, the customer or customers or the tract developer is required to pay for the excess costs. Longmont is neither a customer nor a tract developer. If the ordinance governed new construction, it is clear that Longmont would not be required to bear the cost of undergrounding.

The second paragraph refers to "persons requesting" relocation. Longmont is not requesting relocation; rather, relocation is legally required by ordinance. The first paragraph clearly contemplates new underground construction required by ordinance, yet the tariff does not require municipalities to pay for the additional costs in that case. Again, the tariff is not

artfully drafted, but it is reasonably clear that the second paragraph's reference to "persons" means natural persons, i.e. customers, tract developers, or others who may request relocation, not municipalities which may require relocation by ordinance. Because the tariff does not apply in the instant case, there is no conflict with the ordinance. Therefore, the ordinance is not preempted by the tariff.

Because each of U S West's preemption arguments fails as a matter of law, Longmont is entitled to summary judgment on this issue.[10]

The Constitutional Challenges

U S West challenges the ordinance on constitutional grounds, asserting that the ordinance violates due process and constitutes an unlawful taking without just compensation. A presumption of constitutionality attaches to legislative acts of the governing bodies of municipalities; the presumption can only be overcome by proof beyond a reasonable doubt. Landmark v. City and County of Denver, 728 P.2d 1281 (Colo. 1986).

In a case such as this, where the ordinance does not implicate a fundamental right, due process requires that the ordinance be rationally related to a legitimate public purpose. Id. Longmont's ordinance was enacted for several purposes, including aesthetic purposes and safety concerns. U S West contends that the safety concerns are a mere "smokescreen" for the true purpose, which is purely aesthetic. However, Longmont's concern with traffic safety and reduction of service outages due to accidents or weather conditions are clearly genuine concerns. Furthermore, even if the ordinance was designed for the sole purpose of improving aesthetics, protection of aesthetics is a legitimate function of a legislature. Id.

U S West argues that traffic safety will not be improved, because vehicles which would collide with poles will merely collide with some other object. However, it is rational to conclude that fewer obstacles on or near the public roadways will result in fewer accidents overall. At least some of the accidents involving poles will [illegible] or will be less serious, if poles are removed. Finally, [illegible] ordinance is obviously a rational way to improve community aesthetics. Because Longmont's ordinance is a rational [illegible] to accomplish the legitimate purposes of promoting

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[10] The court notes that this is not a case in which there is a state statute which directly governs the costs of relocation of facilities when a public utility is required to do so by ordinance. If there were a direct conflict, the state statute would govern in a case of "mixed" state and local concern.

traffic safety and improving community aesthetics, the ordinance does not violate due process.

U S West argues that the ordinance constitutes an unlawful taking without just compensation. There are two parts to this argument. First, U S West argues that the physical property of U S West is being taken, in that the existing overhead facilities will have to be scrapped and the salvage value of the facilities is less than the cost of relocating. The second argument is that U S West operates its business pursuant to "statewide operating rights," and that the ordinance deprives U S West of those rights. *See* City of Englewood v. Mountain States Tel. & Tel. Co., 163 Colo. 400, 431 P.2d 40 (1967).

It is clear that every ordinance which imposes some financial burden cannot be invalid as an unlawful taking. Colorado courts have already rejected this argument in the context of utility relocation. Moffat v. City and County of Denver, 57 Colo. 473 (1914). Therefore, there is no taking involved on that basis. U S West's second argument fails as well. Even assuming U S West can rely on the "statewide operating rights" described in City of Englewood,[11] the ordinance does not interfere with such rights. U S West is not required to terminate service. The ordinance merely conditions the operating rights by regulating the location of facilities in the public right of way. This is clearly not a taking. *See* Moffat. Because U S West's constitutional challenges fail, Longmont is entitled to summary judgment on those issues.

The Contract Claim

U S West contends that the ordinance is a violation of the "Pole Sharing" agreement executed by Longmont and U S West's predecessor in 1929. The agreement provides for the joint use of telephone poles by the city and the company and sets out the relationship between owners of poles (designated "owner") and the owners of facilities attached to poles (designated "licensee").

[illegible] case was very narrow, and should be limited to its fac[illegible] case. Englewood had granted permission to Mountain Sta[illegible] and maintain overhead facilities on its public righ[illegible] when it was a "statutory" city. Englewood later became a home rule city and tried to force Mountain States to negotiate a franchise. The court held that Mountain States had a state franchise, and could not be required to seek a new municipal franchise for its existing operations. The case was later limited in City of Greeley v. Poudre Valley Rural Electric Ass'n, 744 P.2d 739 (Colo. 1987). The court notes that U S West operates pursuant to a municipal franchise in this case.

Article XX of the contract expressly reserves to the city all of the rights contained in Ordinance No. 244, which in turn provides that the Company "at all times during the life of this franchise shall be subject to all lawful exercise of the police power by the City, and to such reasonable regulations as the City may by resolution or ordinance hereafter provide." Ordinance No. 244, Section 2. Further, Article VII of the contract expressly disclaims any guarantee that permission shall be granted to maintain attachments on poles, and provides that if objection is made, the owner of the attachment shall be required to remove such facilities at its own expense. Finally, Article XVI of the contract provides that after January 1, 1930, the contract is terminable by either party upon one year's written notice. Longmont gave such notice to U S West on February 8, 1993.

These provisions show that any right that U S West had under the contract to maintain attachments on poles owned by Longmont was limited by both the police power of the city and the continuing permission of Longmont as an owner of poles. Furthermore, the contract terminated on February 8, 1994. The ordinance clearly does not constitute a breach of the agreement. Therefore, Longmont is entitled to summary judgment on this issue.

The Estoppel Claim

U S West contends that Longmont is estopped from requiring the relocation of facilities at U S West's expense. In order to establish a claim for equitable estoppel, the following elements must be established:

> ...the party to be estopped must know the facts and either intend the conduct to be acted on or so act that the party asserting estoppel must be ignorant of the true facts, ...the party asserting estoppel must rely on the other party's conduct with resultant injury, [and] the reliance of the party seeking to benefit from the doctrine must be reasonable.

Committee for Better Health Care v. Meyer, 830 P.2d 884 (Colo. 1992) (citations omitted).

U[illegible] claims it relied upon several things in erecting and maint[illegible]head facilities, including its "statewide operating rights[illegible] zoning provisions of Longmont's municipal code, and the "Po[illegible]ing Agreement." The so-called "statewide operating rights" [illegible] be used to assert a claim for estoppel against Longmont, since they are not based on any conduct of Longmont. *See* City of Englewood. U S West has failed to pursue its argument that it relied upon the zoning code. Therefore, the only possible basis for a claim of estoppel is the Pole Sharing Agreement.

The facts do not support a finding of reasonable reliance. As indicated in the discussion above, the Pole Sharing Agreement could not have created a reasonable expectation that U S West would be permitted to maintain its overhead facilities in perpetuity,[12] or a reasonable expectation that U S West would never have to pay for relocation. The plain language of the Pole Sharing Agreement and the general rule stated in Denver v. Mountain States, *supra*, would make any such reliance entirely unreasonable. There can be no estoppel as a matter of law when the reliance asserted by the party claiming estoppel is not reasonable. Simineo v. Kelling, Jr., 199 Colo. 225, 607 P.2d 1289 (Colo. 1980). Therefore, U S West's estoppel claim must fail as a matter of law, and Longmont is entitled to summary judgment on this claim as well.[13]

V. CONCLUSION

For the forgoing reasons, Longmont's motion to dismiss U S West's first two claims for relief is DENIED; Longmont's motion for summary judgment is GRANTED; and U S West's motion for summary judgment is DENIED. Summary judgment is entered in favor of Longmont and against U S West on all claims for relief.

DONE IN CHAMBERS this April 14, 1994.

Joseph Bellipanni, District Judge

cc: Claybourne Douglas
Joseph Wilson
Thomas Ragonetti
Russell Rowe

The above and foregoing were placed into the normal mailing process to the persons/attorneys indicated.
Date 1/14/[illegible]

[12] The court notes that the case might be different if U S West had not been able to maintain its overhead facilities for many years before being required to relocate, as it did in the present case.

[13] U S West's reliance on City of Englewood, *supra*, is misplaced. Although the court relied on certain principals of equitable estoppel, the holding was not based on equitable estoppel.

APPENDIX C

4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

4.6 OTHER CONSTRUCTION OR CONDITIONS

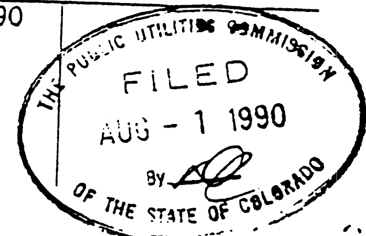
A. SPECIAL TYPES OF CONSTRUCTION

1. Where a special type of construction is desired by a customer, such as where underground construction is requested in locations where aerial construction would be regularly used, or where conditions imposed by the customer involved excessive costs, or where underground construction is legally required by ordinance, covenant, tract restriction or otherwise, the customer or customers served by such facilities or the tract developer shall be required to pay the difference between the cost of the underground or other special type of construction and the average cost of construction normally used by the Company.

2. Where existing aerial facilities are requested to be relocated underground in an area where the Company would not, except for such request, relocate its facilities underground, the Company may charge the cost of such relocation to the persons requesting the relocation of such facilities.

B. TEMPORARY CONSTRUCTION

Where construction is necessary to provide temporary service, such as to an applicant's temporary premises within an exchange in connection with a relocation of a permanent service location, the applicant will be required to pay a construction charge equal to the estimated cost of installing and removing the temporary facilities, less estimated salvage at the time of removal. In the event the facilities are reusable without rearrangement or modification, at the time the temporary services are disconnected, a portion of the construction charge assessed may be refunded, depending upon the circumstances in each case.



4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

4.6 OTHER CONSTRUCTION OR CONDITIONS (Cont'd)

C. CONSTRUCTION UNDER UNUSUAL CONDITIONS

1. Where construction of facilities is required to meet unusual conditions such as to provide service in hazardous and/or inaccessible locations, construction charges will be assessed where regular rates and aid to construction charges are inadequate to cover all costs and provide a fair return for the service requested.

2. Construction and aid to construction charges are billed in even multiples of a dollar; any fraction of a dollar is disregarded.

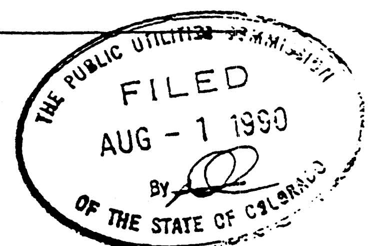
3. Special construction charges will be applicable where, at the request of the customer, the Company constructs a greater quantity of facilities than that which the Company would otherwise construct or normally utilize.

D. BURIED AND/OR UNDERGROUND COMMUNICATION FACILITIES SERVING SUBDIVISIONS AND DEVELOPMENTS

The provision of buried or underground communication facilities to residential subdivisions and developments, except as covered in E. and F. below, shall be dependent upon the following being made available to the Company:

1. A legally sufficient easement to accommodate the placing and maintaining of the common communication serving facilities (e.g., feeder and distribution cables plus terminal pedestals or like devices and access point cabinets). The surface of the easement area must be brought to final grade prior to the installation of buried or underground communication facilities.

2. Adequate trenches and backfill within the subdivision or development suitable for the Company's distribution facilities. This does not include trenches and backfill for the service drop wire (i.e., the facilities between the pedestal terminal or like device and protector or network interface located on or near the customer premises), except as covered in E. and F. below.



4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

4.6 OTHER CONSTRUCTION OR CONDITIONS (Cont'd)

D. BURIED AND/OR UNDERGROUND COMMUNICATION FACILITIES SERVING SUBDIVISIONS AND DEVELOPMENTS (Cont'd)

3. A written trench and backfill agreement entered into by the developer or owner of the subdivision or development and the Company for the provision of the trench and backfill work. The agreement will include the following:

   a. A description of the subdivision or development.

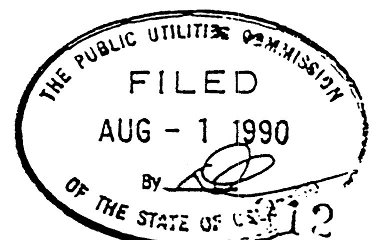
   b. Trench and backfill plans and specifications.

   c. Trench excavation and backfill schedules.

   d. Rights, responsibilities and liabilities associated with performance of the trench and backfill work.

4. In areas where the Company has existing trench and backfill agreements with local power utilities, the developer or owner of the subdivision or development shall be responsible for the Company's portion of the trench and backfill costs.

5. The developer or owner shall have the option of either, (a) providing trench and backfill in accordance with Section 4.6.D.2. or (b) paying the Company's portion of joint trench and backfill costs in accordance with Section 4.6.D.4.



4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

4.6 OTHER CONSTRUCTION OR CONDITIONS (Cont'd)

E. BURIED AND/OR UNDERGROUND COMMUNICATION FACILITIES SERVING CLUSTER AND MOBILE HOMES

The provision of buried or underground communication facilities to serve cluster and mobile home complexes (single or multi-dwelling units which share in the ownership or use of common property) shall be dependent upon the following being made available to the Company:

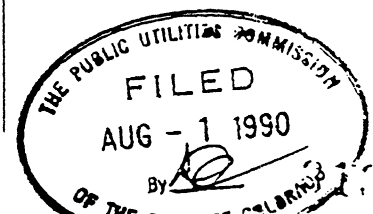
1. A legally sufficient easement to accommodate the placing and maintaining of the common communication serving facilities (i.e., feeder and distribution cable, plus terminal pedestal or like device and access point cabinets). The surface of the easement area must be brought to final grade prior to the installation of buried or underground communication facilities.

2. A reusable raceway or conduit for the exclusive use of the Company facilities between the pedestal terminal or like device is located in the easement and the entrance location of the unit or, in the case of a multi-dwelling building, units in which service is to be provided.

3. Where in the opinion of the Company it is necessary, the provision of adequate trenches and backfill suitable for the Company facilities, including trenches and backfill (for the facilities located between the pedestal terminal or like device in the easement and protecters or network interface located on or near the customer premises).

4. In areas where the Company has existing trench and backfill agreements with local power utilities, the developer or owner of the subdivision or development shall be responsible for the Company's portion of the trench and backfill costs.

5. The developer or owner shall have the option of either, (a) providing trench and backfill in accordance with Section 4.6.D.2. or (b) paying the Company's portion of joint trench and backfill costs in accordance with Section 4.6.E.4.



4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

4.6 OTHER CONSTRUCTION OR CONDITIONS (Cont'd)

F. UNDERGROUND COMMUNICATION FACILITIES SERVING NONRESIDENTIAL BUILDINGS AND CERTAIN RESIDENTIAL BUILDINGS

Underground communication facilities will be provided, where feasible, in new installations at nonresidential buildings and residential buildings with more than four (4) living units, except as covered in D. & E. above, including residential buildings being utilized as business establishments.

Where, in the opinion of the Company, the placement of underground communication facilities is impractical or not feasible, the facilities shall be placed aerially and the owner or customer requesting the same shall provide and furnish the hardware required by the Company to attach to the building including but not limited to "I" bolts, wall sleeves, or such other hardware as specified by the Company.

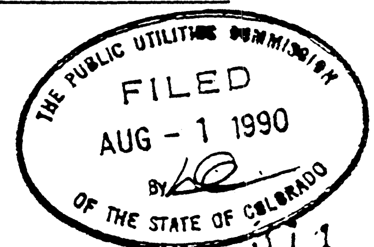
The provision of underground communication facilities to serve these buildings shall be dependent upon the following conditions:

1. All undergound Company wire and cable routes, entrance and/or tie facilities on private property shall be determined by the Company with the concurrence of the building owner or his agent.

2. The owner shall furnish the Company with site plans showing building locations with sewer, water, gas and power routes.

3. Upon agreement to place underground communication facilities and compliance with these listed conditions, the Company shall furnish the owner a plan showing the location of proposed communication facility routes.

4. The owner shall provide reusable conduit, manholes, and handholes in place (size and number specifications to be determined by the Company) from the central distributing point at the buildings to the Company designated facility point (e.g., pedestal, pole and/or property line, etc.) and/or tie facilities between buildings. Such conduit shall be in place and the surface of the ground area must be brought to final grade at least 30 days prior to the requested service date.



4. CONSTRUCTION CHARGES AND OTHER SPECIAL CHARGES

4.6 OTHER CONSTRUCTION OR CONDITIONS (Cont'd)
F. (Cont'd)

5. The Company shall select the location of the facility point. The location may or may not be the closest property line and will be determined based upon the owner's plans and existing or proposed communication facilities.

6. Notwithstanding the provision of the conduit, the building owner or the customer shall be liable for repairs to communication facilities damaged by their actions or that of their employees, contractors, or agents. Such liability shall also include the restoration of the damaged site to original condition (e.g., restoration of asphalt, sod, concrete, landscaping, etc.).

7. Where, in the opinion of the Company, it is reasonably necessary to secure a written easement for the protection of the underground communication facilities to the buildings, the property owner shall execute and deliver the easement in a form satisfactory to the Company.

8. The cost of any rearrangements and/or rerouting of existing communication facilities to the buildings along with the restoration of the site will be borne by the customer and/or property owner requesting same.