4-1-1977

City of Loveland v. Public Utilities Commission

NO. 27444

IN THE

SUPREME COURT

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 District Court In And For The County Of Larimer HONORABLE John A. Price Judge

REPLY BRIEF OF DEFENDANTS-APPELLANTS,

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

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ARGUMENT

City of Loveland begins the STATEMENT OF CASE in its answer brief with the sentence:

> The only truly relevant fact required for determination of this case is a communication to the Commission from Mr. Richard S. Jung informing the Commission that he had been without authority to file so called "Advice Letter No. 12."[1]

Loveland's whole STATEMENT OF CASE[2] centers around Mr. Jung's

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1. At pages 1-2.

2. In reality, more Argument than Statement.

letter referred to in Commission Decision No. 88852 (ff. 42-48). The basic problems with Mr. Jung's letter were that it was some 46 years too late and ignored the reality in which Loveland found itself on May 26, 1976. On May 26, 1976, Loveland had been a public utility for at least 46 years, Public Utilities Commission v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930), and, with respect to its service and rates to customers outside its municipal boundaries, a public utility regulated by The Public Utilities Commission since August 27, 1930. Loveland would have this Court ignore that part of the record in this case which shows that (1) Loveland filed an application on July 29, 1930, for a certificate of public convenience and necessity to exclusively serve with electrical energy and power two specifically described territories outside the City's territorial boundaries, (described in metes and bounds) (ff. 87-90); (2) the Commission on August 27, 1930, issued to Loveland the certificate of public convenience and necessity requested (ff. 98-105); and, (3) since 1930, Loveland has filed with the Commission its schedule of rates, charges, rules and regulations (tariffs) governing the sale of electrical energy and power to customers outside its territorial limits, and annual reports with respect to revenues and operating expenses of its Electric Department (ff. 22, 106-205).

Loveland, in its brief[3] states that there are two groups of cases decided by this Court defining the relationships between the Commission and municipalities. After categorizing one group as "cases in which the municipality involved has directly or indirectly posited some jurisdiction over its municipal utility assets by directly or indirectly seeking the benefit of action by the Commission,"[4] Loveland describes the other group as

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3. At page 4.

4. Ibid.

> cases [having] to do with direct confrontation between the Commission and a municipal corporation in which the municipal corporation refused to submit its improvements, money, property or effects to the jurisdiction of the Commission.[5]

In this second group, Loveland is referring mainly to City of Englewood v. City and County of Denver, 123 Colo. 290, 229 P.2d 667 (1951). A reading of the Englewood case reveals that it in no way involved a "direct confrontation" between the Commission and the City and County of Denver. The confrontation was between Englewood and Denver. The Commission, according to this Court's opinion,

> refused jurisdiction in the matter of the furnishing of water service outside its territorial limits by Denver, in holding that Denver's operations in connection therewith are as those of private contractor or lessor. This ruling and order is to be found in Re City and County of Denver, et al, in volume 20, Colorado Public Utilities Reports at page 235. . . . The commission, by its findings and order, seems to distinguish between the leasing of water and the furnishing of a utility service.

123 Colo. at 300.

Loveland, in its brief,[6] states that the Englewood case, decided in 1951, was the first case in which Article V, Section 35 of the State Constitution was the governing law with respect to municipal service outside the city. The Commission disagrees with this statement. First of all, City of Lamar v. Town of Wiley, 80 Colo. 18, 248 P. 1009 (1929), also considered Article V, Section 35, in light of service by a municipally owned electric utility outside the territorial limits of the city. The Lamar case antedated the Englewood case by some 22 years. It was in the Lamar case that this Court interpreted the prohibitions of Article V, Section 35, as applying to factual situations that existed in Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 148 (1924), i.e., to situations where the General Assembly created a special commission and attempted to delegate to it power to regulate municipal function within the corporate limits of a municipality. Secondly,

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5. Ibid.

6. At page 4.

The Englewood case turned up statutory and case law defining what is a "public utility." Cf. Robinson v. City of Boulder, ___ Colo. ___, 547 P.2d 228 (1976). This is why there is no inconsistency between the holdings in City of Lamar v. Town of Wiley, supra, and City of Englewood v. City and County of Denver, supra - as this Court so stated in City and County of Denver v. Public Utilities Commission, 181 Colo. 38, 44-45, 507 P.2d 871 (1973).

Loveland argues in its brief[7] that the Commission in its opening brief did not point out where Article V, Section 35, makes a distinction between property inside and outside the city limits of a municipality. A reading of Article V, Section 35, does indeed not include either word. However, the Commission, in its opening brief, did discuss and quote at length from City of Lamar v. Town of Wiley, supra, where this Court interpreted Article V, Section 35, as applicable to factual situations such as existed in Town of Holyoke v. Smith,[8] supra, but not to factual situations as existed in City of Lamar v. Town of Wiley,[9] supra. It is customarily acknowledged that courts, especially the highest court of a state, has the power and authority to interpret constitutional provisions.

Loveland argues in its brief[10] in attempting to distinguish City and County of Denver v. Public Utilities Commission, supra, from the instant case that Denver placed "its reliance entirely on Article XXV of the Colorado Constitution in claiming in court that the Commission

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7. At page 6.

8. Where the municipally owned utility was serving only customers receiving electrical service within the territorial limits of the town.

9. Where the municipal-owned utility was serving customers receiving electrical service both within and without the territorial limits of the city.

10. At pages 8-9.

had no jurisdiction over the City's operation of its bus system outside Denver's territorial boundaries. A reading of the brief filed by Denver in this Court reveals that Denver not only relied upon Article XXV in support of its position, but also Article XX and Article V, Section 35 of the State Constitution. In addition, the same cases being rehashed in the instant case were thoroughly rehashed in the Denver case.

Next, Loveland attempts to distinguish K. C. Electric Association, Inc. v. Public Utilities Commission, ___ Colo. ___, 550 P.2d 871 (1976), from the instant case, arguing that: "This is quite natural because K. C. Electric is not applicable here, being a case in which the municipality involved was not before the public utilities commission."[11] To the contrary, the municipality involved - the City of Burlington - was before the Commission. Burlington petitioned the Commission for leave to intervene after K. C. Electric Association had petitioned the Commission for leave to intervene claiming that Burlington was required to buy wholesale electric power from it, not Public Service Company of Colorado. Burlington's petition to intervene was granted by the Commission, and Burlington appeared by counsel and participated in the hearing leading to the Commission's decision, as well as befcre the district court and this Court. All of the above were before this Court when it decided the K. C. Electric Association case.

Loveland in its brief writes: "The Commission had endeavored to demonstrate that Loveland has chosen to be regulated by the Commission and as authority for this refers to Public Utilities Commission vs. City of Loveland, 87 Colo. 556, 289 Pac. 1090 (Apr. 1930)."[12]

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11. At page 10.

12. At page 12.

Such is not the case, the Loveland case was cited by the Commission in its brief to support the proposition that Loveland, in its operation of supplying electrical energy and power at retail is a "public utility."

Loveland argues in its brief[13] that City of Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965), was another case where this Court followed the clear mandate of Article V, Section 35. The Commission submits that this is an overly simplified interpretation of this Court's opinion. The Commission does not read the Thornton case, or as stated above, the Englewood case as being inconsistent with the Lamar case. In the Thornton case, the Commission attempted to undo the sale by Northwest Utilities Company of its water and sewage facilities to the City of Thornton, through the Commission's jurisdiction over Northwest, a regulated public utility. Id. at 191-193. In Thornton, this Court discussed not only Article V, Section 35, but also Article XXV and several statutory provisions: C.R.S. 1953, 115-5-4,[14] 139-32-1 (Supp. 1960), 139-42-1 and C.R.S. 1963, 139-52-1 to 139-52-7. With respect to the statutory provisions appearing in then Chapter 139, this Court wrote:

> In summary, they give full power to the municipality, subject only to the electorate, to purchase or acquire by condemnation at the fair market value thereof any water works or system and appurtenances necessary to the works or system. Such facilities may be wholly within or wholly without the municipality. The muncipality is authorized to operate and maintain such

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13. At pages 10-11.

14. Since repealed and replaced by a new section - now C.R.S. 1973, 40-5-104 - which reads as follows:

> Acquisition by municipality. (1) Any municipality which has acquired or constructed any public utility plant, property, or facility has the power to contract with a public utility for the operation of any part or the whole thereof, subject to the provisions of articles 1 to 7 of this title and to exercise, in respect to such public utility, the powers of regulation and supervision conferred upon by the commission.
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> (2) Sections 40-5-101 to 40-5-104 shall not apply to railroads.

> water facilities or sewer facilities or both for its own use, for the use of public or private use, and for use within and without the territorial boundaries of the municipality. One section provides that the operation and the cost thereof shall be without modification, supervision or regulation of rates, fees, tolls or charges by any board, agency, bureau, commission or official other than the governing body as provided by ordinance in the municipality. A pertinent portion of C.R.S. 1963, 139-52-10, provides, "* * * In so far as the provisions of this article are inconsistent with the provisions of any other law, the provisions of this article shall be controlling."
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> A reading of the various pertinent statutes points to the inescapable conclusion that the acquisition by Thornton of the Northwest facilities could not be prevented or interfered with by any agency once the people of Thornton determined by their vote that the system was to be acquired. . . .

157 Colo. 195-196. (Emphasis partly Court's, partly added.) By the force of Article V, Section 35, and the statutory provisions cited above, the Commission not only did not have jurisdiction to undo the sale of Northwest's water and sewage facilities within the City of Thornton to Thornton, but also Northwest's water and sewage facilities outside the City of Thornton.

Loveland makes the argument in its brief that the Commission's Order in Decision No. 3021, dated August 27, 1930, which reads

> IT IS THEREFORE ORDERED, That the public convenience and necessity requires that the City of Loveland be, and the same is hereby, authorized to sell and distribute electrical energy to the public residing in the two areas hereinbefore described, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

(f. 104) (Emphasis added.) did not grant a certificate of public convenience and necessity to Loveland.

In its application for a certificate of public convenience and necessity, Loveland prayed for the following order:

> WHEREFORE the City of Loveland, applicant herein, respectfully asks:

> 1. That the Public Utilities Commission of the State of Colorado make its order granting to applicant a certificate that the present or future public convenience and necessity require or will require an extension of its distribution system into the territory hereinabove described, with the necessary distribution lines and equipment for the service of inhabitants of said territory.
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> 2. For such other and further orders as may be reasonable, necessary and appropriate in the premises.

(ff. 94-95) Loveland argues that although it requested a certificate of public convenience and necessity, and although the Commission said it was granting Loveland a certificate of public convenience and necessity, in reality the Commission did not grant Loveland a certificate of public convenience and necessity, because Loveland did not submit itself to the jurisdiction of the Commission.[15] Loveland bases this conclusion on the following statement in Commission Decision No. 3021, which Loveland quotes in its brief at page 13 as follows:

> The attorneys for the City made it clear that the description used was employed as a matter of convenience and not because of any concession on the part of the City that the operation of its own municipal plant is under the jurisdiction of the Commission.

(f. 103) (Emphasis added.) What Loveland has not included in its argument, is what the immediately preceding sentence says as to what

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15. Whether the Commission has jurisdiction to regulate the activities of a person, firm, corporation or municipality does not depend upon whether that person, firm, corporation or municipality submits itself to the jurisdiction of the Commission, as it would to a court of law. The Commission's jurisdiction to regulate attaches anytime the activities of a person, firm or corporation brings it within the definition of being a "public utility"; and in the case of a municipality, when its activities bring it within the definition of being a "public utility," and such activities are carried on outside the territorial limits of the municipality, unless the General Assembly by statute provides that the municipality is free from regulation, as in City of Thornton v. Public Utilities Commission, supra. Whether the person, firm, corporation or municipality wants or does not want to be regulated, or the Commission wants or does not want to regulate is of no controlling force.

the "description" referred to in the quotation included. The sentence immediately preceding the above quotation reads as follows:

> The territory first described includes the City of Loveland.

(f. 102) (Emphasis added.) In both the application of Loveland and the Commission decision, there appears a lengthy description in metes and bounds of two described areas. (ff. 87-90, 99-102) The City of Loveland is completely enclosed in the one description, the City itself being a small part of the described area.[16] Thus, what the Commission was acknowledging was that although the City itself was included within one of the described areas to which Loveland was asking for a certificate of public convenience and necessity, Loveland was not including in its request, its municipal system included within the City's territorial boundaries. This is understandable when one realizes that Loveland's application for a certificate was filed (and the Commission's decision entered thereon) within three years after this Court decided City of Lamar v. Town of Wiley, supra, and within six years after this Court decided Town of Holyoke v. Smith, supra.

Loveland makes an argument in its brief that the Commission finds hard to take seriously. Loveland writes:

> It [Commission] bases this conclusion [that Article V, Section 35 does not prohibit regulation by the Commission outside the city's territorial limits] on "case law." This is indeed a novelty. The Commission claims that the Constitution can be amended not by the people, but by decisions of this Court. The Court must be as surprised at such a concept as we were.[17]

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16. This is visually revealed in the map annexed to Loveland's application, which the Clerk of the Court in and for Larimer County, together with another map, did not include in the record, although requested. The maps were part of Appendices F and G to the Commission's Answer and Counterclaims.

17. At page 11.

Other than the third sentence quoted above being a puerile characterization of the Commission's argument, it is hard to believe that anyone as late as 1977 is questioning whether courts, especially the highest court of the State, has power and authority to interpret constitutional provisions.

The City of Fort Collins has appeared in the within appeal as an Amicus Curiae. Fort Collins was neither a party, nor an Amicus Curiae in the district court. Inasmuch as the legal arguments contained in Fort Collins' brief follow closely those contained in Loveland's brief, the Commission will not burden the Court by repeating the Commission's arguments. However, though, the Commission would like to point out that all of the "factual" statements made by Fort Collins in the PRELIMINARY STATEMENT[18] portion of its brief are outside the record in this case. Rather than moving to strike such statements at this time, the Commission will orally move at the time of argument before the Court for leave to respond. The Commission's responses, of course, will, of necessity, also be outside the record.

The Colorado Municipal League has also appeared as an Amicus Curiae in the appeal. Like the City of Fort Collins, it was neither a party, nor an Amicus Curiae before the district court. The Municipal League's argument, stated in a nutshell, is that whenever this Court has had a case before it involving the issue of Commission jurisdiction to regulate a municipal utility being operated outside the corporate limits of the municipality, and has specifically considered Article V, Section 35, the Court has ruled that Article V, Section 35, bars Commission jurisdiction. Such a position, of course, has to assume that this Court never specifically considered Article V, Section 35, in City of Lamar v. Town of Wiley, supra, although the Court thoroughly analyzed Town of Holyoke v. Smith, supra, and stated:

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18. At pages 1-2.

> We think the trial court extended to a state of facts in the present case an inapplicable doctrine, and the rule laid down in the Holyoke case, under a state of facts which are radically different, does not govern the case. It was there held that our State Public Utilities Commission has not the power to prescribe rates for the town of Holyoke because section 35 of article 5 of our Constitution prohibits the General Assembly from delegating such power to a special commission such as our Utilities Commission is. . . . The Holyoke opinion itself differentiates the two cases. . . . The decision in the Holyoke case is necessarily restricted to the case of a municipality which is furnishing a public utility to its own citizens or inhabitants, consumers, all of whom live within the territorial boundaries of the municipality, and in whom is vested the ultimate authority to fix rates for themselves. . . . The same fundamental reason that operated to control the decision in the Holyoke case, under the facts of that case, makes inapplicable the rule there applied to the state of facts here, which invoke a different rule.

80 Colo. 21-23.

The Municipal League's argument must also assume that, although Denver in its brief in the Supreme Court in City and County of Denver v. Public Utilities Commission, supra, quoted Article V, Section 35; based one whole argument on Article V, Section 35, and discussed the same cases that have been discussed in every brief filed in this action, this Court did not consider them.

CONCLUSION

It was in Town of Holyoke v. Smith, supra, that this Court thoroughly analyzed the origins and reasons for Article V, Section 35. The principle underlying Article V, Section 35, is well stated by this Court when it wrote:

> On principle it would seem entirely unnecessary to give a commission authority to regulate the rates of a municipally owned utility. The only parties to be affected by the rates are the municipality and its citizens, and, since the municipal government is chosen by the people, they need no protection by an outside body. If the rates for electric light or power are not satisfactory to a majority of the citizens, they can easily effect a change, either at a regular election, or by the exercise of the right of recall.

75 Colo. at 296. It was not by coincidence that in this Court's latest

opinion on this subject - K. C. Electric Association, Inc. v. Public Utilities Commission, supra - the Court wrote:

> The rationale of Article XXV and City and County of Denver v. PUC, supra, is that when a municipally owned utility operates within the municipality there is no one who needs the protections of the PUC. The electorate of the City exercises ultimate power and control over the City-run utility and if the people of the City are in any way dissatisfied with the operation of the utility, they may demonstrate their discontents at the next municipal election.
>
> When a municipally owned utility provides utility service outside the municipality, those receiving the service do not have a similar recourse on election day. They have no effective way of avoiding the possible whims and excesses of the municipality in absence of state regulation by the PUC.

550 P.2d at 873-874. The instant case is such a case where regulation by The Public Utilities Commission is needed for those customers receiving electrical service outside the territorial limits of Loveland.

Respectfully submitted,

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DATED: APRIL 1977

CERTIFICATE OF SERVICE

Undersigned hereby certifies that the attached Reply Brief of Defendants-Appellants, The Public Utilities Commission of the State of Colorado and members of said Commission, was served by mailing a true and correct copy thereof in the United States Mail, first-class postage prepaid on this 1st day of April, 1977, properly addressed to the following:

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