COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80203	
Appeal From the District Court of Delta County Honorable Steven L. Schultz Case No. 2014 CV 30066	
Plaintiff-Appellant: DELTA-MONTROSE ELECTRIC ASSOCIATION, a Colorado electric cooperative association v. **Defendant-Appellee:** THE CITY OF DELTA, a Colorado municipality	**▲COURT USE ONLY▲**
Attorney for *Amicus Curiae* Colorado Association of Municipal Utilities: William H. McEwan, #3082 William H. McEwan, P.C. 8272 W. Cielo Grande Peoria, Arizona 85303 Phone: (303) 829-5371 Email: bmcewan@ix.netcom.com Attorney for *Amicus Curiae* Colorado Municipal League: Geoffrey T. Wilson, #11574 Colorado Municipal League 1144 Sherman Street Denver, Colorado 80202 Phone: (303) 831-6411 Email: gwilson@cml.org	Case No.: 2015CA1116
AMICUS BRIEF OF THE COLORADO ASSOCIATION OF MUNICIPAL UTILITIES AND THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF DELTA	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

Choose one:

☒ It contains 3,269 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

Duly signed original on file at William H. McEwan, P.C.

/s/ William H. McEwan
William H. McEwan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF IDENTITY OF AMICI AND THEIR INTEREST IN THE CASE

The Colorado Association of Municipal Utilities ("CAMU") is a non-profit, state-wide association established to advance the educational, technical and customer interests of its member municipally-owned electric utilities. Founded in 1982, CAMU currently has a membership of 29 Colorado municipal distribution utilities and three joint action agencies. CAMU's municipal utilities and joint action agencies provide electricity to 17% of Colorado's electric consumers, or 440,000 Coloradoans. The City of Delta ("City"), defendant-appellee, is a member of CAMU.

The Colorado Municipal League ("League") was formed in 1923. The League is a non-profit, voluntary association of 266 of the 271 municipalities located throughout the state of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 100 home rule municipalities, 165 of the 171 statutory municipalities and the lone territorial charter city.

The Court's decision in this appeal could have far-reaching significance to all Colorado municipalities and their municipally-owned utilities, particularly those municipally-owned utilities that provide electricity to their citizens and businesses located inside municipal boundaries lying adjacent to the service territory of

cooperative electric associations ("cooperatives"). CAMU and the League ask the Court to keep in mind the constitutionally protected rights of municipal electric utilities to serve customers within their territorial boundaries when considering the conflict with the service rights of a cooperative, which are derived from a certificate of public convenience and necessity ("CPCN) issued by the Colorado Public Utilities Commission ("CPUC") pursuant to statute. Additionally, CAMU and the League urge the Court to reject efforts by the plaintiff-appellant Delta Montrose Electric Association ("DMEA") and its amicus, the Colorado Rural Electric Association ("CREA"), to have this Court engage in what amounts to hypothetical rulemaking, an inappropriate judicial function.

CAMU and the League understand that the DMEA complaint in this case is initially focused on the provision of electric service to a single new customer referred to as the "Maverik service station" (DMEA Complaint, ¶¶ 40, 42, 50-56, and first claim for relief). DMEA's second, third, and fourth claims for relief seeking a declaratory judgment raise hypothetical and speculative claims in a futile hunt for an advisory opinion which this Court should refrain from issuing.

SUMMARY OF ARGUMENT

In this Amicus Brief, CAMU and the League will (1) discuss the City's *constitutional* right to provide electric service inside municipal boundaries without

interference from the PUC and without restriction from a CPCN issued to a cooperative; (2) discuss the Colorado Supreme Court's reasoning in its *Poudre Valley* decision[1] and why that decision does not require this Court to engage in "prospective guidance" as urged by DMEA and CREA, and (3) explain why the guidance announced in *Poudre Valley* is clear and unambiguous.

ARGUMENT

A. THE CITY'S RIGHT TO PROVIDE ELECTRIC SERVICE INSIDE MUNICIPAL BOUNDARIES IS DERIVED DIRECTLY FROM THE COLORADO CONSTITUTION.

The City's authority to provide electric service inside municipal boundaries derives directly from the Colorado Constitution, Article XX, section 6 and Article XXV. This constitutional principle has been affirmed on numerous occasions by the Colorado courts. *See, e.g., Union Rural Elec. Ass'n v. Town of Frederick,* 670 P.2d 4, 8:

> … there is no doubt that Frederick had a constitutional right to construct and operate a municipally owned facility to furnish utility service to customers within its corporate limits.

On the other hand, DMEA's authority to provide electric service in a defined geographic area stems solely from legislative provisions carried out by the PUC through the issuance of a CPCN. C.R.S. § 40-5-101.

[1] *Poudre Valley Elec. Ass'n, Inc. v. City of Loveland,* 807 P.2d 547 (Colo. 1991).

Except in very limited circumstances not present here, the PUC lacks authority to issue a CPCN to a non-municipally owned utility such as DMEA for service inside municipal boundaries.[2] *See, e.g., City of Fort Morgan v. Public Utilities Comm'n.,* 159 P.3d 87, 93 (Colo. 2007); *City of Thornton v. Pub. Utils. Comm'n.,* 157 Colo. 188, 194, 402 P.2d 194, 197 (Colo. 1965); *Town of Holyoke v. Smith*, 75 Colo. 286, 296, 226 P. 158, 161 (1924); *City of Lamar, Town of Wiley*, 80 Colo. 18, 248 P. 1009 (1926). As the Colorado Supreme Court noted in *Poudre Valley Rural Elec. Ass'n. v. City of Loveland,* 807 P. 2d 547, 551-552:

> The PUC constitutionally has no jurisdiction over municipally owned utilities operating within their municipal boundaries, and hence 'cannot grant a publicly owned utility [cooperative] greater rights than are available under the Colorado Constitution' (citing *Union Rural Elec. Ass'n. v. Town of Frederick, supra*).

This settled principle of Colorado law is recognized by CREA. (CREA Amicus Brief, pp. 4, 6).

Since the PUC has no jurisdiction to grant a CPCN permitting a cooperative to provide electricity inside the municipal boundaries of a municipally owned electric utility, the cooperative's CPCN must yield to the constitutional right of the municipality to provide electric service inside municipal boundaries.

[2] The only exception is when the municipal electric utility is either unwilling or unable to serve a customer inside municipal boundaries. *City of Fort Morgan, supra.* No such facts exist in this case.

CAMU and the League ask the Court to begin its analysis in this case from the starting point that a municipality has the constitutional right to provide electricity inside municipal boundaries, even in circumstances where the geographic area of the municipality expands over time through annexation.

B. THE DOCTRINE OF REGULATED MONOPOLY DOES NOT CONTROL THE DISPUTE IN THIS CASE.

Generally, the doctrine of regulated monopoly provides that non-municipal utilities (such as DMEA) have an exclusive right to serve in a designated area delineated in a CPCN issued by the PUC. *Rocky Mt. Natural Gas Co. v. Pub. Utils. Comm'n.*, 199 Colo. 352, 617 P.2d 1175 (1980); *City of Greeley v. Poudre Valley R. Elec.*, 744 P.2d 739 (Colo. 1987). However, this legislative doctrine has no application to prevent a municipal utility from exercising its constitutional rights to provide electricity inside municipal boundaries. *Union Rural Elec. Ass'n. v. Town of Frederick, supra.*

At first, CREA recognizes this principle in its amicus brief:

> CREA understands that the Constitutional right of municipal utilities to serve their residents trumps Colorado's regulated monopoly doctrine. CREA Amicus Brief, p. 17.[3]

[3] Despite its *amicus* position, DMEA incorrectly argues that the doctrine of regulated monopoly must be taken into account when a municipal utility decides to compete with a cooperative for customers in annexed areas. *See*, DMEA Complaint, ¶¶ 17, 19.

But then CREA goes on to say:

> In considering how competition should work in practice, however, CREA asks this Court to ensure that competition accords with Colorado's long-standing policy against waste and duplication in public utilities. CREA Amicus Brief, p. 17.

The Colorado Supreme Court established many years ago that the long-standing policy CREA refers to (duplication of service) is the basis for the doctrine of regulated monopoly.

> The statute [CRS § 40-5-101] is the foundation of the regulated monopoly principle and as this court has observed on many occasions it was designed to prevent duplication of service…. *W. Colorado Power Co. v. Pub. Utilities Comm'n.*, 159 Colo. 262, 411 P.2d 785, 791 (1966).

Since the doctrine of regulated monopoly does not apply here, the basis for that doctrine, duplication of service, similarly is inapplicable.

It is important to recall this case does not involve an effort by a municipal electric utility to serve customers in a cooperative's territory outside municipal boundaries. As in *Poudre Valley*, *supra,* the instant case only involves a situation where a municipality annexes territory and wishes to provide electricity to its citizens and businesses within municipal boundaries. Any legislative or court announced doctrine of regulated monopoly cannot serve to prevent a municipal utility from providing electric service inside its municipal boundaries. Colo.

Const. art. XXV; *City and Cnty. of Denver v. Pub. Utils. Comm'n.*, 507 P.2d 871, 875 (Colo. 1973). When the City provides electric service inside municipal boundaries, it is expressly authorized to do so under article XX, §§ 1 and 6, of the Colorado Constitution.

Put simply, the doctrine of regulated monopoly must yield to the Colorado Constitution which preempts this doctrine in limited circumstances. These circumstances exist in the narrow situation such as here where a municipality annexes territory (which it is constitutionally permitted to do), Colo. Const. art. II, § 30; C.R.S. § 31-12-101-123, and wishes to provide electric service in the newly annexed territory (which it is also constitutionally permitted to do), Colo. Const. art. XX, § 6, either exclusively or by competing for customers with a cooperative.

Consequently, efforts by DMEA and CREA to bootstrap the doctrine of regulated monopoly to serve as an impediment to a municipality's constitutional right to provide electricity inside municipal boundaries are simply inappropriate as a matter of law.

C. ONCE A MUNICIPAL ELECTRIC UTILITY ANNEXES TERRITORY INTO MUNICIPAL BOUNDARIES, THE ONLY REMAINING QUESTION IS WHETHER A TAKING HAS OCCURRED WARRANTING COMPENSATION TO THE COOPERATIVE.

In facing the interplay between the municipally-owned utility's constitutional right to be the sole supplier of electricity inside municipal boundaries and the diminished property rights of cooperatives, the Colorado Supreme Court carefully crafted a delicate policy and legal balance to harmonize these rights. In reaching its balance, the Supreme Court stated the premise of the challenge it faced:

> The cooperative has a property right, but the extent of that right is not so great as to prevent a municipally owned utility from competing for customers within its municipal limits. *Poudre Valley*, 807 P. 2d at 553.

While the legislative and court efforts are described more fully below, the balance struck by the Supreme Court is this: If the municipality asserts an exclusive right to serve in a newly annexed territory, it constitutes a taking for which compensation is due to the cooperative providing service prior to the annexation. If, on the other hand, the municipality does not exclude the cooperative and permits it to compete, there is no taking because the cooperative is still authorized to provide service, but now on a competitive basis. *Poudre Valley, supra.*

The General Assembly dealt with this balance when it enacted C.R.S. §§ 40-9.5-201-207. This statute (the "Compensation Statute") addresses the nature of the compensation which a municipality must pay to a cooperative in the event of a taking, *i.e.*, when the municipality asserts an exclusive right to serve inside municipal boundaries. The Colorado Supreme Court added the second prong to the balance when, faced with a constitutional challenge to the Compensation Statute, it upheld its constitutionality, but in doing so it further held the municipality may choose to allow the cooperative to continue to serve in the annexed area on a competitive basis with the municipal utility. In such case the Court held no taking would be deemed to occur. If no taking occurs when the municipal utility chooses to allow the cooperative to serve but on a competitive basis, the Supreme Court held that the Compensation Statute did not apply. *Poudre Valley, supra.*

While DMEA and CREA may not like this result and try to defeat the balance struck in the Compensation Statute and the *Poudre Valley* decision, it represents current law.[4] The Colorado Supreme Court in its *Poudre Valley*

[4] Contrary to the assertion in DMEA's Complaint that the Supreme Court's decision in *Poudre Valley* allowing a municipality to compete with a cooperative in a newly annexed area as a non-taking event is merely *dicta* (¶ 14), the plain language of the decision warrants otherwise. "If the municipality is simply competing with the cooperative for customers in the annexed area, the cooperative has no right to compensation". *Poudre Valley, supra,* at 553. This is decidedly not *dicta*.

decision constructed a harmonious balance of constitutional rights held by the municipality and the legislative rights held by the cooperative.

D. THE COURT SHOULD REFRAIN FROM ISSUING "GROUND RULES" TO INTERPRET WHAT THE *POUDRE VALLEY* COURT MEANT BY COMPETITION.

CREA and DMEA urge this Court to establish ground rules for the definition of competition as established by the *Poudre Valley* court since cooperatives "operating near or within municipal boundaries, may face unfettered, unfair, and unregulated competition" (CREA Amicus Brief, pp. 21-22) and equity and fairness demand that the Court here act to flesh out the rules that should govern competition in an annexed area. (CREA Amicus Brief, pp. 19-20).

There are several fatal problems with this argument. First, DMEA and CREA seek Court intervention on hypothetical matters, not a concrete case or controversy. CREA states that a cooperative "may face unfettered, unfair and unregulated competition" (CREA Amicus Brief, pp. 21-22). "May" here means "maybe". "Maybe" tries to push the Court into addressing a speculative event that may never occur rather than seeking relief in an existing case or controversy.

Any effort to seek a court resolution to hypothetical competition in the future is clearly outside the Court's jurisdiction. Courts deal with justiciable controversies, *Bd. of Directors, Metro Wastewater Reclamation Dist. v. Nat'l*

Union Fire Ins. Co. of Pittsburgh, PA, 105 P.3d 653, 656 (Colo. 2005). Courts do not take jurisdiction based on speculating what a party might do in a given situation, *Farmers Ins. Exchange v. District Court for Fourth Judicial Dist*., 862 P.2d 944, 947 (Colo. 1993).

Second, DMEA and CREA are asking the Court to establish prospective guidelines that should govern hypothetical competition in an annexed area. This is not a proper role for the Court. Courts interpret the law not create law. *People ex. rel. Salazar v. Davidson*, 79 P.3d 1221,1243 *(Korlis, J., dissenting).*

Third, CREA asserts that equity and fairness dictate that this Court act to establish rules of competition (CREA Amicus Brief, pp. 19-20). Once again CREA engages in hypothetical situations to support its argument (*e.g.*, municipality refusing a franchise). None of these hypothetical situations are factually present in this case. Additionally, DMEA's and CREA's painting of the competition option as inequitable has previously been dealt with by the Supreme Court when it held in the *Union Rural* decision that cooperatives had no reasonable expectation that their CPCNs issued by the PUC would be protected from competition by a municipal utility seeking to provide electric service inside municipal boundaries:

> Under the Colorado Constitution and case law, [the cooperative] could not have had a reasonable expectation

> that the certificate of public convenience and necessity that it received from the PUC would immunize it from competing municipalities…. 670 P. 2d at 8.

This Court must determine its decision in this case on the basis of the law and case precedents, not engage in hypothetical guess work on what might happen in the future. There is no merit to DMEA's and CREA's assertion that the Court should enter this fray and establish rules for hypothetical future competition. Accordingly, this Court should refrain from defining the boundaries of the Colorado Supreme Court's holding that competition does not constitute a taking of a cooperative's property. The mere possibility of a future claim rising to the level of a case or controversy is not a justiciable issue for this Court to entertain. Moreover, even if there was constitutional room to craft rules of competition in circumstances such as here, that would be a legislative function, not a judicial function. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1248 (Colo. 2003) ("Quite simply, the judiciary cannot legislate."); *Native American Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283 (Colo. App. 2004).

E. THERE ARE NO ALLEGATIONS IN DMEA'S COMPLAINT SUGGESTING THE CITY ENGAGED IN CONDUCT PREVENTING DMEA FROM MAKING A COMPETITIVE OFFER TO THE MAVERIK SERVICE STATION.

There is absolutely nothing in DMEA's Complaint that suggests the City has engaged in any conduct warranting intervention by the Court. All claims raised by

DMEA and supported by CREA are based on hypothetical future competition which may or may not ever occur. Such hypothetical claims cannot serve to prevent the City from exercising the constitutional right it possesses as a home rule city to serve electricity inside municipal boundaries. The cases cited by CREA (*Bennet Bear Creek Farm Water & Sanitation Dist. V. City & Cty. Of Denver*, P.2d 1254 (Colo. 1996); and *U.S. Disposal Sys., Inc. v. City of Northglenn*, 567 P.2d 365 (Colo. 1977)][5] are not controlling or dispositive because those cases each involved evidentiary facts regarding actual conduct of the municipalities, not hypothetical and speculative possibilities of how the municipalities might act.

F. THE COMPETITION OPTION ARTICULATED BY THE COURT IN *POUDRE VALLEY* CONSISTS OF ALLOWING THE COOPERATIVE TO MAKE AN OFFER TO THE CUSTOMER AND ALLOWS THE CUSTOMER TO MAKE THE CHOICE OF SUPPLIERS.

At its core, the *Poudre Valley* decision describing competition as a non-taking event refers to (a) no exclusion of the cooperative, *Poudre Valley, supra,* 807 P.2d at 552, (b) allowing the cooperative to make an offer to a prospective customer, and (c) giving the customer a right to choose an electric supplier. No other definitive rules are necessary. As the Court noted in *Poudre Valley*:

> If the municipality is simply competing with the cooperative for customers in the annexed area, the

[5] CREA Amicus Brief, p. 20.

> cooperative has no right to compensation. If the cooperative is excluded, however, from serving its customers in the annexed area, there is a taking and the cooperative is entitled to compensation. 807 P. 2d at 553.

The lynchpin is whether DMEA was excluded from competing with the City for the new Maverik service station. There is simply no evidence that DMEA was in fact excluded from competing. Indeed, in its Complaint (¶ 40), DMEA admits it was not excluded from making an offer to the new Maverik service station.

CAMU and the League submit efforts by DMEA and CREA to convince the Court that further refinement is necessary are veiled attempts to restrict the City from exercising its constitutional rights to annex and provide electric service inside municipal boundaries.

Again, there are no allegations in the pleadings suggesting that (a) DMEA was prohibited from making an offer to serve the new Maverik service station, or (b) the customer, Maverik, was forced to accept the City's offer without regard to any proposal DMEA might make. All other claims raised by DMEA seeking a declaratory judgment raise hypothetical and speculative questions of future competition that this Court should refrain from addressing.

CREA's reliance (CREA Amicus Brief, p. 18) on *Clare v. Florissant Water and Sanitation District*[6] is misplaced entirely because there is no evidence in this record that the City's actions left "no basis on which [DMEA] could compete with it".

G. THE COLORADO SUPREME COURT HAS ALREADY PRONOUNCED WHAT GUIDELINE TO APPLY WHEN THE MUNICIPAL UTILITY ASSERTS ITS CONSTITUTIONAL RIGHT TO COMPETE WITH A COOPERATIVE AND NO FURTHER GUIDANCE IS NECESSARY

CREA urges the Court to "provide guidelines to ensure that competition is fair, comprehensible, and does not raise serious public policy concerns". CREA Amicus Brief, p. 20. This assertion has no merit because the Supreme Court has already provided the necessary guideline – competition means the cooperative is not excluded from serving inside a newly annexed area and is allowed to compete for customers with the municipal utility. CAMU suggests the pleas of CREA are a red herring designed to convince this Court to go further and establish prospective rules that will impair the constitutional right of a municipal utility from providing electric service inside municipal boundaries.

All the evils raised by CREA are nothing more than hypothetical musings on what might happen in the future. Thus, the potential refusal to grant a franchise, to

[6] 879 P.2d 471 (Colo. App. 1994).

enter into anticompetitive contracts with customers (CREA Amicus Brief, p. 19), or to act in such a manner as to render the cooperative's facilities useless (CREA Amicus Brief, p. 18) are all speculative creations of CREA that do not constitute a case or controversy.

CONCLUSION

The purpose of this Amicus Brief is to respond to arguments raised by DMEA and CREA encouraging the Court to establish "guidance on what competition means in practice" (CREA Amicus Brief, p. 21). CAMU and the League submit that such efforts must be rejected because they are based on hypothetical what ifs, not an actual case or controversy. DMEA and CREA have not set forth any legitimate basis to support their assertions that this Court should establish prospective guidance on how competition between a municipal utility and a cooperative is to work under the holding in *Poudre Valley*. That guidance is already in place and this Court should refrain from acting until and unless the evidence clearly demonstrates an attempt by a municipal utility to exclude a cooperative from competing as defined in the *Poudre Valley* decision. No such evidence is present here.

RESPECTFULLY SUBMITTED this 21st day of January, 2016.

WILLIAM H. McEWAN, P.C.

/s/ William H. McEwan
William H. McEwan

Attorney for Amicus Curiae Colorado Association of Municipal Utilities

COLORADO MUNICIPAL LEAGUE

/s/ Geoffrey T. Wilson
Geoffrey T. Wilson

Attorney for Amicus Curiae Colorado Municipal League

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of January, 2016, a true and correct copy of the foregoing **AMICUS BRIEF OF THE COLORADO ASSOCIATION OF MUNICIPAL UTILITIES AND THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF DELTA** was filed and served via ICCES to the following:

Christina F. Gomez, #36026
J. Lee Gray, # 27306
Robert M. Thomas, #40174
HOLLAND & HART LLP
6380 S. Fiddlers Green Circle
Suite 500
Greenwood Village, CO 80111
cgomez@hollandhart.com
lgray@hollandhart.com
rmthomas@hollandhart.com
Counsel for Plaintiff-Appellant

Craig N. Johnson, #21905
Lee Katherine Goldstein, #31548
FAIRFIELD AND WOODS, P.C.
1801 California Street, Suite 2600
Denver, CO 80203
cjohnson@fwlaw.com
lgoldstein@fwlaw.com
Counsel for Appellee The City of Delta

Thomas J. Dougherty, #30954
Amy D. Wills, #42111
Lewis Roca Rothgerber, LLC
1200 17th Street, Suite 3000
Denver, CO 80202
tdougherty@lrrlaw.com
awills@lrrlaw.com
Counsel for Amicus, Colorado Rural Electric Association

Original duly signed and on file for review

s/ William H. McEwan

Pursuant to C.R.C.P. 121, § 1-26(9), a printed copy of this document with original signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request.