3-16-1977

City of Loveland v. Public Utilities Commission

NO. 27444

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY OF LOVELAND, Plaintiff-Appellee, vs. THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, AND EDWIN R. LUNDBORG, HENRY E. ZARLENGO, AND EDYTHE S. MILLER, as Members of said Commission, Defendants-Appellants.	)	Appeal from the District Court in and for the County of Larimer Civil Action No. 29348 HONORABLE JOHN A. PRICE, JUDGE

BRIEF OF AMICUS CURIAE THE CITY OF FORT COLLINS, COLORADO, A MUNICIPAL CORPORATION

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INDEX

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

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PRELIMINARY STATEMENT

The City of Fort Collins is a home rule city organized under Article XX of the Colorado Constitution. Like the City of Loveland and many other municipalities in the State, Fort Collins owns and operates its own municipal electric utility. This system is operated for the benefit of the citizens of the City but some service has been extended to areas outside of the City.

In some cases out-of-city service is provided for historical reasons. When this City acquired its utility, the system acquired had previously served areas which were out of the City and this service has been continued to this date. In other cases, service was provided because the City extended its lines into areas which were in the growth pattern of the City and about to be annexed into the City.

In order to be able to provide municipal services to areas incorporated into the City by annexation, the City must anticipate development and extend its utilities and other services into areas which are in its growth pattern. This is particularly important in the case of a City such as Fort Collins which has experienced significant growth in recent years.

The Fort Collins City Council establishes the rates charged by the municipal electric utility. These rates are fixed after public hearings by ordinances passed by the Council. The City Charter sets forth in some detail the basis for the rates of the municipal utilities. Incidentally, in Fort Collins the rates charged to out-of-city customers are the same as the rates for in-city service.

So far as the City has been able to determine, the City of Fort Collins has never submitted its rates for review to the Public Utilities Commission and there has been no attempt by the Commission to exercise any jurisdiction over any City utility. If this City were required to gain approval by the PUC for its rates, the City would to that extent lose control over its utility. Since this is the issue in this case, the City of Fort Collins is vitally affected by the decision in this case. The City takes the position that the decision of the trial court was correct and the Public Utilities Commission did not have jurisdiction over the Loveland utility.

ISSUE PRESENTED

The issue presented by this case is solely the issue of whether the Public Utilities Commission has the power to regulate or otherwise interfere with the operation of a municipal utility system without the consent of the municipality.

SUMMARY OF THE ARGUMENT

The Colorado Constitution (Article V, Section 35) prohibits the legislature from delegating regulatory powers over municipal utilities. This provision makes no distinction on the basis of in-city service versus out-of-city service.

This does not prevent a municipality from submitting its utility to the jurisdiction of the PUC. There may be good reason for a City to do this. For example, it may desire to have specific territory set aside for exclusive service by its utility. To the extent that a municipality voluntarily submits to such jurisdiction, there can be no violation of the Constitutional prohibition. This is not a case of the General Assembly delegating jurisdiction to the PUC but rather a case of a city voluntarily subjecting its property to this jurisdiction.

Absent such voluntary subjection, regulation by the PUC is violative of the Constitutional prohibition regardless of the locale or use of the municipal property. It is municipal ownership, not place of service or use which the Constitution speaks to.

ARGUMENT

In its brief the City of Loveland sets forth the arguments against regulation of a city utility by the Public Utilities Commission. The City of Fort Collins concurs in the arguments advanced by that brief. Therefore, this brief will not contain detailed arguments or detailed citation of authorities.

By Section 35 of Article V of the Colorado Constitution, the people of this state insured that their municipalities could operate their own property free of regulation or interference by any agency created by the legislature. That section forbids the legislature delegating to any special commission "any power to make, supervise or interfere with

any municipal improvement, money, property or effects. . . ." The Public Utilities Commission is a special commission within the meaning of this section of the Constitution. Holyoke v. Smith, 75 Colo. 286, 226 Pac. 158 (1924). There can be no question but that a municipal electric utility is a municipal improvement or property. The Constitution does not limit its language in this regard to situations regarding in-city use of municipal property. There is no language in this section creating an exception where the property is used out of the city limits. As this court stated in a similar situation involving the Charter of this City, ". . . we cannot read into the provision an exception which is not there." City of Fort Collins v. Dooney, 178 Colo. 25, 30, 496 P.2d 316 (1972).

In the case of Englewood v. Denver, 123 Colo. 290, 229 P.2d 667 (1951), this Court applied this provision in holding that the Denver Water Utility was not subject to regulation by the Public Utilities Commission. In that case the Court referred to the case of Lamar v. Wiley, 80 Colo. 18, 248 Pac. 1009 (1926), which is heavily relied upon by the Public Utilities Commission and the Colorado Rural Electric Association in their briefs. In holding that the Lamar case did not control, the Court pointed out that Lamar had invoked the jurisdiction of the Public Utilities Commission.

In Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965), the Court also applied the prohibition contained in Article V, Section 35, of the Constitution to an attempt by the Public Utilities Commission to regulate a municipal utility. Again the Court held that the Public Utilities Commission could not interfere with such municipal improvements.

It is submitted that the Englewood case and the Thornton case correctly applied the Constitutional prohibition set

forth in Article V, Section 35. Any other ruling would create an intolerable conflict between the Public Utilities Commission and municipalities owning electric utilities. If the Public Utilities Commission does have jurisdiction over municipal electric rates, it must also have all other powers granted by the public utilities law. This would include the power to regulate services and facilities (C.R.S. 1973, § 40-4-101); the power to require municipal utilities to change plants, equipment and facilities (C.R.S. 1973, § 40-4-102); the power to impose standards for electric service by the municipal utility (C.R.S. 1973, § 40-4-108); the power to prescribe the system of accounts maintained by the municipality (C.R.S. 1973, § 40-4-111); the power to regulate new construction (C.R.S. 1973, § 40-5-101); and a host of other powers normally exercised by the Public Utilities Commission over non-municipal utilities. The exercise of such powers by the Public Utilities Commission would interfere with the operation of the utility both within and without the City to the point that the municipality would completely lose control of its utility. In effect, the incidental service to areas outside of the city limits would control the entire utility. This would be a classic case of the tail wagging the dog. In Englewood v. Denver, supra, this Court recognized that this situation would be intolerable and completely in conflict with the prohibitions contained in the Colorado Constitution.

All parties appear to agree that a municipality has sole jurisdiction over its electric utility within the city limits. In order to be able to provide service to areas annexing into the municipality, it is necessary to anticipate such annexations and to provide service to areas in the path of the City's development and growth. To remove this capability would be to seriously impair one of the natural functions of

municipal government, the function of meeting territorial growth needs.

CONCLUSION

For the reasons set forth above and in the brief of the City of Loveland, it is respectfully submitted that the decision of the trial court was correct and that the Public Utilities Commission does not have jurisdiction to regulate rates and other aspects of a municipal utility unless the municipality in question voluntarily submits to such jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief of Amicus Curiae, The City of Fort Collins, Colorado, a municipal corporation, upon all parties herein, including amicus curiae, by mailing two true and correct copies thereof to each of their counsel of record, by first class mail, postage prepaid, this 16th day of March, 1977, as follows:

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