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SUPREME COURT, STATE OF COLORADO Two East 14th Avenue, 4th Floor Denver, CO 80203	
Appeal from the District Court Morgan County, Case No. 04CV301 Colorado Public Utilities Commission, Docket Nos. 00A-635G and 00D-261G (Consolidated)	▲ COURT USE ONLY ▲
Petitioner/Appellee: CITY OF FORT MORGAN, v. Respondents/Appellants: THE COLORADO PUBLIC UTILITIES COMMISSION; COMMISSIONER GREGORY E. SOPKIN; COMMISSIONER POLLY PAGE and COMMISSIONER CARL MILLER; and Respondents/Appellants: KN WATTENBERG TRANSMISSION, L.L.C.; LEPRINO FOODS COMPANY; AND CARGILL MEAT SOLUTIONS CORPORATION.	Case Number: 06SA118

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AMICUS CURIAE BRIEF OF THE COLORADO ASSOCIATION OF MUNICIPAL UTILITIES AND THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF FORT MORGAN

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The Colorado Association of Municipal Utilities ("CAMU") and The Colorado Municipal League ("The League"), through its undersigned counsel, submits its *amicus curiae* brief in support of the Answer Brief filed by the City of Fort Morgan.

I. This Court Should Reaffirm the Long-Standing Principle of the Plenary Control of Municipal Utilities by Municipal Governing Bodies to the Exclusion of Interference by the Public Utilities Commission.

The primary question before the Court can be simplified to this: Should the *ultra vires* actions of the Federal Energy Regulatory Commission (FERC) and the Colorado Public Utilities Commission (CPUC) in authorizing the construction and operation of the unlawful KNW pipeline undermine the constitutional limitation on the jurisdictional authority of the CPUC that has existed in Colorado for over 100 years.

As *amicus*, CAMU/The League will not attempt to rebut the arguments raised by Appellants; this is best left for counsel to the City of Fort Morgan. CAMU/The League will focus on the broader issue of the demarcation of regulatory authority that exists between municipal governments that operate utilities and the CPUC. This regulatory division of labor has its bases in the principle of local control over local affairs

enshrined in the Colorado Constitution. Colo. Const., Articles V, XX and XXV.

Local regulatory control of the utility services offered by municipalities is a time-honored concept that dates from the inception of the utility industry. Municipalities in Colorado were first empowered to offer gas utility service and electric service in 1893. (1893) Colorado Session Laws, pp. 464-66. Article XX of the Colorado Constitution, adopted in 1904, followed suit and authorized the provision of utility services by home rule cities. The authority granted to home rule cities to operate utilities by Article XX is plenary and self-executing. *Cook v. City of Delta,* 100 Colo. 7, 64 P.2d 1257 (1937). Part and parcel to the provision of utility service, municipalities are authorized to levy charges for electricity and natural gas "based upon usage." C.R.S. § 31-15-707. Exercising this authority, many of the early municipal utilities developed rate-setting procedures well before the CPUC was created in 1913.

Shortly after the CPUC was created the division of regulatory authority between the CPUC and the local governing bodies of municipal utilities was placed at issue. Two cases arose during the 1920s, and the demarcation established by these cases is still applicable today. In *Town of Holyoke v. Smith,* 75 Colo. 286, 226 P. 158 (1924) this Court ruled that the

CPUC had no authority to review the rates charged by a municipal utility to customers within municipal limits. Conversely, this Court ruled in *City of Lamar v. Town of Wiley,* 80 Colo. 18, 248 P. 1009 (1926) that service provided by a municipal utility *outside of municipal limits* was subject to CPUC regulation. Underlying both of these decisions is the principle of local control: The residents of Holyoke did not need the police power protection of the CPUC when receiving service from their municipality because through the political process they could control their utility. Residents of the Town of Wiley, on the other hand, did not have control over the rates established by the City of Lamar, and regulatory recourse to the CPUC was appropriate. See also, *City of Durango v. Durango Transportation, Inc.,* 807 P.2d 1152 (1991), applying the local control limitation on CPUC jurisdiction to county transportation systems; *United States Disposal Systems v. City of Northglenn,* 193 Colo. 277, 567 P.2d 365 (1977), application to trash collection; and *K.C. Electric Ass'n. V. Public Util. Comm'n,* 191 Colo. 96, 550 P.2d 871 (1976), discussing the local control limitations of CPUC jurisdiction in the context of Article XXV of the Colorado Constitution.

The constitutional basis for the holding in *Town of Holyoke* is dispositive regarding the issue presently before the Court, and bears a

detailed review. The chief issue in *Town of Holyoke* was whether Article V, section 35 of the Colorado Constitution prohibited CPUC review of the rates charged by the Town. The Court began its analysis by stating that "to ascertain the meaning of [Article V, section 35] we may consider its historical background, the conditions existing when it was adopted, and ...the mischiefs against which it was intended to guard." *Town of Holyoke,* supra, 75 Colo. at 288.

The Court answered the first two of these contextual inquiries by finding that Article V, section 35, incorporates the principle of municipal control over local issues. The court stated that "[t]he central idea of government in this country was and is that in local matters municipalities should be self-governing." *Town of Holyoke, supra,* 75 Colo. at 289. The Court, quoting Cooley's Constitutional Limitations (7th Ed.) pg. 261, went on to presage the regulatory division of labor that was to result from its holding by stating that "one of the vital ideas in the American form of government is 'that local affairs shall be managed by local authorities, and general affairs only by the central authority.'" *Town of Holyoke,* supra.

The Court's answer to the question of the mischief to be prevented by Article V, section 35, flowed directly from the historic context of the provision: "The framers of the Constitution had in mind the possibility that

the Legislature might attempt to create some special body to interfere with the management of municipal affairs, and wisely made provision to prevent such action." *Town of Holyoke,* supra, 75 Colo. at 294. Thus, Article V, section 35, prohibited the CPUC from reviewing the locally established rates of the Town of Holyoke.

The rule of law established by *Town of Holyoke* applies at present. The record demonstrates that in exercising its home rule authority the City of Fort Morgan made the investments necessary to construct a municipal natural gas system. Local processes were created to establish rates and service characteristics. The City of Fort Morgan further determined that the municipal utility should be the sole provider of natural gas service within municipal limits. A decision by a municipality to be a monopoly utility provider is fully within its authority. *Poudre Valley Elec. Ass'n v. City of Loveland,* 807 P.2d 547 (Colo. 1991); *City of Colorado Springs v. Mountain View Elec. Ass'n,* 925 P.2d 1378 (Colo. App. 1995). Furthermore, the exclusive right to provide utility service to customers is a property right. *Public Service Co. v. Trigen-Nations Energy Co.,* 982 P.2d 316 (Colo. 1999); *Rocky Mountain Nat. Gas. Co. v. Public Util. Comm'n,* 199 Colo. 352, 617 P.2d 1175 (1980). The CPUC cannot deprive a municipality of this right for service within municipal boundaries. *Union Rural Elec. Ass'n v.*

Town of Frederick, 670 P.2d 4 (Colo. 1983) (the presence of a previously issued CPCN does not prevent a municipal utility from providing service to residents of the municipality). The orders of the CPUC authorizing KNW to provide service to municipal residents interferes with municipal improvement and property rights, and violates Article V, section 35, of the Colorado Constitution.

The lines of regulatory authority drawn in *Town of Holyoke* and *Town of Wiley* are settled law in Colorado. The General Assembly has deferred to this regulatory framework. In fact, to the extent that the actions of the Legislature have disturbed this division of regulatory labor it has been to *remove* regulatory authority from the CPUC in favor of municipal control.

For example, in 1984 the Legislature adopted C.R.S. § 40-3.5-101 *et seq.* This statute addresses the rates, charges, and tariffs applicable to the customers of municipal electric and natural gas utilities that reside beyond municipal limits. The statute *removes* rate setting jurisdiction for these customers from the CPUC and places it with the local governing body, provided such rates, charges and tariffs do not vary from those applied to municipal residents. C.R.S. § 40-3.5-102. In effect, the municipal political protections inure to the benefit of customers beyond municipal limits when the rates, charges and tariffs are identical. This statute left the CPUC with

only the limited authority to resolve complaints raised by customers who reside beyond municipal limits. C.R.S. § 40-3.5-104. The Legislature went even further in the context of water and wastewater rates charged to customers beyond municipal limits, and removed *all* regulatory authority from the CPUC. C.R.S. § 31-35-402(1)(f); see, *Board of County Comm'r v. Denver Water Board,* 718 P.2d 235 (Colo. 1986).

These actions by the Legislature confirm the vitality of the principles underlying Article V, section 35. Plenary local control of municipal utilities remains the overriding policy of this State, and has even been extended into areas beyond municipal limits at the expense of CPUC jurisdiction, where appropriate.

The party that seems dissatisfied with the demarcation established in *Town of Holyoke* and *Town of Wiley* has been the CPUC – But when the CPUC has tested its jurisdictional limits on this point it has been rebuffed by this Court.

The first case of note is *People ex rel v. City of Loveland,* 76 Colo. 188, 230 P. 399 (1924). In this case the CPUC attempted to prevent the City of Loveland from constructing a power plant to provide service to municipal residents. When the Attorney General refused to represent the CPUC based upon *Town of Holyoke*, the CPUC went ahead and filed suit anyway. In an

irony that proves the point that the regulated industries eventually "capture" their regulators, the CPUC was represented in this matter by attorneys from the Public Service Company of Colorado. The Court ruled that the CPUC could not prevent the construction of a power plant by the City of Loveland. As in the case at bar, the effort of the CPUC to expand its jurisdiction at the expense of local control in *City of Loveland* occurred in the larger context of a dispute between local authorities and a utility subject to CPUC regulation. See also, *United States Disposal Systems v. City of Northglenn, supra; City of Durango v. Durango Transportation, Inc.*, supra.

This Court again reviewed this issue in *City of Thornton v. Public Util. Comm'n,* 402 P.2d 194 (Colo. 1965). This case involved an attempt by the CPUC to invalidate a contract for the sale of a water utility to the City of Thornton. A prior writ of prohibition sought by the City against the CPUC had been denied as premature. See, *City of Thornton v. Public Util. Comm'n,* 391 P.2d 374 (Colo. 1964). Referring to its earlier action in *City of Thornton,* supra, 391 P.2d 374, the Court's impatience speaks volumes to the principle at issue here:

> Both by the constitution of the State of Colorado and the pertinent statutes here involved, the Commission has no jurisdiction to invalidate or nullify the acquisition by Thornton of the water and sewage system previously owned and operated by Northwest. This seemed so elemental that in the previous Thornton case we were unwilling to assume that the Commission would attempt to assert such

> jurisdiction or to issue such orders as we have seen in the record. Mr. Justice Franz, in his dissenting opinion, warned that the Commission was well launched on its "bootstrap" operation, but it was not so readily admitted then what so plainly can be seen now.

City of Thornton, supra, 402 P.2d 196. This Court ruled that the CPUC lacked jurisdiction to interfere with the municipal purchase of the water and sewer system.

The record demonstrates that the Fort Morgan customers in question did not participate in the duly authorized local regulatory processes, but rather sought recourse to regulatory bodies lacking jurisdiction. The unfortunate predicament in which the Appellants now find themselves is of their own making.

The Court should take this opportunity to reiterate the proper regulatory roles of municipal governing bodies and the CPUC. In doing so, the Court should again make clear that when the customers of a municipality take issue with the rates or services offered, they must seek recourse through the processes developed by the municipality, both regulatory and political.

This is not an illusory remedy. The ability of customers of the size, sophistication and resources of Excel and Luprino to bring issues before the municipality is unquestioned; they simply refused to seek relief. Their refusal to participate in the legitimate and recognized processes cannot

provide grounds to erode the principle of local control incorporated in the Colorado Constitution and upheld against challenge by this Court for nearly 100 years.

II. This Court Should Continue to Construe Article V, section 35, of the Colorado Constitution Broadly to Prohibit Public Utilities Commission Interference with Municipal Property and Improvements.

The CPUC argues that it is not regulating Fort Morgan because it is not ordering Fort Morgan to do anything. In effect, the CPUC is seeking approval from this Court to do through indirection that which it cannot do directly. This position ignores the language of Article V, section 35, of the Colorado Constitution as well as the cases that have construed this Constitutional protection afforded to municipal property and improvements.

This Court has expressly stated that Article V, section 35, should be given an expansive reading to fully effect the protections the drafters of the Constitution intended. *Town of Holyoke v. Smith,* supra. The language of Article V prevents the CPUC from taking any action that will "interfere" with "municipal improvements" or "property". To accept that the CPUC could authorize a duplicate pipeline that will idle a municipal pipeline designed to provide service to customers within municipal limits and, in so doing, not "interfere" with municipal property and improvements requires a construction of Article V that is narrowed to the absurd.

This Court has disposed of analogous situations in the past. For example, in *City of Thornton v. Public Util. Comm'n,* supra, the CPUC did not order the City of Thornton to do anything. Nevertheless, this Court found that the CPUC orders to the Northwest Water Company constituted an interference with municipal improvements and property. Similarly, in *City of Durango v. Durango Transportation, Inc.,* supra, the Court refused to elevate form over substance and found that counties were beneficiaries to the protections of Article V, and thus beyond the reach of CPUC jurisdiction, when providing municipal functions. Local political control of the county and the services it offered was central to this Court's analysis in *City of Durango*. *See,* supra, 807 P.2d at 1157 - 1158.

The CPUC next seeks to cloak its actions in the mantle of the doctrine of regulated monopoly. The doctrine of regulated monopoly is based upon the concept commonly referred to as the "regulatory compact". As described in Phillips, *The Regulation of Public Utilities* (PUR 3rd Ed., 1993), pg. 21, the regulatory compact has two aspects: "First, in return for a monopoly franchise, utilities accepted an obligation to serve all comers. Second, in return for agreeing to commit capital to the business, utilities were assured a fair opportunity to earn a reasonable return on capital."

Indeed, it is Fort Morgan that has properly applied the doctrine of regulated monopoly and the CPUC which seeks to subvert the doctrine. Exercising its plenary authority, Fort Morgan enacted ordinances to protect its monopoly franchise. It invested a significant amount of municipal capital to build a pipeline with sufficient capacity to serve all customers within municipal limits, including Luprino and Excel. Because it invested sufficient capital to size the pipeline appropriately, the City provided uninterrupted gas service to Luprino and Excel until the *ultra vires* acts of the FERC allowed the construction of a competing pipeline. All of this occurred within the municipal boundaries of Fort Morgan, and was thus beyond the jurisdiction of the CPUC.

The CPUC orders at issue will not only eliminate the monopoly Fort Morgan granted itself but could destroy the investment Fort Morgan made in the municipal gas facilities. This runs directly counter to the doctrine of regulated monopoly, which requires the CPUC to deny operating authority that would result in "excessive" or "destructive" competition. *Trans-Western Express., Ltd. v. Public Util. Comm'n,* 877 P.2d 350 (Colo. 1994).

To put this in perspective, let's consider what might have happened if Fort Morgan was subject to CPUC jurisdiction. If Luprino and Excel had complained to the CPUC concerning the lack of a firm gas transportation

service offering, it is likely that the CPUC would have ordered Fort Morgan to offer firm service; the record demonstrates that sufficient pipeline capacity is available. The doctrine of regulated monopoly would not have supported a CPUC order for the construction of a duplicate pipeline by a competing utility when the CPUC simply could have ordered the provision of firm service. Conversely, if Luprino and Excel had brought a complaint to Fort Morgan on this issue or participated in any of the local regulatory proceedings, the City may have provided firm service; we cannot know because the customers chose not to participate in these local proceedings. But now -- because the CPUC does not have jurisdiction over Fort Morgan – the CPUC claims that the doctrine of regulated monopoly gives it the authority to order a jurisdictional utility to operate a duplicate pipeline which will create just the type of uneconomic duplication of facilities that the doctrine of regulated monopoly was intended to prevent. And all of this within the municipal limits of a home rule city, which has exercised plenary authority to create a monopoly service territory for itself in conformance with the doctrine of regulated monopoly.

The result sought by the Appellants must be denied on the very grounds they advance: The doctrine of regulated monopoly preserves the

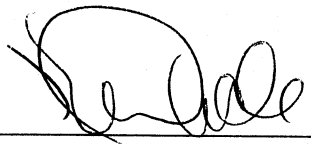
monopoly service territory of the City of Fort Morgan, and the residents of the City must obtain the relief they seek from the City.

III. CONCLUSION

CAMU and The League respectfully requests, for the reasons cited herein and in Fort Morgan's Answer Brief, this Court affirm the district court's decision reversing the CPUC Decisions on appeal.

We hereby certify that this brief is 14 pages long and contains 2,975 words.

Respectfully submitted this 29th day of September, 2006.



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CERTIFICATE OF SERVICE

I hereby certify that an original and 10 copies of the foregoing AMICUS CURIAE BRIEF OF THE COLORADO ASSOCIATION OF MUNICIPAL UTILITES AND THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF FORT MORGAN was hand-delivered to the Colorado Supreme Court and a true and correct copy was deposited in the United States mail, postage prepaid, this 2nd day of October, 2006, to the following addressees:

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