COLORADO SUPREME COURT

CASE NO. 99SA219

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

CITY AND COUNTY OF DENVER,
Appellant,

v.

U.S. WEST COMMUNICATIONS, INC., a Colorado Corporation, MCIMETRO ACCESS TRANSMISSION SERVICES, INC., a Colorado Corporation, AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC., a Colorado Corporation, ICG TELECOM GROUP, INC., a Colorado Corporation, and TELEPORT DENVER, LTD., a Colorado Limited Partnership,

Appellees.

Appeal from the District Court for the City and County of Denver, Consolidated Civil Action No. 98CV691 (Consolidating Case Nos. 98CV691, 98CV737, 98CV873, and 98CV2006), Courtroom 14, the Honorable Edward A. Simons and the Honorable Gloria A. Rivera

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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 Appellant, the City and County of Denver.

STATEMENT OF ISSUES ON APPEAL

The Colorado Municipal League hereby adopts and fully incorporates by reference the statement of the issues on appeal in the opening brief of Appellant, the City and County of Denver.

STATEMENT OF CASE

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

SUMMARY OF ARGUMENT

In Colorado, a legislative body's power to donate public property for the benefit of a private corporation is subject to a limit beyond whatever political influence the corporation may have with the legislative body. That limit is Art. XI, Sec. 2 of the Colorado Constitution.

In SB 96-10 (1996 Colo. Sess. Laws 298, codified at C.R.S. 38-5.5-101-107; attached hereto as Appendix A), the General Assembly, at the urging of the telecommunications industry lobbyists, compelled that local streets be made available free of charge to telecommunication corporations in perpetuity for implacement of corporate infrastructure. In exchange for this giveaway of property acquired and maintained by local taxpayers, the General Assembly secured nothing in the way of consideration from the telecommunications corporations. At the same time, apparently recognizing the value of access to public property to the telecommunications corporations, the State expressly preserved in SB 96-10 its right to "just compensation" for use of its property by these same corporations.

This Court's Colo. Const. Art. XI, Sec. 2 (hereafter cited as "Art. XI, Sec. 2") decisions have generally upheld public entity transactions with private corporations when the entity involved receives valuable consideration for the benefit it provides to the private corporation; in such cases, no prohibited "donation" to the corporation has been found. Local governments received no such consideration in SB 96-10.

This lack of consideration is not cured by identification of some speculative "public purpose" vaguely associated with SB 96-10. "Public purposes" or benefits can be posited in connection with virtually any scheme to donate public property or funds to private corporations. Consequently, identification of a "public purpose", without more, should not be permitted to rationalize such gifts. A more comprehensive evaluation of the consideration on both sides of the transaction, such as that utilized by the Arizona courts, is appropriate. In such an evaluation, "public purpose" or benefit may be *a* factor considered; however, it will not be the *only* factor.

SB 96-10 compels a donation of local government property to private telecommunication corporations, while explicitly prohibiting adequate consideration. As such, SB 96-10 violates Art. XI, Sec. 2 of the Colorado Constitution.

ARGUMENT

I. Colorado Constitution Art. XI, Sec. 2: Introduction

In its 1996 session, the General Assembly adopted a new Art. 5.5 in Title 38, C.R.S. through SB 96-10, (1996 Colo. Sess. Laws 298; codified at C.R.S.38-5.5-101-107; attached hereto as

Appendix A; hereafter "SB 96-10"). SB 96-10 gives private telecommunication corporations the right to occupy all "public highways" with their infrastructure. 38-5.5-103(1) C.R.S. "Public highway" is defined as including "all roads, streets, and alleys and all other dedicated rights-of-way and utility easements of the state or any of its political subdivisions". 38-5.5-102(2) C.R.S. Significantly for purposes of the present appeal, political subdivisions, but not the state, are prohibited from levying any "charge" for use of this public property by these private corporations. 38-5.5-107(1)(a) C.R.S.[1] Conflict with SB 96-10 was a substantial basis for the trial court's finding that Denver's ordinance was invalid. Record: Vol. 4, pps. 942-948; Vol. 6, pps. 1489-1451.

Art. XI, Sec. 2 of the Colorado Constitution was adopted as part of the original, fundamental law of our state in 1876. That section provides, in pertinent part, as follows:

> Neither the state, nor any county, city, town, township, or school district shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in any corporation or company.

At the time of the adoption of Art. XI, Sec. 2, the railroads enjoyed considerable political and economic power in Colorado. Shortly after the adoption of the Constitution, this Court, which then included as two of its three members individuals who had been members of the Constitutional

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[1] SB 96-10 does permit political subdivisions with limited authority to assess street "construction permit" fees, provided that such fees are "reasonably related to the costs directly incurred by the political subdivision in providing services relating to the granting or administration of permits." 38-5.5-107(1)(a)II and (1)(b) C.R.S. Obviously, this narrow authority to recover permit administration costs in no way provides adequate consideration to the political subdivisions for private corporate use of their property in perpetuity. Thus, subsequent references herein to the effect that SB 96-10 provides the telecommunications corporations with use of local public property free of charge relate to charges for use of the public property itself.

Convention (*See* Lord v. City and County of Denver, 58 Colo. 1, 16, 143 P. 284, 288-289 (Colo. 1914)), explained the purpose of Art. XI, Sec. 2 as follows:

> [I]t was undoubtedly the intention of the framers of the Constitution, whether wisely or not, to prohibit, by the fundamental law of the new State, all public aid to railroad companies, whether by donation, grant or subscription, no matter what might be the public benefit and advantages flowing from the construction of such roads. I understand the framers of the Constitution and the people who adopted it, to have intended by this provision the declaration of a broad policy of prohibition forbidding state, county and municipal aid to railroad and other companies in any of the modes specified.

Colorado Central Railroad Company v. Lea, 5 Colo. 192, 196 (1879).

The *Lea* Court made the foregoing statement in the course of invalidating an agreement by Boulder county to transfer 2,000 shares of county owned railroad stock to the railroad upon the railroad's completion of its connecting line to Cheyenne, Wyoming.

In Lord v. City and County of Denver, 58 Colo. 1, 143 P. 284 (Colo. 1914), this Court invalidated as violative of Art. XI, Sec. 2 an agreement between Denver and the Denver and Salt Lake Railroad Company for construction of the Moffat Tunnel.

The Court provided further background on the motivation for adoption of Art. XI, Sec. 2:

> Prior to the adoption of our Constitution, the policy of extending public aid to private corporations had grown to be alarming. . . To prevent this evil, there began the adoption of constitutional amendments by many of the states, denying the right of the Legislature to grant such powers. Our Constitution was adopted at a time when the subject was much in the public mind. An examination of the proceedings of the Constitutional Convention shows the introduction of several resolutions upon the subject, and repeated redrafts of these sections with the result that sections 1 and 2 of Art. XI are broader in scope, and more specific in the matter of restriction, than any similar constitutional provision considered or brought to our attention.

Id. at 15 ,143 P. at 288.[2]

Unlike the facts in *Lea* and *Lord*, in the case at bar it is not the local governments that have decided to give away their property to influential corporations. Rather it is the state legislature which, at the urging of telecommunications industry representatives, has passed a law giving the telecommunication corporations rent-free use of a vast quantity of valuable local government property across Colorado, in perpetuity.

In consideration for this wholesale giveaway of public property, the public has received virtually nothing. There has been no demonstrable benefit to average Colorado consumers, either in terms of additional service availability or prices charged, attributable to SB 96-10. Nothing in SB

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[2] Serving a similar public policy, and thus also potentially implicated by SB 96-10 is Colo. Const. Art. V, Sec. 25, which reads, in pertinent part:

> "The general assembly shall not pass local or special laws in any of the following enumerated cases . . .granting to any corporation, association or individual any special privilege, immunity or franchise whatever. In all other cases, where a general law can be made applicable no special law shall be enacted."

A "special law" is a law that is enacted for an individual case and singles out a particular person, entity, or entities within the same class. In re Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005, 814 P.2d 875 (Colo. 1991); *see also,* e.g., Morgan County Junior College Dist. v. Jolly, 168 Colo. 466, 470, 452 P.2d 34,36 (1969); In re Constitutionality of Senate Bill No. 293, 21 Colo. 38, 40-41, 39 P.522, 523 (1895); Denver v. Bach, 26 Colo. 530, 533, 58 P. 1089, 1090 (1899) (The purpose of Article V, Section 25 is to protect against legislative enactments that either benefit or disadvantage a particular person, entity, or artificially created group); *see generally*, 2 Sutherland, Statutory Construction §40.04 (4th ed. 1986).

In SB 96-10, telecommunications corporations are given a special status provided to no other competitive private corporations; they are given the right to use local public property free of charge and without provision of any other meaningful consideration to the effected local government or its taxpayers (*see:* 38-5.5-107(1)(a) C.R.S.)

96-10 requires that any savings achieved by the telecommunications companies as a result of avoiding a reasonable charge for use of local public property be passed along to consumers in the form of lower rates. Nothing in SB 96-10 requires that telecommunications companies making use of local public property provide any benefit to the local taxpayers whose property they are occupying. In SB 96-10, the General Assembly traded free use of local government property forever in exchange for siren promises of "ubiquitous, seamless, statewide telecommunications networks." § 38-5.5-101(1)(b) C.R.S. In a competitive telecommunications marketplace, whether and to what extent telecommunication corporations may decide to build these networks will be a business decision of the corporations themselves, made in the best interests of their shareholders.

The parallels between the spectacle of the General Assembly passing SB 96-10 for the benefit of powerful telecommunications corporations and the abuses that prompted the adoption of Art. XI, Sec. 2 in the first place are so glaring as to be inescapable. The League respectfully urges that if Art. XI, Sec. 2 is to retain any credible viability as a restriction on corporate giveaways, SB 96-10 must be found unconstitutional. As will be developed below, SB 96-10 was a classic "donation" of public property designed to aid the private telecommunications corporations.

This appeal presents an opportunity for this Court to clarify its construction of Art. XI, Sec. 2, in order to invalidate SB 96-10 and discourage future legislation of this sort. This is important because, absent clear direction from this Court reaffirming the restrictions in Art. XI, Sec. 2, all manner of politically powerful corporations could well decide that free use of local public property would be convenient to their shareholders, and would simply secure passage of state legislation giving them such use. In particular, if Art. XI, Sec. 2 may be effectively circumvented and ignored

by the simple expedient of identifying some "public purpose," Art. XI, Sec. 2 will become a nullity, as was predicted by this Court in Lea, 5 Colo. 192 at 196 (*see*: *infra* at 12-13), since such a purpose could be made out with respect to virtually any legislation.

II. SB 96-10 is unconstitutional insofar as it compels a donation of public property to aid private corporations without adequate consideration.

In numerous decisions of this Court since *Lea* and *Lord* this Court has found various transactions or enactments not violative of Art. XI, Sec. 2 based on a determination that no "donation" of public property had occurred. Common to these decisions was a finding that the people, through their government, had received adequate consideration for what was given by their government to the corporation.

For example, in Milhiem v. Moffat Tunnel Improvement District, 72 Colo. 268, 211 P. 649 1922) the Court found the statute establishing the Tunnel District not violative of Art. XI, Sec. 2. Unlike the joint financing scheme for the tunnel invalidated in *Lord* (under which the railroad would have had rent-free use of the municipally-owned tunnel) the statute sustained in *Milhiem* provided that "any railroad company using it will pay the rental fixed by the tunnel commission" Milhiem, 72 Colo. at 276, 211 P. at 653. This rental arrangement, along with the fact that the statute did not propose a construction partnership with the railroad, was critical to the Court's conclusion that the statute did not violate Art. XI, Sec. 2.

If railroad lobbyists had succeeded in getting the General Assembly to insert a provision in the Tunnel District statute providing that the railroad would have received perpetual use of the Moffat Tunnel rent-free, would the decision in *Milheim* have been different? The League respectfully suggests that it is a safe bet that the answer to this question is "yes". As with SB 96-10,

such a provision would clearly constitute a "donation" of public property for private corporate benefit.

In Allardice v. Adams County, 173 Colo. 133, 476 P.2d 982 (1970) a county bond issue designed to facilitate purchase of an agricultural feed plant prompted an Art. XI, Sec. 2 challenge to the Colorado Economic Development Revenue Bond Act of 1967, C.R.S. 36-24-1 (1963) *et. seq.*; now codified at C.R.S. 24-46.5-101 et. seq. (1991), which authorized bond issues for such purchases. A lease-option to purchase agreement with Ralston-Purina was found not to violate Art. XI, Sec. 2, because Ralston-Purina was oblidged to:

> pay rent sufficient to pay all bond obligations as they become due, maintenance of and insurance on the project, and an amount in lieu of, but equal to, taxes on the project; and lessee having the option, after the bonds are paid, of buying the project for $1,000.

Id. at 137, 476 P.2d at 984.

Here again, as in *Milhiem*, the payment of rental sufficient to fully cover the benefit provided to the corporation resulted in this transaction not being deemed a "donation" for Art. XI, Sec. 2 purposes. One can certainly imagine a different result if industry lobbyists had secured in the Economic Development Revenue Bond Act a provision that certain classes of corporations would be entitled to occupy property purchased with public bond proceeds rent-free in perpetuity. Yet that is precisely what the General Assembly has in essence done for the benefit of the telecommunications corporations in SB 96-10. Bond proceeds, tax revenues and other public funds are generally used to acquire and maintain local rights-of-way. Once the public has financed acquisition and maintenance of these rights-of-way, SB 96-10 grants competitive private corporations the right to permanently occupy this valuable property with their equipment.

At issue in Denver Urban Renewal Authority v. Byrne, 618 P.2d 1374 (Colo. 1980) was a tax increment financing mechanism, under which urban renewal bonds are paid off through increased taxes generated by the improved property (*See* 31-25-107(9) C.R.S.). Among the complaints was that construction of such improvements for ultimate sale or lease to private corporations or persons would violate Art. XI, Sec. 2. In response, this Court said:

> [W]e find no donation or grant in aid of an individual or corporation which might purchase or lease any of the property acquired by DURA. *DURA may not sell, lease, or otherwise transfer real property or improvements at less than fair value.*

Id. at 1383 (emphasis added)

Witcher v. Canon City, 716 P.2d 445 (Colo. 1986) involved a challenge to terms of a lease between the City and the private operator of the Royal Gorge Bridge, which is owned by the City. In order to assist its operator in modernizing and improving the bridge, the City agreed to forego a percentage of the bridge tolls that it ordinarily would have received, to enable the bridge operator to accumulate funds for the improvements. This Court found no violation of Art. XI, Sec. 2.:

> Here. . . there is no donation since the City has received the benefit of an improved facility with an extended life in exchange for its agreement to forego certain revenues.

Id. at 455.

The difference between the facts in *Witcher* and those presented in SB 96-10 is, of course, that in *Witcher* the City had the assurance of receiving for its citizens a direct, tangible benefit (increased tourism, with the associated revenue, and physical improvement of a bridge owned by the City) as a result of foregoing a *portion* of its bridge tolls. Under SB 96-10, *all* political subdivisions,

including municipalities, are forced to forego *all* rental for use of property in the public rights-of-way, with no assurance that corporate occupancy of this property will benefit local citizens in any way whatsoever. The town's rights-of-way may simply be a convenient way for the corporation to reach lucrative business customers in the next city; the corporation may well have no intention of ever providing service to local taxpayers, on whose property it capitalizes.

In City of Aurora v. Public Utilities Commission, 785 P.2d 1280 (Colo. 1990) the City challenged a new PUC approved formula that defined what portion of line extensions to new customers must be paid by an electrical utility. Costs of the extension above and beyond those provided in the formula had to be paid by the new customer. The City claimed that this resulted in compelled payment to a private corporation for a capital asset that the City did not own, in violation of Art. XI, Sec. 2. The Court rejected this argument :

> The term "donation" obviously means a gift — that is, a voluntary transfer of property to another without consideration. (Citation omitted); Blacks Law Dictionary 619 (5th ed. 1979). It cannot be reasonably argued that Aurora, a new utility customer, would receive no consideration in return for the payment of some of the costs associated with service extension facilities. Aurora, as any other new utility customer, would receive electrical utility service which is, after all, exactly what a new customer bargains for. Aurora, therefore, clearly would receive consideration in return for its payment.

Id. at 1288. Unlike the situation in *City of Aurora,* where the Court found a *quid pro quo*, under SB 96-10, the General Assembly has obliged municipalities to provide free use of local public property to the telecommunication corporations with no assurance of any benefit whatsoever to local residents.

III. Mere declaration or identification of a speculative "public purpose" should not serve, in lieu of more substantial consideration, to insulate SB 96-10 from Art. XI, Sec 2 invalidity.

As a donation in aid of the private telecommunication corporations, SB 96-10 would appear to be prohibited by the clear wording of Art. XI, Sec. 2. The "public purpose" exception mentioned in several decisions of this Court should not be utilized a device to find adequate consideration where none otherwise exists, and thereby salvage the constitutionality of SB 96-10 (Art. XI, Sec. 2 contains several express exceptions; a "public purpose" exception is not one of them).

The most recent reference to a "public purpose" exception by this Court occurred in In re: Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005, 814 P.2d 875 (Colo. 1991). In that case, the Governor requested the Court's opinion as to the constitutionality of legislation creating a "Colorado Business Incentive Fund" (CBIF), from which the General Assembly was authorized to appropriate monies to fund certain types of intergovernmental agreements. The intergovernmental agreements were to provide incentives to large employers to locate their businesses in Colorado. Creation of the fund was generally understood as motivated by the desire of the Governor and the General Assembly to lure a major United Airlines maintenance facility to Denver.

The CBIF was challenged as violating Art. XI, Sec. 2. This Court described the "public purpose" exception as permitting the government to confer:

> . . . a monetary benefit on a private company in consideration of the company's undertaking a project, even though the company might have been required to take the project without such benefit, *as long as the expenditure by a municipality furthers a valid public purpose.*

Id. at 882 (quoting City of Aurora v. Public Utilities Commission, 785 P.2d 1280, 1289 (Colo. 1990); emphasis added by the Court).

The Court found that the statute did not by its terms make a donation or grant in aid of a corporation (appropriations by the General Assembly to fund CBIF intergovernmental agreements were authorized, but it was not *required* in the statute that these intergovernmental agreements provide a grant or donation to a corporation by the state), and thus that there was no violation of Art. XI, Sec. 2.[3] Because of this, the Court declared that "it is unnecessary to further define the contours of either the consideration requirement or the public purpose doctrine."

Id. at 883.

Respectfully, the League suggests that this appeal now presents an appropriate opportunity to further define the contours of the consideration requirement and the public purpose doctrine, in order to assure that the so-called "public purpose exception" does not effectively remove Art. XI, Sec. 2 from our Constitution.

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[3] In a footnote, the Court declares:

> We express no opinion, however, on whether the various proposals for implementation of HB 1005 that have been suggested in the briefs of amici violate article XI, section 2. The actual execution of an intergovernmental agreement and the provisions of incentives must of course also comply with Article XI, Section 2.

In re: Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005, 814 P2d at 883, n.2. The Court then suggests comparison of *Allardice* and *Milhiem*, where rental was paid as consideration for use of public property and no Art. XI, Sec. 2 violation was found, with *Lord*, where no such consideration was paid and where the agreement was struck down. Id. *See: supra* at pages 5-7, 3-4 and *infra*, page 17, respectively.

A very useful history of the public purpose doctrine is provided by Professor Rubin in Dale F. Rubin, Constitutional Aid Limitation Provisions and the Public Purpose Doctrine, 12 St. Louis Univ. Pub. L. Rev. 143 (1993). As Professor Rubin explains, the public purpose doctrine actually pre-dates adoption by the states of anti-donation provisions, such as Colorado's Art. XI, Sec. 2. As initially developed, the doctrine was a limitation on the taxing power, providing that taxes may only be imposed to serve a public purpose.

> Thus, during the time the Public Purpose Doctrine was gaining a judicial foothold, the debate was focused on the purpose for which tax monies were being spent. Indeed, there was no judicial recognition that stock subscriptions, donations, or lending of credit in aid of private or public corporations was directly prohibited. Discussion of these latter issues would await the passage of specific constitutional aid limitation provisions. The Public Purpose Doctrine was developed in the absence of any consideration whether any aid to private or public corporations was proper irrespective of its purpose.

Id. at 152.

Describing the tax limitation origins of the Public Purpose Doctrine and its subsequent use as an "exception" to limitations such as Art. XI, Sec. 2, Professor Rubin points out:

> [A]n examination of the historical underpinnings of the Public Purpose Doctrine indicates that the courts were not as concerned with whether a private entity benefitted from taxpayer dollars as they were with whether the taxpayer dollars were being spent in a manner that benefitted the general populace. The emphasis was entirely different. The state or other governmental entity (county, municipality) could give aid to a private entity as long as the entity was performing a service that could be characterized as fulfilling a public purpose. On the other hand, the legislative history concerning aid limitation provisions is emphatic that any aid to a private (and in some cases public) entity or individual is prohibited, irrespective of whether that entity or individual is engaged in activities that could be deemed "public". Since most of the aid limitation provisions were adopted after the Public Purpose Doctrine was judicially enunciated, the courts could not have conceived the doctrine either as an exception or as a doctrine devised to preempt such limitations.

> For example, prior to the adoption of the aid limitation provisions, the construction of a road by a private entity was considered constitutionally proper as long as the function (the construction of the road) was deemed public. The intent of the constitutional provisions was to focus on the ownership of the entity performing the service. Thus, if a private entity proposed to construct a road, no public assistance could be constitutionally allowed. The characterization of the service performed by the private entity was irrelevant in determining whether the aid limitation provisions apply.

Id. at 165.

The problem with a "public purpose" exception, of course, is that, unless it is carefully defined and limited, such an exception can virtually "swallow the rule." This possibility was well recognized by this Court in *Lea* which, as noted above, included as two of its three members individuals who had been participants in the Colorado's constitutional convention:

> That the construction of the proposed line of railroad would be of great benefit to the county and its citizens; that it would give them increased and superior facilities for traffic and commerce with both the Atlantic and Pacific seaboards, do not make it any less a donation within the intent of the inhibition.
>
> These and similar considerations of public benefit and advantage, had constituted for years, under our territorial government, the basis of appeals for and grants of county and municipal aid to railroad companies, and it was undoubtedly the intention of the framers of the Constitution, whether wisely or not, to prohibit, by the fundamental law of the new state, all public aid to railroad companies, whether by donation, grant or subscription, no matter what might be the public benefit and advantages flowing from the construction of such roads. I understand the framers of the Constitution and the people who adopted it, to have intended by this provision the declaration of a broad policy of prohibition, forbidding state, county and municipal aid to railroad and other companies in any of the modes specified.
>
> *If the existence of a public benefit is to give such an agreement the character of a sale of stock and take it out of the constitutional prohibition, then the prohibition is utterly nugatory and valueless, as such consideration would exist in every probable case.*

Id. at 196. (emphasis added)

The language quoted above was cited with approval by the Court in *Lord* as that Court rejected a public purpose argument made in support of the contract at issue in that case. (*See* Lord, 143 P. at 289.)

The *Lord* opinion is also instructive because the charter amendment that authorized the contract at issue in that case contained a declaration as to all manner of salutory public benefits that the amendment would accomplish. SB 96-10 contains a similar legislative "declaration" at §38-5.5-101 C.R.S. The *Lord* Court was unequivocal in rejecting this device as a savior of the amendment. Declaring, in essence, that "saying it doesn't make it so", the Court stated:

> It will certainly not be contended that either the Legislature of the state, or by the legislative powers of a municipality, such powers as are expressly prohibited by the organic law may be exercised by either. Ours is a constitutional government, wherein the sovereign will of all the people, as expressed in the Constitution, is supreme, beyond the expressed limitations of which a municipality may not go. If the municipality may offend, then so may the individual. If this may be done in case of the levy of a prohibited tax, it follows that it may be done in a case involving life or liberty; the Bill of Rights is then no protection, and the Constitution becomes a rope of sand.
>
> . . .
>
> From what has been said it is clear that the declaration in the amendment to the charter, section 355, to the effect that the tunnel will be of local use, and convenient to the public, and is essential to the future growth and welfare of the city and county cannot prevail as against an expressed constitutional prohibition of the power therein attempted to be exercised.

Id. at 291-292.

As developed above, many of this Court's decisions sustaining various enactments against Art. XI, Sec. 2 challenges have been based upon a completely dispositive finding that no "donation" occurred, because adequate consideration was found to have been received by the public.

Subsequent comments in the opinions that a "public purpose" *also* supports the challenged transaction may thus reasonably be viewed as discussion of supplemental consideration received by the public.

For example, in *Witcher*, the City's decision to forego certain toll revenues in order to permit the private operator of a City owned bridge to make needed improvements on the bridge was found to not constitute a "donation" because the City "received the benefit of an improved facility with an extended life". Witcher, 716 P2d at 455. The "public purpose" subsequently identified was remarkably similar: "improving and extending the life of a valuable source of municipal revenue and enhancing a major attraction that brings visitors to the City". Id.

Similarly, discussion of a "public purpose" justification followed fully dispositive findings that no "donation" had occurred in City of Aurora v. Public Utilities Commission,785 P2d at 1289, and Denver Urban Renewal Authority v. Byrne, 618 P2d at 1384.

This case presents a different situation. In SB 96-10, the General Assembly gave the telecommunications corporations rent-free use of valuable local public property in perpetuity, and received no consideration in return. Thus, the question here becomes whether mere declaration of a public purpose, *standing alone*, is sufficient to legitimize donations of public property to private corporations, despite the prohibition of Art. XI, Sec. 2.

The League respectfully suggests that neither a declaration of a public purpose by a legislative body, nor a presumption by a reviewing court that *any* action of a public body, *ipso facto*, serves a "public purpose," should suffice to avoid a restriction in the fundamental law of our State. After all, when it is decided that public property is to be given to a private corporation, only the most

uncreative of public bodies will be unable to offer up some sort of "public purpose" that will be served.

In evaluating whether a violation of Art. XI, Sec. 2 has occurred, the focus should be on whether consideration has been received, and its adequacy .

A practical three-part test for this evaluation is presented in David V. Martin, Washington State Constitutional Limitations on Gifting of Funds to Private Enterprise: A Need for Reform, 20 Seattle Univ.L.Rev. 199 (Fall 1996). That test would examine "(1) whether the consideration received by the government is measurable; (2) whether the consideration received by the government is lasting; and (3) whether that consideration is adequate." Id. at 221. Such a test, or some variation thereof, properly applied, would be a useful device for reining in an otherwise open-ended "public purpose" exception that could easily legitimize virtually any government gift to the railroads, the telecommunication corporations or any other currently politically powerful corporation.

As the author explains, in applying the first element of the test:

> [M]easurable consideration would not be sustained by a finding of generalized public benefits. Quantifiable exchange would be necessary. Though government is well-suited to make decisions to provide general public benefits (a source of continual discussion with the court and commentators), using this basis to justify transactions unsupported by consideration has been criticized; "if . . . the 'public benefit achieved from such activities is the consideration for the funds expended,' logically any public benefit from what would otherwise be a gift to a private individual or entity would be constitutionally acceptable'." Moreover, viewing generalized public benefits as consideration was criticized ninety years ago:
>
> > [Merely] because a private individual or corporation uses public funds or property for a 'public purpose' is not sufficient, in and of itself to remove that use from the [gift and credit] provisions . . . to hold otherwise and say that a 'public purpose' was the only criterion by which the validity of an appropriation of public funds is to be measured, there would be hardly any limit upon the right of the state, county, city, or school districts to appropriate monies to a private corporation.

Id. at 221-222 quoting In re Marriage of Johnson, 96 Wash. 2d 255, 262, 634 P.2d 877, 881 (1981), and Nicholas J. Wallwork and Alice S. Wallwork, Protecting Public Funds: A History of Enforcement of the Arizona Constitution's Prohibition Against Improper Private Benefit From Public Funds, 25 Ariz. St. L.J. 349, 367 (1991), quoting City of Tempe v. Pilot Properties Inc., 527 P.2d 515, 521 (Ariz. Ct. App. 1974).

The second element of the test:

> promotes informed decision-making by demanding benefits to be calculated or quantified on a long-term basis. . . . measurable and lasting consideration properly serves as an important procedural safeguard when reviewing possible gift transactions with private enterprise.

Id. at 233.

The author describes the third element of the test, adequate consideration, as the most important part of the analysis. Here the author suggests a balancing of factors presently used by the courts in Arizona.[4] In this balancing, existence of a "public purpose" or benefit is a consideration; notably, however, it is not the *sole* consideration:

> The Arizona test examines whether the consideration received by the state in return for an expenditure of public funds to private entities is equitable and reasonable to ensure adequate compensation for the public. This determination is made by analyzing the fair market value of the benefit given to the private entity, the value of the benefits bestowed on the government by the private entity, and other material factors attaching to the consideration received. The Arizona court described the adequate consideration process as an inquiry into the sufficiency of the consideration exchanged:

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[4] A thorough discussion of the Arizona "adequacy of consideration" test may be found in Wallwork and Wallwork, Protecting Public Funds: A History of Enforcement of the Arizona Constitution's Prohibition Against Improper Private Benefit From Public Funds, 25 Ariz. St. L.J. 349 (1991).

> The reality of the transaction both in terms of purpose and consideration must be considered. A panoptic view of the facts of each transaction is required . . . the public benefit to be obtained from the private entity is consideration for the payment or conveyance from a public body must constitute a "valuable consideration" but the Constitution may still be violated if the value to be received by the public is far exceeded by the consideration being paid by the public.
>
> Thus, under the adequate consideration test, courts must balance consideration received by the public against that received by the private entity; equity and reasonableness must be found in order for the challenged expenditure to be allowed.

Id. at 224, quoting Wisturber v. Paradise Valley Unified Sch. Dist. 687 P.2d 354, 357 (Ariz. 1984)

The approach adopted by the Arizona courts, in which mere declaration of a public purpose will not suffice, and the actual adequacy of consideration received by the public is closely examined, is not without precedent here in Colorado.

In the *Lord* case, the City sought to defend its contract for construction of the Moffat Tunnel by pointing to various provisions which the City claimed would constitute adequate consideration and thus take the contract out of the Art. XI, Sec. 2 prohibitions. The Court exhaustively analyzed whether these "reservations" constituted adequate consideration (See: Lord, 143 P. at 289-291) and concluded that they did not. Indeed, the Court determined that:

> From our consideration of these provisions inserted in the contract, we are irresistibly forced to the conclusion that they were inserted, not for the accomplishment of a legitimate municipal purpose, but rather in an effort to evade the constitutional prohibition.

Id. at 291.

Furthermore, as discussed above (Argument, *supra*, pages 5-8) this Court has examined adequacy of consideration in its Art. XI, Sec. 2 decisions that have concluded that no "donation"

occurred when consideration was adequate. Notably, in all of these cases the consideration was received by the governmental entity whose property or funds was transferred for the benefit of the private corporation. Thus, for example, in *Milhiem*, the railroad paid tunnel rental to the entity that constructed the tunnel. In *Allardice*, Ralston-Purina paid its rent to the county that owned the feed plant and which had issued the bonds. In *Witcher*, the City received the benefit of improvements to its property in exchange for giving up a portion of its share of bridge tolls. In *City of Aurora*, the City received new electrical utility service in exchange for paying line extension charges.

SB 96-10 does not present a question of the State's ability to receive adequate consideration for use of *its* property by the telecommunication corporations. This is because in SB 96-10, the General Assembly provided that:

> Any domestic or foreign telecommunications provider authorized to do business under the laws of this state shall have the right to construct, maintain, and operate lines of communication, switches, and related facilities and obtain permanent right-of-way therefore over, upon, under, and across all public lands owned by or under the control of the state, upon the payment of such just compensation and upon compliance with such reasonable conditions as may be required by the State Board of Land Commissioners.

38-5.5-104 C.R.S. In contrast, SB 96-10 provides that "no political subdivision shall levy a . . . charge for use of a public highway" by a telecommunications corporation. 38-5.5-107(1)(a) C.R.S.

SB 96-10 thus establishes a scheme in which the State may receive "just compensation" for use of its property but local governments may not (apparently, the vision of "ubiquitous, seamless statewide telecommunications networks", 38-5.5-101(1)(b) C.R.S., even in service of a "public purpose" or benefit, was not regarded as sufficient consideration alone to rationalize the State giving away free use of *its* property in perpetuity to the telecommunications corporations).

The League respectfully urges this Court to find that SB 96-10 violates Art. XI, Sec. 2 of the Colorado Constitution. By any fair measure, taxpayers in Colorado's cities and towns did not receive fair consideration for the donation that SB 96-10 compels.

CONCLUSION

WHEREFORE, the League respectfully urges that, in addition to the relief requested by the City and County of Denver, the decision of the District Court be reversed and SB 96-10 be declared unconstitutional.

Respectfully submitted this 7th day of January, 2000.

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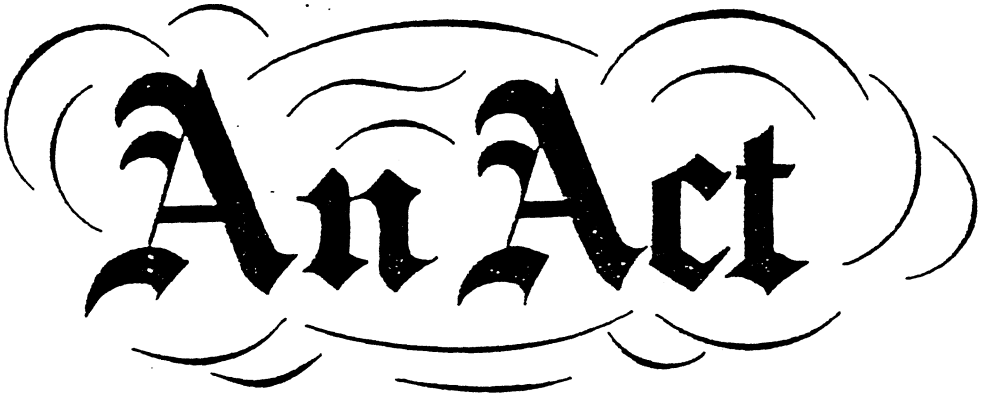

SENATE BILL 96-010

BY SENATOR Feeley;
also REPRESENTATIVES Foster, Armstrong, Paschall, and Prinster.

CONCERNING LIMITATIONS ON THE POWERS OF MUNICIPALITIES TO PLACE CONDITIONS ON THE USE OF RIGHTS-OF-WAY, AND, IN CONNECTION THEREWITH, PROHIBITING DISCRIMINATION AGAINST PROVIDERS OF CERTAIN TYPES OF TELECOMMUNICATIONS SERVICES.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Title 38, Colorado Revised Statutes, 1982 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW ARTICLE to read:

ARTICLE 5.5
Rights-of-way: Telecommunications Providers

38-5.5-101. Legislative declaration. (1) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT:

(a) THE PASSAGE OF HOUSE BILL 95-1335 ENACTED AT THE FIRST REGULAR SESSION OF THE SIXTIETH GENERAL ASSEMBLY ESTABLISHED A POLICY WITHIN THE STATE TO ENCOURAGE COMPETITION AMONG THE VARIOUS TELECOMMUNICATIONS PROVIDERS, TO REDUCE THE BARRIERS TO ENTRY FOR THOSE PROVIDERS, TO AUTHORIZE AND ENCOURAGE COMPETITION WITHIN THE LOCAL EXCHANGE TELECOMMUNICATIONS MARKET, AND TO ENSURE THAT ALL CONSUMERS BENEFIT FROM SUCH COMPETITION AND EXPANSION.

(b) THE STATED GOALS OF HOUSE BILL 95-1335 WERE THAT ALL CITIZENS HAVE ACCESS TO A WIDER RANGE OF TELECOMMUNICATIONS SERVICES AT RATES THAT ARE REASONABLY COMPARABLE WITHIN THE STATE, THAT BASIC SERVICE BE AVAILABLE AND AFFORDABLE TO ALL CITIZENS,

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

AND THAT UNIVERSAL ACCESS TO ADVANCED TELECOMMUNICATIONS SERVICES WOULD BE AVAILABLE TO ALL CONSUMERS. SUCH GOALS ARE ESSENTIAL TO THE ECONOMIC AND SOCIAL WELL-BEING OF THE CITIZENS OF COLORADO AND CAN BE ACCOMPLISHED ONLY IF TELECOMMUNICATIONS PROVIDERS ARE ALLOWED TO DEVELOP UBIQUITOUS, SEAMLESS, STATEWIDE TELECOMMUNICATIONS NETWORKS. TO REQUIRE TELECOMMUNICATIONS COMPANIES TO SEEK AUTHORITY FROM EVERY POLITICAL SUBDIVISION WITHIN THE STATE TO CONDUCT BUSINESS IS UNREASONABLE, IMPRACTICAL, AND UNDULY BURDENSOME. IN ADDITION, THE GENERAL ASSEMBLY FURTHER FINDS AND DECLARES THAT SINCE THE PUBLIC RIGHTS-OF-WAY ARE DEDICATED TO AND HELD ON A NONPROPRIETARY BASIS IN TRUST FOR THE USE OF THE PUBLIC, THEIR USE BY TELECOMMUNICATIONS COMPANIES IS CONSISTENT WITH SUCH POLICY AND APPROPRIATE FOR THE PUBLIC GOOD.

(2) THE GENERAL ASSEMBLY FURTHER FINDS, DETERMINES, AND DECLARES THAT NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO ALTER OR DIMINISH THE AUTHORITY OF POLITICAL SUBDIVISIONS OF THE STATE TO LAWFULLY EXERCISE THEIR POLICE POWERS WITH RESPECT TO ACTIVITIES OF TELECOMMUNICATIONS PROVIDERS WITHIN THEIR BOUNDARIES, AND, SUBJECT TO SUCH RESERVATION OF AUTHORITY, THAT:

(a) THE CONSTRUCTION, MAINTENANCE, OPERATION, OVERSIGHT, AND REGULATION OF TELECOMMUNICATIONS PROVIDERS AND THEIR FACILITIES IS A MATTER OF STATEWIDE CONCERN AND INTEREST;

(b) TELECOMMUNICATIONS PROVIDERS OPERATING UNDER THE AUTHORITY OF THE FEDERAL COMMUNICATIONS COMMISSION OR THE COLORADO PUBLIC UTILITIES COMMISSION PURSUANT TO ARTICLE 15 OF TITLE 40, C.R.S., REQUIRE NO ADDITIONAL AUTHORIZATION OR FRANCHISE BY ANY MUNICIPALITY OR OTHER POLITICAL SUBDIVISION OF THE STATE TO CONDUCT BUSINESS WITHIN A GIVEN GEOGRAPHIC AREA AND THAT NO SUCH POLITICAL SUBDIVISION HAS JURISDICTION TO REGULATE TELECOMMUNICATIONS PROVIDERS BASED UPON THE CONTENT, NATURE, OR TYPE OF TELECOMMUNICATIONS SERVICE OR SIGNAL THEY PROVIDE EXCEPT TO THE EXTENT GRANTED BY FEDERAL OR STATE LEGISLATION;

(c) TELECOMMUNICATIONS PROVIDERS HAVE A RIGHT TO OCCUPY AND UTILIZE THE PUBLIC RIGHTS-OF-WAY FOR THE EFFICIENT CONDUCT OF THEIR BUSINESS;

(d) ACCESS TO RIGHTS-OF-WAY AND OVERSIGHT OF THAT ACCESS MUST BE COMPETITIVELY NEUTRAL, AND NO TELECOMMUNICATIONS PROVIDER SHOULD ENJOY ANY COMPETITIVE ADVANTAGE OR SUFFER A COMPETITIVE DISADVANTAGE BY VIRTUE OF A SELECTIVE OR DISCRIMINATORY EXERCISE OF THE POLICE POWER BY A LOCAL GOVERNMENT.

38-5.5-102. Definitions. AS USED IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "POLITICAL SUBDIVISION" MEANS A COUNTY, CITY AND COUNTY, CITY, TOWN, SERVICE AUTHORITY, SCHOOL DISTRICT, LOCAL IMPROVEMENT DISTRICT, LAW ENFORCEMENT AUTHORITY, WATER,

SANITATION, FIRE PROTECTION, METROPOLITAN, IRRIGATION, DRAINAGE, OR OTHER SPECIAL DISTRICT, OR ANY OTHER KIND OF MUNICIPAL, QUASI-MUNICIPAL, OR PUBLIC CORPORATION ORGANIZED PURSUANT TO LAW.

(2) "PUBLIC HIGHWAY" OR "HIGHWAY" FOR PURPOSES OF THIS ARTICLE INCLUDES ALL ROADS, STREETS, AND ALLEYS AND ALL OTHER DEDICATED RIGHTS-OF-WAY AND UTILITY EASEMENTS OF THE STATE OR ANY OF ITS POLITICAL SUBDIVISIONS, WHETHER LOCATED WITHIN THE BOUNDARIES OF A POLITICAL SUBDIVISION OR OTHERWISE.

(3) "TELECOMMUNICATIONS PROVIDER" OR "PROVIDER" MEANS A PERSON THAT PROVIDES TELECOMMUNICATIONS SERVICE, AS DEFINED IN SECTION 40-15-102 (29), C.R.S., WITH THE EXCEPTION OF CABLE SERVICES AS DEFINED BY SECTION 602(5) OF THE FEDERAL "CABLE COMMUNICATIONS POLICY ACT OF 1984", 47 U.S.C. SEC. 522(c), PURSUANT TO AUTHORITY GRANTED BY THE PUBLIC UTILITIES COMMISSION OF THIS STATE OR BY THE FEDERAL COMMUNICATIONS COMMISSION. "TELECOMMUNICATIONS PROVIDER" OR "PROVIDER" DOES NOT MEAN A PERSON OR BUSINESS USING ANTENNAS, SUPPORT TOWERS, EQUIPMENT, AND BUILDINGS USED TO TRANSMIT HIGH POWER OVER-THE-AIR BROADCAST OF AM AND FM RADIO, VHF AND UHF TELEVISION, AND ADVANCED TELEVISION SERVICES, INCLUDING HIGH DEFINITION TELEVISION. THE TERM "TELECOMMUNICATIONS PROVIDER" IS SYNONYMOUS WITH "TELECOMMUNICATION PROVIDER".

38-5.5-103. Use of public highways - discrimination prohibited - content regulation prohibited. (1) ANY DOMESTIC OR FOREIGN TELECOMMUNICATIONS PROVIDER AUTHORIZED TO DO BUSINESS UNDER THE LAWS OF THIS STATE SHALL HAVE THE RIGHT TO CONSTRUCT, MAINTAIN, AND OPERATE CONDUIT, CABLE, SWITCHES, AND RELATED APPURTENANCES AND FACILITIES ALONG, ACROSS, UPON, AND UNDER ANY PUBLIC HIGHWAY IN THIS STATE, SUBJECT TO THE PROVISIONS OF THIS ARTICLE AND OF ARTICLE 1.5 OF TITLE 9, C.R.S.; AND THE CONSTRUCTION, MAINTENANCE, OPERATION, AND REGULATION OF SUCH FACILITIES, INCLUDING THE RIGHT TO OCCUPY AND UTILIZE THE PUBLIC RIGHTS-OF-WAY, BY TELECOMMUNICATIONS PROVIDERS ARE HEREBY DECLARED TO BE MATTERS OF STATEWIDE CONCERN. SUCH FACILITIES SHALL BE SO CONSTRUCTED AND MAINTAINED AS NOT TO OBSTRUCT OR HINDER THE USUAL TRAVEL ON SUCH HIGHWAY.

(2) NO POLITICAL SUBDIVISION SHALL DISCRIMINATE AMONG OR GRANT A PREFERENCE TO COMPETING TELECOMMUNICATIONS PROVIDERS IN THE ISSUANCE OF PERMITS OR THE PASSAGE OF ANY ORDINANCE FOR THE USE OF ITS RIGHTS-OF-WAY, NOR CREATE OR ERECT ANY UNREASONABLE REQUIREMENTS FOR ENTRY TO THE RIGHTS-OF-WAY FOR SUCH PROVIDERS.

(3) NO POLITICAL SUBDIVISION SHALL REGULATE TELECOMMUNICATIONS PROVIDERS BASED UPON THE CONTENT OR TYPE OF SIGNALS THAT ARE CARRIED OR CAPABLE OF BEING CARRIED OVER THE PROVIDER'S FACILITIES; EXCEPT THAT NOTHING IN THIS SUBSECTION (3) SHALL BE CONSTRUED TO PREVENT SUCH REGULATION BY A POLITICAL SUBDIVISION WHEN THE AUTHORITY TO SO REGULATE HAS BEEN GRANTED TO

THE POLITICAL SUBDIVISION UNDER FEDERAL LAW.

38-5.5-104. Right-of-way across state land. ANY DOMESTIC OR FOREIGN TELECOMMUNICATIONS PROVIDER AUTHORIZED TO DO BUSINESS UNDER THE LAWS OF THIS STATE SHALL HAVE THE RIGHT TO CONSTRUCT, MAINTAIN, AND OPERATE LINES OF COMMUNICATION, SWITCHES, AND RELATED FACILITIES AND OBTAIN PERMANENT RIGHT-OF-WAY THEREFOR OVER, UPON, UNDER, AND ACROSS ALL PUBLIC LANDS OWNED BY OR UNDER THE CONTROL OF THE STATE, UPON THE PAYMENT OF SUCH JUST COMPENSATION AND UPON COMPLIANCE WITH SUCH REASONABLE CONDITIONS AS MAY BE REQUIRED BY THE STATE BOARD OF LAND COMMISSIONERS.

38-5.5-105. Power of companies to contract. ANY DOMESTIC OR FOREIGN TELECOMMUNICATIONS PROVIDER SHALL HAVE POWER TO CONTRACT WITH ANY PERSON OR CORPORATION, THE OWNER OF ANY LANDS OR ANY FRANCHISE, EASEMENT, OR INTEREST THEREIN OVER OR UNDER WHICH THE PROVIDER'S CONDUITS, CABLE, SWITCHES, AND RELATED APPURTENANCES AND FACILITIES ARE PROPOSED TO BE LAID OR CREATED FOR THE RIGHT-OF-WAY FOR THE CONSTRUCTION, MAINTENANCE, AND OPERATION OF SUCH FACILITIES AND FOR THE ERECTION, MAINTENANCE, OCCUPATION, AND OPERATION OF OFFICES AT SUITABLE DISTANCES FOR THE PUBLIC ACCOMMODATION.

38-5.5-106. Consent necessary to use of streets. (1) (a) NOTHING IN THIS ARTICLE SHALL BE CONSTRUED TO AUTHORIZE ANY TELECOMMUNICATIONS PROVIDER TO ERECT ANY POLES OR CONSTRUCT ANY CONDUIT, CABLE, SWITCH, OR RELATED APPURTENANCES AND FACILITIES ALONG, THROUGH, IN, UPON, UNDER, OR OVER ANY PUBLIC HIGHWAY WITHIN A POLITICAL SUBDIVISION WITHOUT FIRST OBTAINING THE CONSENT OF THE AUTHORITIES HAVING POWER TO GIVE THE CONSENT OF SUCH POLITICAL SUBDIVISION.

(b) A TELECOMMUNICATIONS PROVIDER THAT, ON OR BEFORE THE EFFECTIVE DATE OF THIS SECTION, EITHER HAS OBTAINED CONSENT OF THE POLITICAL SUBDIVISION HAVING POWER TO GIVE SUCH CONSENT OR IS LAWFULLY OCCUPYING A PUBLIC HIGHWAY IN A POLITICAL SUBDIVISION SHALL NOT BE REQUIRED TO APPLY FOR ADDITIONAL OR CONTINUED CONSENT OF SUCH POLITICAL SUBDIVISION UNDER THIS SECTION.

(2) CONSENT FOR THE USE OF A PUBLIC HIGHWAY WITHIN A POLITICAL SUBDIVISION SHALL BE BASED UPON A LAWFUL EXERCISE OF THE POLICE POWER OF SUCH POLITICAL SUBDIVISION AND SHALL NOT BE UNREASONABLY WITHHELD, NOR SHALL ANY PREFERENCE OR DISADVANTAGE BE CREATED THROUGH THE GRANTING OR WITHHOLDING OF SUCH CONSENT.

38-5.5-107. Permissible taxes, fees, and charges. (1) (a) NO POLITICAL SUBDIVISION SHALL LEVY A TAX, FEE, OR CHARGE FOR ANY RIGHT OR PRIVILEGE OF ENGAGING IN A BUSINESS OR FOR USE OF A PUBLIC HIGHWAY OTHER THAN:

(I) A LICENSE FEE OR TAX AUTHORIZED UNDER SECTION 31-15-501 (1) (c), C.R.S., OR ARTICLE XX OF THE STATE CONSTITUTION; AND

(II) A STREET OR PUBLIC HIGHWAY CONSTRUCTION PERMIT FEE, TO THE EXTENT THAT SUCH PERMIT FEE APPLIES TO ALL PERSONS SEEKING A CONSTRUCTION PERMIT.

(b) ALL FEES AND CHARGES LEVIED BY A POLITICAL SUBDIVISION SHALL BE REASONABLY RELATED TO THE COSTS DIRECTLY INCURRED BY THE POLITICAL SUBDIVISION IN PROVIDING SERVICES RELATING TO THE GRANTING OR ADMINISTRATION OF PERMITS. SUCH FEES AND CHARGES ALSO SHALL BE REASONABLY RELATED IN TIME TO THE OCCURRENCE OF SUCH COSTS. IN ANY CONTROVERSY CONCERNING THE APPROPRIATENESS OF A FEE OR CHARGE, THE POLITICAL SUBDIVISION SHALL HAVE THE BURDEN OF PROVING THAT THE FEE OR CHARGE IS REASONABLY RELATED TO THE DIRECT COSTS INCURRED BY THE POLITICAL SUBDIVISION. ALL COSTS OF CONSTRUCTION SHALL BE BORNE BY THE PROVIDER.

(2) (a) ANY TAX, FEE, OR CHARGE IMPOSED BY A POLITICAL SUBDIVISION SHALL BE COMPETITIVELY NEUTRAL AMONG TELECOMMUNICATIONS PROVIDERS.

(b) NOTHING IN THIS ARTICLE OR IN ARTICLE 32 OF TITLE 31, C.R.S., SHALL INVALIDATE A TAX OR FEE IMPOSED IF SUCH TAX OR FEE CANNOT LEGALLY BE IMPOSED UPON ANOTHER PROVIDER OR SERVICE BECAUSE OF THE REQUIREMENTS OF STATE OR FEDERAL LAW OR BECAUSE SUCH OTHER PROVIDER IS EXEMPT FROM TAXATION OR LACKS A TAXABLE NEXUS WITH THE POLITICAL SUBDIVISION IMPOSING THE TAX OR FEE.

(c) IF A POLITICAL SUBDIVISION IMPOSES A TAX ON A PROVIDER AND SUCH TAX DOES NOT APPLY TO OTHER PROVIDERS OF COMPARABLE TELECOMMUNICATIONS SERVICES DUE TO THE LANGUAGE OF THE ORDINANCE OR RESOLUTION THAT IMPOSES THE TAX, THEN THE GOVERNING BODY OF THE POLITICAL SUBDIVISION SHALL TAKE ONE OF THE FOLLOWING TWO COURSES OF ACTION:

(I) IF IT CAN DO SO WITHOUT VIOLATING THE ELECTION REQUIREMENTS OF SECTION 20 OF ARTICLE X OF THE STATE CONSTITUTION, THE GOVERNING BODY SHALL AMEND THE ORDINANCE OR RESOLUTION THAT IMPOSES THE TAX SO AS TO EXTEND THE TAX TO PROVIDERS OF COMPARABLE TELECOMMUNICATIONS SERVICES; OR

(II) IF AN ELECTION IS REQUIRED UNDER SECTION 20 OF ARTICLE X OF THE STATE CONSTITUTION, THE GOVERNING BODY SHALL CAUSE AN ELECTION TO BE HELD IN ACCORDANCE WITH SAID SECTION 20 TO AUTHORIZE THE EXTENSION OF THE TAX TO PROVIDERS OF COMPARABLE TELECOMMUNICATIONS SERVICES. IF THE EXTENSION OF THE TAX IS NOT APPROVED BY THE VOTERS AT SUCH ELECTION, THEN THE EXISTING TAX SHALL NO LONGER APPLY TO THE PROVIDERS THAT HAD BEEN SUBJECT TO THE TAX IMMEDIATELY BEFORE THE ELECTION.

(3) TAXES, FEES, AND CHARGES IMPOSED SHALL NOT BE COLLECTED THROUGH THE PROVISION OF IN-KIND SERVICES BY TELECOMMUNICATIONS PROVIDERS, NOR SHALL ANY POLITICAL SUBDIVISION REQUIRE THE PROVISION OF IN-KIND SERVICES AS A CONDITION OF CONSENT TO USE A

HIGHWAY.

(4) THE TERMS OF ALL AGREEMENTS BETWEEN POLITICAL SUBDIVISIONS AND TELECOMMUNICATIONS PROVIDERS REGARDING USE OF HIGHWAYS SHALL BE MATTERS OF PUBLIC RECORD AND SHALL BE MADE AVAILABLE UPON REQUEST PURSUANT TO ARTICLE 72 OF TITLE 24, C.R.S.

38-5.5-108. Pole attachment agreements - limitations on required payments. (1) NO MUNICIPALLY OWNED UTILITY SHALL REQUEST OR RECEIVE FROM A TELECOMMUNICATIONS PROVIDER OR A CABLE TELEVISION PROVIDER AS DEFINED IN SECTION 602(5) OF THE FEDERAL "CABLE POLICY ACT OF 1984", IN EXCHANGE FOR PERMISSION TO ATTACH TELECOMMUNICATIONS DEVICES TO POLES, ANY PAYMENT IN EXCESS OF THE AMOUNT THAT WOULD BE AUTHORIZED IF THE MUNICIPALLY OWNED UTILITY WERE REGULATED PURSUANT TO 47 U.S.C. SEC. 224, AS AMENDED.

(2) NO MUNICIPALITY SHALL REQUEST OR RECEIVE FROM A TELECOMMUNICATIONS PROVIDER, IN EXCHANGE FOR OR AS A CONDITION UPON A GRANT OF PERMISSION TO ATTACH TELECOMMUNICATIONS DEVICES TO POLES, ANY IN-KIND PAYMENT.

SECTION 2. 38-5-101, Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

38-5-101. Use of public highways. Any domestic or foreign ~~telegraph, telephone,~~ electric light power, gas, or pipeline company authorized to do business under the laws of this state or any city or town owning electric power producing or distribution facilities shall have the right to construct, maintain, and operate lines of ~~telegraph, telephone,~~ electric light, wire or power or pipeline along, across, upon, and under any public highway in this state, subject to the provisions of this article. Such lines of ~~telegraph, telephone,~~ electric light, wire or power, or pipeline shall be so constructed and maintained as not to obstruct or hinder the usual travel on such highway.

SECTION 3. 38-5-102, Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

38-5-102. Right-of-way across state land. Any domestic or foreign ~~telegraph, telephone,~~ electric light power, gas, or pipeline company authorized to do business under the laws of this state, or any city or town owning electric power producing or distribution facilities shall have the right to construct, maintain, and operate lines of ~~telegraph, telephone,~~ electric light wire or power or pipeline and obtain permanent right-of-way therefor over, upon, under, and across all public lands owned by or under the control of the state, upon the payment of such compensation and upon compliance with such reasonable conditions as may be required by the state board of land commissioners.

SECTION 4. 38-5-103, Colorado Revised Statutes, 1982 Repl.

Vol., is amended to read:

38-5-103. Power of companies to contract. Such ~~telegraph, telephone,~~ electric light power, gas, or pipeline company, or such city or town shall have power to contract with any person or corporation, the owner of any lands or any franchise, easement, or interest therein over or under which the line of ~~telegraph, telephone,~~ electric light wire power or pipeline is proposed to be laid or created for the right-of-way for the construction, maintenance, and operation of its ~~telegraph, telephone,~~ electric light wires, pipes, poles, regulator stations, substations, or other property and for the erection, maintenance, occupation, and operation of offices at suitable distances for the public accommodation.

SECTION 5. 38-5-107 (1), Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

38-5-107. Companies, cities, and towns carrying high voltage - crossings - arbitration. (1) Any person, corporation, or city or town seeking to secure a right-of-way for lines of ~~telegraph, telephone,~~ electric light or for the transmission of electric power for any purpose over, under, or across any right-of-way of any other person, corporation, or city or town for such purposes or seeking to erect or construct its lines of wire under or over the lines of wire already constructed by such other person, corporation, or city or town for any such purposes upon, under, along, or across any public highway or upon, under, along, or across any public lands owned or controlled by the state of Colorado before constructing such lines or wires over, under, or across such rights-of-way or wires of other persons, corporations, or cities or towns, where either of said lines or wires carry a current at an electrical pressure of five thousand volts or more, shall agree with such other persons, corporations, or cities or towns as to the conditions under or upon which such overhead or underneath construction or crossing shall be made, looking to the due protection and safeguard of the wires of the person, corporation, or city or town already having a right-of-way for such wires and looking to the safety of life, health, and property. In case of an inability to agree upon the conditions under or upon which such overhead or underneath crossings shall be made, the person, corporation, or city or town owning and operating or controlling the lines of wires already built or constructed and the person, corporation, or city or town seeking to construct new lines or wires or to make said crossings shall each select a person as an arbitrator, which two persons shall determine said conditions under or upon which such overhead or underneath construction or crossing shall be made. In case of a disagreement in regard thereto by the arbitrators, they shall select a third person to act with them, and the decision made by any two of said arbitrators shall be final and binding upon the person, corporation, or city or town so seeking to make or

construct the crossings, who shall construct the crossings in a manner determined by such arbitrators.

SECTION 6. 38-5-108, Colorado Revised Statutes, 1982 Repl. Vol., is amended to read:

38-5-108. 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 power line, 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 7. No appropriation. The general assembly has determined that this act can be implemented within existing appropriations, and therefore no separate appropriation of state moneys is necessary to carry out the purpose of this act.

SECTION 8. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

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THE SENATE

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SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Joan M. Albi
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THE SENATE

Judith M. Rodrigue
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED April 12, 1996 at 7:43 p. m.

Roy Romer
GOVERNOR OF THE STATE OF COLORADO

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of the Colorado Municipal League as an *Amicus Curiae* was placed in the U.S. Postal System by first class mail, postage prepaid, on the 7th day of January, 2000, addressed to the following:

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