2-6-1984

Board of County Comm'rs v. Denver Bd. of Water Comm'rs

SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 252

PLAINTIFFS-APPELLEES' ANSWER BRIEF

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE;
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ADAMS; and
BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON,

Plaintiffs-Appellees,

v.

DENVER BOARD OF WATER COMMISSIONERS;
CITY AND COUNTY OF DENVER, STATE OF COLORADO, a municipal corporation; FEDERICO PENA, Mayor; and
THE DENVER PLANNING BOARD,

Defendants-Appellants.

February 6, 1984

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D. Whether the Counties Have Standing to Bring This Action.

E. Whether the Trial Court Correctly Refused to Reopen This Case to Receive Additional Evidence.

II. STATEMENT OF THE CASE

Defendants, the Denver Board of Water Commissioners ("Water Board"), the City and County of Denver, a municipal corporation, Federico Pena, Mayor, and the Denver Planning Board appeal from the trial court's entry of judgment in favor of plaintiffs, the Board of County Commissioners of the County of Arapahoe, the Board of County Commissioners of the County of Adams, and the Board of County Commissioners of the County of Jefferson ("the Counties").

III. STATEMENT OF FACTS

This action was instituted by the Counties on September 5, 1973 (Vol.1, p.1-12). The Counties contended, inter alia, that the Denver Water Board in its actions in acquiring

substantial water rights, in developing an intricate and complex water distribution system, in representing that it intended to serve water to the entire Denver metropolitan area, and in representing the same to the Counties, had become a public utility subject to the jurisdiction of the Public Utilities Commission ("PUC") (Vol.1, p.1-12). The Counties also contended the Board was unlawfully interfering with their planning and zoning functions and that it would be inequitable for the Board to refuse service to citizens in the Counties. Finally, the Counties contended a constructive trust should be impressed upon the Board in favor of the Counties for the water it had obtained for the Counties, and the Board should be estopped from refusing to serve water to citizens in the Counties (Vol.1, p.1-12). The Counties requested that the court enter an order compelling the Board to supply water as available to the citizens of the Counties, to charge reasonable rates therefor, and to require the Water Board to comply with the rules and regulations of the PUC (Vol.1, p.1-12).

After trial to the court, it was held the Board had become a public utility. Discriminatory practices relating to providing water to the Denver metropolitan area were recognized. Policies adopted in connection with the Board's water service were held to interfere with the Counties' primary governmental functions of planning and zoning. The court ordered the Board

to comply with the rules and regulations of the PUC with respect to its service outside the jurisdictional boundaries of the City and County of Denver (see Vol.2, p.322-365).

On November 29, 1982, the Board moved to reopen the action for the purpose of taking additional evidence (Vol.2, p.388-434). The court denied the Board's motion to reopen the case to take additional evidence on February 4, 1983 (Vol.2, p.476-479). This appeal followed (Vol.2, p.506-507).

IV. SUMMARY OF ARGUMENT

A. Municipally Owned Utilities Are Subject To PUC Jurisdiction When They Become Public Utilities.

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E. The Trial Court Correctly Denied the Board's Motion To Receive Additional Evidence.

V. ARGUMENT

A. Municipally Owned Utilities Are Subject to PUC Jurisdiction When They Become Public Utilities.

1. Introduction.

Colo. Const. Art. XXV invests the PUC with the authority to regulate public utilities in Colorado.[1] The definition of a public utility is set forth in §40-1-103(1) C.R.S. 1973 (1983 Cum. Supp.):

> The term 'public utility,' when used in articles 1 to 7 of this title, includes every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest, and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title. (Emphasis added.)

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1 ". . . all power to regulate the facilities, service and rates and charges therefor, including facilities and service and rates and charges therefor within home rule cities and home rule towns, of every corporation, individual, or association of individuals, wheresoever situate or operating within the state of Colorado, whether within or without a home rule city or home rule town, as a public utility, as presently or may hereafter be defined as a public utility by the laws of the state of Colorado, is hereby vested in such agency of the state of Colorado as the general assembly shall by law designate.
"Until such time as the general assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the state of Colorado...." (Emphasis added.)

Thus, a municipality that is operating a public utility is subject to the jurisdiction of the PUC.

The regulatory powers of the PUC are broad and extensive. City of Montrose v. Public Utilities Commission, 629 P.2d 619 (Colo. 1981). It is incumbent upon the PUC to exercise its power giving paramount consideration to the public interest. Public Service Company v. Public Utilities Commission, 142 Colo. 135, 350 P.2d 543 (1960), cert. denied 364 U.S. 820, 81 S.Ct. 53, 5 L.Ed.2d 50 (1960). And, a primary purpose of utility regulation is to ensure that rates charged are not excessive or unjustly discriminatory.[2] Cottrell v. City and County of Denver, 636 P.2d 703 (Colo. 1981).

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2 Section 40-3-102, C.R.S. 1973 (1983 Cum.Supp.) states:

> [t]he power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in said articles through proper courts having jurisdiction; except that nothing in this article shall apply to municipal natural gas or electric utilities for which an exemption is provided in the Constitution of the state of Colorado, within the authorized service area of each such municipal utility except as specifically provided in section 40-3.5-102. (Emphasis added.)

Municipalities unquestionably have the authority to operate water utilities and to supply water inside and outside their jurisdictional boundaries.[3] Moreover, the City and County of Denver is constitutionally empowered to operate utilities.[4]

Finally, a municipality has the power to operate a water facility wholly within or wholly without its jurisdictional boundaries and to prescribe rates and collect charges for the services furnished by such water facilities without external regulation.[5]

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3 Section 31-15-708(1)(d), C.R.S. 1973, provides that the governing body of each municipality has the power to:

> . . . supply water from its water system to consumers outside the municipal limits of the municipality and to collect such charges upon such conditions and limitations as said muncipality may impose by ordinance.

4 Colo. Const. Art. XX, §1 provides:

> . . . the City of Denver . . . shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase . . . .

5 Section 31-35-402, C.R.S. 1973 (1983 Cum.Supp.) provides in pertinent part as follows:

> (1) In addition to the powers which it may now have, any municipality, without any election of the qualified electors thereof, has power under this part 4:

The critical inquiry in this case is not whether the Board has the power to extend service extra-territorially; nor is the issue whether the Board, in operating an extra-territorial "water facility" or "water works" is immune from PUC jurisdiction. The question, rather, is whether the PUC has jurisdiction to regulate an extra-territorial municipality owned water facility which has become a public utility. The Board and all amicus curiae refuse to recognize this distinction. As hereafter discussed in further detail, a municipality that operates an extra-territorial water facility, which is not incidental to its service to its own residents, but is an integrated system held to be a public utility, is subject to PUC regulation, notwithstanding any of the constitutional provisions, statutes or cases cited by the Board or the amicus curiae.

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5 (continued)

(a) to acquire by gift, purchase, lease, or exercise of the right of eminent domain, to construct, to reconstruct, to improve, to better, and to extend water facilities or sewerage facilities or both, wholly within or wholly without the municipality or partially within and partially without the municipality, and to acquire by gift, purchase, or the exercise of the right of eminent domain lands, easements, and rights in land in connection therewith . . . .

(f) to prescribe, revise, and collect in advance or otherwise, from any consumer or any owner or

2. A Municipality Providing a Utility Service Within Its Boundaries Is Exempt from PUC Jurisdiction.

A municipal corporation which operates as a public utility and limits its service to the inhabitants of the municipality only is not subject to PUC regulation. Matthews v. Tri-County Water Conservancy District, 200 Colo. 202, 613 P.2d 889 (1980); Thornton v. PUC, 157 Colo. 188, 402 P.2d 194 (1965); also see Colo. Const. Art. V, §35.[6] In Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158 (1924), the Supreme Court articulated the rationale for exempting intra-municipal utility services from PUC regulation:

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5 (continued)

> occupant of any real property connected therewith or receiving service therefrom, rates, fees, tolls, . . . and other costs of collection without any modification, supervision, or regulation of any such rates, fees, tolls, or charges by any board, agency, bureau, commission, or official other than the governing body collecting them . . . .

6 The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatsoever.

> On principal 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 [utility service] 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.

226 P. at 161.

3. Municipalities Are Empowered to Extend Utility Services Beyond Their Jurisdictional Boundaries and, Unless They Are Operating a Public Utility, May Do So Without PUC Regulation.

Municipalities are also empowered to provide water service outside of their corporate boundaries. Section 31-15-708, C.R.S. 1973; §31-35-402(1)(a)(b); Colo. Const. Art. XX, §1. And, in charging rates, fees, tolls, and charges for its water services, a municipality that is not operating an extra-territorial public utility is insulated from PUC jurisdiction. Section 31-35-402(1)(f), C.R.S. 1973 (1983 Cum.Supp.). A long line of cases, heavily relied upon by the Board and the various amicus curiae, have consistently upheld this power. See Cottrell v. Denver, supra; K.C. Electric Ass'n, Inc. v. Public Utilities Commission, 191 Colo. 96, 550 P.2d 871 (1976); Thornton v. PUC, supra; Colorado Springs v. Kitty Hawk Development Co., 154 Colo. 535, 392 P.2d 467 (1964); Englewood v. Denver,

123 Colo. 290, 229 P.2d 667 (1951); Colorado Utilities Corporation v. PUC, 99 Colo. 189, 61 P.2d 849 (1936). However, these cases either reiterated the rule that a municipality has the power to acquire and extend extra-territorial municipal service, and did not address the issue of whether, in doing so, it had become a public utility, see Cottrell v. Denver, supra; Colorado Open Space Council, Inc. v. Denver, 190 Colo. 122, 543 P.2d 1258 (1975), or had made a factual determination that the particular utility service involved was not a public utility. Englewood v. Denver, supra; Colorado Utilities Corporation v. PUC, supra. This is the crucial distinction avoided by the Board in its opening brief. Only where a municipality is extending a utility service outside of its corporate boundaries and such service is incidental to its essential purpose in servicing its own residents, it is not a "public utility" and, therefore, is not subject to PUC jurisdiction.

4. With the Exception of Those Municipal Utilities Statutorily Exempted from PUC Jurisdiction Under §40-3.5-101(4), C.R.S. 1973 (1983 Cum.Supp.), Municipal Public Utilities Are Subject to PUC Jurisdiction.

The distinction between a municipality operating a public utility and a municipality operating an extra-territorial water facility that is incidental to servicing its own residents was first illustrated in Englewood v. Denver, supra. There, Englewood sought to enjoin Denver and its Board of Water Commis-

sioners from collecting increased water rates from domestic water consumers in Englewood and from requiring the installation of meters until authority had been obtained from the PUC. The court traced the history of Denver's acquisition of its water facilities in 1916 from the Denver Union Water Company. Certain of the acquired properties included pipelines and easements located in Englewood. Until 1948, Denver had permitted the residents of Englewood to connect to its water system and pay the same rates as were being paid by Denver residents. With reference to this acquisition and extension of service to Denver and Englewood, the court stated:

> . . . the only purpose was to supply water to the residents of Denver and the permission granted the Englewood residents by the ordinance, supra, to connect with the corporate lines was, and is, wholly incidental to the main purpose and is strictly a municipal affair.

229 P.2d at 671. The court then goes on to define a public utility:

> . . . to fall into the class of a public utility, a business or enterprise must be impressed with a public interest and that those engaged in the conduct thereof must hold themselves out as serving or ready to serve all members of the public, who may require it, to the extent of their capacity. The nature of the service must be such that all members of the public have an enforcible right to demand it.

229 P.2d at 672. Also see Cady v. Arvada, 31 Colo. App. 85, 499 P.2d 1203 (1972); Ginsberg v. Denver, 164 Colo. 572, 436 P.2d

685 (1968). Based on the facts existing in 1951, the Denver Water Board was not a public utility because the extra-territorial service was incidental to the service afforded the residents of the City and County of Denver. As will be discussed in further detail below, based upon the definition of a public utility enunciated in Englewood v. Denver, the trial court in this case properly found that, due to a radical change of circumstances, the Board is today a public utility.

The obvious corollary to the rule set forth in Englewood v. Denver is that, if a municipality is holding itself out as serving or ready to serve all members of the public to the extent of its capacity, it is a public utility, and is subject to PUC jurisdiction. In Loveland v. PUC, 195 Colo. 298, 580 P.2d 381 (1978), the City of Loveland filed suit against the PUC in an attempt to enjoin PUC interference with rate increases proposed for Loveland customers outside the municipal boundaries served by its electrical power facilities. The PUC counter-claimed to enjoin Loveland from collecting the revised rates from its out of city customers and to penalize Loveland for each day it continued to collect the increased rates. The trial court entered judgment in favor of Loveland, holding that Colo. Const., Art. V, §35 prohibited special commissions from interfering with municipal property, and that the PUC's regulation of rates charged by municipally owned operations to customers out-

side the city's boundaries constituted such an interference. The Supreme Court of Colorado disagreed. It initially recognized that a "public utility" is defined as including a "municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses." Section 40-1-103, C.R.S. 1973 (1983 Cum.Supp.). Although the PUC may not set rates within municipal boundaries in cities which are served by municipally owned facilities, the court held that the PUC may regulate municipally owned public utilities to the extent of their operations outside city boundaries. The rationale for the distinction was predicated upon Lamar v. Town of Wiley, 80 Colo. 18, 248 P. 1009 (1926):

> We . . . hold that where a municipality, as owner of a public utility, furnishes the commodity in question to its own citizens and inhabitants, consumers within the municipal limits, the city itself, through its proper officers, possesses the sole power to fix rates. When a municipality . . . furnishes public service to its own citizens and in connection therewith supplies its products to consumers outside of its own territorial boundaries, the function it thereby performs, . . . in supplying outside consumers with a public utility, is and should be attended with the same conditions and be subject to the same control and supervision that apply to a private public utility owner who furnishes like service. (Emphasis added.)

80 Colo. at 23.

In Denver v. PUC, 181 Colo. 38, 507 P.2d 871 (1973), the PUC sought to regulate the services and rates of the Denver

mass transit system, which it had recently acquired from the Denver Tramway Corporation. The trial court enjoined the PUC from exercising jurisdiction over the mass transit system outside the territorial boundaries of the city. The Supreme Court reversed, holding that the PUC did have jurisdiction over Denver's extra-territorial transit system. Significantly, the court distinguished Englewood v. Denver, supra, as being limited to the particular facts existing in that case in 1951. Denver's mass transit system, nevertheless, being a public utility, was held subject to PUC jurisdiction when it operated outside Denver's boundaries.

The rule is the same when the municipally owned public utility is a public water utility. In Robinson v. Boulder, 190 Colo. 357, 547 P.2d 228 (1976), the plaintiffs sought to subdivide approximately 79 acres of land in the Gunbarrel Hill area outside of its city limits. The circumstances surrounding Boulder's operation of a water and sewer utility system were identical to the Board's situation here. Boulder had staked out an area beyond its corporate limits, including the subject property. It had done so in order to gain indirect control over the development of property located within its service area. Boulder contracted with and provided water and sewer service to the Boulder Valley Water and Sanitation District. The contract between Boulder and the district vested in the former almost

total control over water and sewer service within district boundaries. There, as here, the district functioned in merely a nominal administrative capacity. Specifically, Boulder retained control over all engineering and construction aspects of the service as well as decision making power over the district's authority to expand its boundaries. (Facts which are identical to those in the case at hand.) Boulder refused to extend service to the plaintiff landowners on the grounds that the landowners' proposal was inconsistent with the Boulder Valley Comprehensive Plan and various aspects of the city's interim growth policy. In a well reasoned opinion, the trial court held Boulder had unjustly discriminated against the plaintiffs by denying them service, while having previously approved service extensions to neighboring residential and industrial developments. The court concluded Boulder could only refuse to extend its service to landowners for utility related reasons. Relying upon Englewood v. Denver, supra, Boulder urged on appeal that it was not a public utility. The Supreme Court disagreed. It again distinguished Englewood v. Denver as being limited to its particular facts. While Denver's supplying of water to Englewood users was wholly incidental to the operation of its water system in 1951, Boulder had staked out a territory and had intended to supply all within this territory to the extent of its capacity. Boulder was, therefore, a public utility and

could not refuse to extend service to the plaintiffs since they were located within Boulder's "staked out" territory.

The factual similarities between Robinson v. Boulder, and this case will be discussed in Part B below. However, the amicus curiae brief of the Homebuilders Association of Metropolitan Denver advances an interesting distinction between the posture of the Robinson v. Boulder case and this case in legal terms. In Robinson v. Boulder, the plaintiffs did not seek PUC regulation of Boulder's extra-territorial water service. They only sought an adjudication that Boulder was, in fact, a public utility and, therefore, could not refuse to extend its services to them. The Homebuilders thereby conclude that although a municipality operating an extra-territorial water service may be a public utility, it is still not subject to PUC regulation. This argument is without merit. In Boulder Valley Water and Sanitation District v. Boulder (Boulder District Court, Civil Action No. 80CV0137-5, July 21, 1980), the Boulder District Court addressed the contention of the Homebuilders. In another well reasoned opinion (attached hereto as Exhibit "A"), the court held Boulder's water utility was subject to PUC jurisdiction. Moreover, in Cottrell v. Denver, supra, this Court held:

> In the past we have taken cognizance of the question whether the PUC has jurisdicion over the provision of utility services only when that issue has been presented in litigation involving a party directly affected by the services in question. See generally,

e.g., [cites]; Robinson v. City of Boulder, 190 Colo. 357, 547 P.2d 228 (1976).

636 P.2d at 711-712. Thus, this Court has recognized that Robinson v. City of Boulder does hold that the PUC has jurisdiction over municipal extra-territorial public water utilities.

Defendants and the other amicus curiae also attempt to legally distinguish Robinson v. Boulder on the basis that §31-35-402, C.R.S. 1973 (1983 Cum.Supp.) was not addressed in that decision. However, the provisions that defendants contend are pertinent in the statute have been in existence since 1962. Colo. Sess. Laws, 1962, Chapter 89, §139-52-2 at 281-284. Thus, the Robinson v. Boulder and Cottrell v. Denver cases were decided well after the effective date of that statute. This Court would surely have recognized a statutory impediment if it had perceived one to exist.

Moreover, §31-35-402, C.R.S. 1973 (1983 Cum.Supp.), does not address itself to the issue at hand. While the statute prohibits rate regulation by the PUC over "water facilities," it does not prohibit PUC regulation of these water facilities when they become "public utilities." It is a basic principal of statutory interpretation that statutes must be read in pari materia, Colorado and Southern Railway Co. v. District Court, 177 Colo. 162, 493 P.2d 657 (1972), and to give full effect to each if possible. State v. Beckman, 149 Colo. 54, 368 P.2d 793 (1962). The Board's construction of §31-35-402 would leave

municipally owned public water utilities without any source of supervision or regulation. As recognized by the court in K.C. Electric Association v. PUC, supra:

> The rationale of Article XXV (and Article V, section 35) . . . is that when a municipally owned utility operates within the municipality, there is no one who needs the protection 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 discontent at the next municipal election.
>
> When a municipally owned utility provides utility services outside the municipality, those receiving the service do not have a similar recourse on election day. They have no effective way of avoiding the whims and excesses of the municipality in the absence of state regulation by the PUC.

550 P.2d at 873-876. Also see Boulder Valley Water and Sanitation District v. Boulder, supra; see generally City of Lafayette, Louisiana v. Louisiana Power & Light Co., 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

Finally, the Board fails to address the adoption in 1983 of §40-3.5-101, et seq., C.R.S. 1973 (1983 Cum.Supp.), and the amendment of §40-3-102. (These statutes are attached hereto as Exhibit "B".) The legislative history of these statutes indicates an intent to permit PUC regulation of extra-territorial water service by municipal utilities and a recognition of the necessity of utility regulation. The effect of

these statutes was to remove only municipally owned natural gas and electric utilities from PUC regulation, and to require those utility businesses to regulate themselves in the same manner as the PUC regulated utilities. Any variation between rates charged by the exempted (gas and electric) utilities internally and externally is still subject to PUC approval. Thus, throughout a municipality's service area, including customers within its boundaries and outside its boundaries:

> No rate, charge, or tariff shall unjustly discriminate between or among those customers or recipients of any commodity, service, or product of the municipal utility within the authorized service area. In the event that any rate, charge, or tariff established within the authorized service area which lies outside the jurisdictional limits of the municipality varies from the rate, charge, or tariff established for the same class of customers or recipients of any such service within the authorized service area which lies inside the jurisdictional limits of the municipality, such rate, charge, or tariff shall not become effective until reviewed and approved by the [PUC].

Section 40-3.5-102. Significantly, these statutes in their original forms did not limit the definition of municipal utility to natural gas and electric utilities, but were amended to specifically except only natural gas and electric utilities. (See Exhibit "C".) Rather, the statutes originally covered <u>all</u> municipal utilities. Thus, the Board might have been removed from PUC jurisdiction had this statute remained in its original form. The amendment indicates a clear legislative intent to allow for

the regulation of extra-territorial water and sewerage public utilities by the PUC and to require that exempted (gas and electric) utilities are still ultimately responsible to comply with public utility regulatory procedures.

Since the PUC has jurisdiction to regulate extra-territorial municipal public utilities, the critical inquiry at this juncture is whether the trial court correctly determined as a factual matter that the Board is a public utility. Because overwhelming evidence exists in the record to support the trial court's findings of fact in this regard, this Court must affirm its ruling. Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979).

B. The Trial Court Correctly Determined the Board Is a Public Utility.

The court determined the Board staked out the Denver metropolitan area (see defendants' Exhibit 39) as its service area within which it holds itself out as ready and willing to serve all, to the extent of its capacity. The Board has therefore become a public utility. (Vol.2, pp.364-365.) The court also found the effect of the Board's status as a public utility, regulating water service in the metropolitan area, effectively usurped the Counties' planning and zoning functions provided by §30-28-101, et seq., C.R.S. 1973 (1983 Cum.Supp.). (Vol.2, p.365). In arriving at its conclusions, the court compared the

facts existing in 1951 at the time of the Englewood v. Denver decision, with the present existing facts. (Vol.2, p.325.) Based on these changed circumstances, and relying upon Robinson v. Boulder, supra, and Boulder Valley Water and Sanitation District v. Boulder, supra, the court ordered that the Counties be afforded relief and ordered the Board to comply with the rules and regulations of the PUC. (Vol.2, pp.361-365.) All of the court's findings are relevant to the issue of whether the Board is a public utility. Because of the voluminous nature of these findings, however, the Counties will highlight some of the more salient points of evidence supporting the court's conclusion.

The Englewood v. Denver decision was predicated upon the factual determination that, in 1951, the extra-territorial dimension of the Water Board's service area was incidental to its primary purpose of serving the residents of the City and County of Denver. In 1959, the Denver Charter was amended to allow for the permanent distribution of water (rather than distribution on an annual basis) to users outside of the jurisdictional boundaries of Denver. (Vol.2, p.327.) As a matter of sheer volume, the distribution of water outside of the jurisdictional boundaries of Denver cannot be considered incidental. Forty percent of all the water distributed by the Board is now delivered to outside users. (Vol.2, p.328; Vol.11, pp.4-118 - 4-119.) The Water Board's staff predicted that by the year

2014, eighty percent of its water consumers will reside outside the limits of the City and County of Denver (Vol.2, p.340; Vol.12, pp.4-162 - 4-165.) Over fifty percent of all of the operating revenue of the Denver water system comes from sales of water to outside users. (Vol.2, p.328; Vol.11, pp.4-119; plaintiffs' Exhibit Z-21.)

Further, the evidence at trial showed the Board operates an integrated system and acquires water rights for the purpose of supplying water to the entire Denver metropolitan area, not just the City and County of Denver. The Denver Charter (C4.22) provides for water operations at rates "reasonably anticipated for the anticipated growth of the Denver metropolitan area and to provide for Denver's general welfare." (Vol.2, p.324). Mr. James Ogilvie, a longtime former manager of the Denver Water Board, testified the Board operates an "integrated system." (Vol.2, p.329; Vol.13, p.5-45.) After completion of the Dillon Reservoir Project in 1963, there was a large expansion of water service to outside consumers located within water districts. (Vol.2, p.330; Vol.12; pp.4-142 - 4-149.) Once such a district was formed, and entered into a contract with the Board, the Board held itself out as ready and willing to serve any and all citizens who requested water within the water district's contract service area. (Vol.2, p.330; Vol.12, pp.4-157 - 4-159.) Jerry Shirm, a Water Board staff member, agreed that

not allow co-mingling of its water with any other sources and no other supplier is allowed to deliver water within the system. (Vol.2, p.339; defendants' Exhibit 4, par.13; defendants' Exhibit 5, par.13; defendants' Exhibit 6, par.14.) Mr. Shirm acknowledged the Board's own guidelines (plaintiffs' Exhibit 15) would prevent any contract distributor from amending a new area into the contract service area if the distributor were to receive water service from any entity other than the Board. (Vol.2, p.344; Vol.28, pp.17-115 - 17-119.) Mr. William Miller, the current Board manager, and Mr. Glen Shellenbaum of the Board's sales department, agreed that there is no competition for supply within a contract service area. (Vol.2, p.350; Vol.22, p.182-184; Vol.19, pp.10-52 - 10-53; Vol.20, p.10-134; Vol.21, p.11-18.) Mr. Miller admitted in his deposition taken on January 6, 1982, that the typical distributor contract and total service contract gives the Board a monopoly on service to those areas. (Vol.2, p.351; Vol.22, pp.11-188 - 11-189.)

Finally, the court found the Board, functioning as a public utility in the Denver metropolitan area, has perpetrated the precise abuses that the PUC is designed to prevent, i.e., unjust discrimination and extortion in rates and service. Citizens residing outside Denver's jurisdictional boundaries have no control over the Board. (Vol.2, p.333; Vol.11, pp.4-56 - 4-57.) The evidence showed, and the trial court held the Board has used

its power as a "lever" to influence land use planning and negotiations which had direct adverse effects upon the Counties and their citizens. The Board's staff must approve all TAP applications. (Vol.2, p.331; see Vol.16, pp.8-2069 - 8-255.) The experience of Mr. Whitson in his attempts to acquire service taps in 1979 for High View Water District demonstrated to the court the arbitrary nature of the tap system. (Vol.2, p.331; see Vol.11, pp.8-2069 - 8- 255.) In order to expand, a district must apply to the Board and receive its approval. (Vol.2, p.332; plaintiffs' Exhibit 6, para.13.) The Board's TAP program discriminates against outside users in the number of allocations permitted (Vol.2, p.353; Vol.19, pp.10-57 - 10-60, 10-74), and it was undisputed that rates charged to outside users greatly exceed those charged to inside users.

Hence, the court correctly ascertained that the foregoing exercise of control over the allocation of the West's most precious scarce resource, water, interfered with the Counties' planning and zoning functions since a particular suburban area cannot be developed until it is known whether water will be available. (Vol.2, pp.36-40.) As an example of the Board's interference with planning functions, the Court cited the situation of William Collins' in Bancroft Clover District in Jefferson County. Mr. Collins could not obtain a water tap, and therefore could not complete the sale of his property to a developer who had

already installed streets and streetlights. (Vol. 15, P8-112-115, 8-117, 8-119.) This evidenced the practical impediments to development and land use planning when water is denied. The court also correctly determined that the Board is a public utility. Englewood v. Denver, supra; Robinson v. Boulder, supra. Since adequate evidence exists in the record to support the trial court's findings, they must be upheld on appeal. Stubblefield v. District Court, supra. It is noteworthy that the Homebuilders' Association acknowledges in their amicus curiae brief that the Board has been guilty of discriminatory conduct and agrees that some protection against those abuses is necessary, but argues that PUC regulation is not the answer.

The Board attempts to distinguish this case from Robinson v. Boulder, supra, on the basis that in Robinson, the City of Boulder had made agreements with other suppliers to prevent water service by competitors in the Denver metropolitan area. However, the court here found the TAP program and the distribution contracts had the same intent and effect. In any event, the attempt to eliminate competitors is not a requirement to become a public utility under the Englewood v. Denver test. The test, rather, is whether the utility is holding itself out as ready and willing to serve all within its service area. The Board meets this criteria.

The Board also attempts to distinguish Robinson v. Boulder on the basis that it was the exclusive supplier in its service area, but that other suppliers exist in the Denver metropolitan area. This is also irrelevant. The Board is the exclusive supplier within its service area comprising great parts of the metropolitan area. Therefore, it is a public utility within this service area. Obviously, there are other water utilities that service the areas contiguous to Boulder's service area as well. The operative fact is that no other supplier exists within Denver's exclusive service area as shown in defendants' Exhibit 39.

1. The Board Has Raised Several Arguments which are Irrelevant and Without Merit.

In an attempt to obscure the real issues in this case, the Board has also raised the following arguments which are non-issues:

1) The Board argues that it cannot be considered as holding itself out as ready and willing to serve the public indiscriminately because it has demonstrated discrimination in particular instances against persons who desire tap allocations. However, the court properly found that this was evidence of the Board's abuse of power and demonstrates the necessity for PUC regulation, not evidence that the Board was not ready and willing to serve the needs of the entire Denver metropolitan area. The Board overlooks the fact that in Robinson v. Boulder, it was

determined the defendant was a public utility despite the fact the plaintiff was bringing the action because he was refused service.

2) The Board argues there can be no judicial dedication of the Board's surplus water to non-residents. The Board appears to be saying that, since the Denver Charter provides for a limitation of extra-territorial service dependent upon an adequate supply of water to Denver residents, the PUC cannot regulate its extra-territorial water service. This argument lacks merit. Whether the Denver Charter authorizes the Board to operate a metropolitan area public utility is irrelevant to the issue of whether it is, in fact, operating one. See Cottrell v. Denver, supra. The Denver Charter cannot be construed as superior to state legislation and constitutional provisions. Where the Board's actions impact the surrounding areas because of its status as a public utility, it is subject to state laws. A logical extension of the Board's argument is that a municipality could supersede state statute by enacting a contrary charter provision. Again, the problem anticipated by the Board is speculative and prospective, and is not relevant to the issue presented in this case.

3) The Board contends that the PUC has never regulated it before, and, therefore, cannot do so now. Whether the PUC has regulated the Board in the past has no bearing on

whether Colorado statutes and court decisions require such regulation now. As the court found in this case, circumstances have so radically changed that the Board has become a public utility and is now subject to PUC jurisdiction.

4) The Board and amicus curiae raise an obtuse argument relating to §31-12-121, C.R.S. 1973 (1983 Cum.Supp.), which allows a municipality, as a condition precedent to the supplying of municipal services, to require a contemporary agreement by such consumers to consent to the annexation of the area to the supplying municipality. The Board seems to be contending that because it may refuse to serve outlying areas that are not annexed, it cannot be required to do so. This argument is spurious. The Board has developed a large business which has chosen to serve large, unannexed areas that it has staked out as its own service area. In doing so, it is a public utility. As a public utility, it is subject to PUC regulation. Section 40-1-103(1), C.R.S. 1973 (1983 Cum.Supp.).

5) The Board also advances the contention that the trial court "misconstrued" or was "misled" by the Counties' expert testimony. Specifically, the Board contends the court was misled by Mr. Weiskopf's "lack of experience," yet his credentials in the field of public utility accounting are impeccable (Vol.25, pp.15-2 - 15-8), and he was accepted by the trial court as a competent expert witness.

The Board is attempting to retry its case in the Supreme Court. In so doing, it is addressing itself to the wrong forum. The credibility of witnesses and the weight to be accorded their testimony are matters solely within the discretion of the trial court. Matter of Painter's Estate, 628 P.2d 124 (Colo. App. 1981).

6) Finally, the Board argues that the TAP program is fair and reasonable. The court found otherwise, and this finding is amply supported by the record. For example, the record supports the court's conclusion that the withholding of tap allocations to Carl Whitson's customers was arbitrary. (Vol.16, pp.8-206a - 8-255; 8-214). Mr. McMahon's efforts over many years to obtain service, after having been approved for inclusion in a distributor contract service area, only to be denied service by the Board is a further example of the Board's abuse of power and complete control over expansion of contract service areas. (Vol.14, pp.5-184 - 5-255). Moreover, Mr. Ernsten testified how he was denied inclusion in a service area because his district refused to agree to an unreasonably one-sided amended contract. (Vol.16, p.8-255 - 8-274). There is the aforementioned case of Mr. William Collins, who has been unable to get a water tap on his property in Jefferson County for twenty years. (Vol.31, pp.18-127 - 18-128). Finally, Hazen Moore could not get water without annexation. (Vol.13, pp.5-89 - 5-116; see plaintiff's Exhibit A-11.)

With respect to the other contentions in the Board's brief and the amicus briefs regarding the issue of whether the court erred in determining that the Board is a public utility, the Counties submit that these contentions are an attempt to have this Court overturn the trial court's factual findings which are amply supported by the record. The other contentions are speculation regarding what might happen under PUC regulation. These arguments are irrelevant to the issue in this case. The legislature saw fit to establish the PUC for the purpose of regulating public utilities. The fact that the Board, Thornton, Colorado Springs, and Aurora own utilities and wish to provide extra-territorial service without regulation demonstrates the legislature's wisdom in establishing the PUC.

C. The Trial Court Correctly Determined the Contract Distributors Are Not Indispensable Parties Under C.R.C.P. 19.

C.R.C.P. 19 provides for the joinder of persons needed for a just adjudication. An indispensable party is one in whose absence relief may be granted which, as a practical matter, impairs or impedes the parties' interests or leaves a current party subject to risk of incurring multiple or inconsistent obligations with the absent parties. Potts v. Gordon, 34 Colo.App. 128, 525 P.2d 500 (1974). However, mere interest in the subject matter of the litigation, even though substantial, is not sufficient in itself to warrant a determination of indispensability. Thorne

v. Board of County Commissioners, 638 P.2d 69 (Colo. 1981); see Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963).

Generally, a third party is not a necessary or indispensable party simply because the third party's rights or obligations under an entirely separate contract would be seriously affected by an action. Special Jet Services v. Federal Insurance Co., 83 F.R.D. 596 (W.D. Pa. 1979). Thus, it has been held that, although the setting aside of a lease would make impossible the performance of a contract between the lessee and another third party, that third party was only a proper party (see C.R.C.P. 20) and could be joined or not joined at the option of the plaintiff. American Brake Shoe and Foundry Co. v. Interborough Rapid Transit Co., 10 F.Supp. 512 (S.D. N.Y.), aff'd 76 F.2d 1002 (2d Cir. 1935), cert. denied, City of New York v. Murray, 295 U.S. 760, 55 S.Ct. 923, 79 L.Ed. 1702 (1935).

Pertinent to the instant action is Thorne v. Board of County Commissioners, supra. There, the plaintiffs brought an action to seek C.R.C.P. 106(a)(4) review of proceedings resulting in the issuance of special use permits by the Board of County Commissioners of Fremont County to certain mining corporations. The complaint did not join other owners of mineral or surface estates located within the area covered by the special use permits. The board of county commissioners moved to dismiss the action on the basis that the court could not proceed in the absence of

these other landowners. The board argued that the permits created valuable rights in the owners and that such interests could not be impaired in their absence. The trial court agreed, finding that approval of the permits conferred a benefit on the owners of the surface and mineral estates in the permit areas because the permitted activity allowed them to derive an economic and legal benefit from the more complete use of their land. The Supreme Court of Colorado reversed, holding that the interests of the absent landowners were indirect and speculative. Also see Talbott Farms v. Board of County Commissioners, 199 Colo. 338, 607 P.2d 999 (1979); Bender v. District Court, 132 Colo. 12, 231 P.2d 684 (1955).

In this case, the Board and the amicus curiae brief of three water districts[7] assert that contract distributor rights might possibly be impaired by the order of the court in this case and that, therefore, the districts should have been joined as indispensable parties. This argument is without merit. What may or may not be the effect of PUC regulation upon the Denver Water Board and how such regulation may impact on the contract

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7 It should be noted the would-be intervenors are only three of over one hundred fourteen of the Board's service area contractors.

rights of the distributors is not the subject matter of this litigation and is only tangentially and prospectively related to it. The subject matter of this litigation is the relationship between the Counties and the Water Board with respect to the Board's status as a public utility. The contract rights of the distributor districts with respect to PUC regulation does not derive from a common nucleus of operative fact. This is because the "fact," i.e. PUC regulation, has not occurred. Again, their status is that of amicus curiae, not indispensable parties. As more fully set forth in the Counties' answer brief in the water districts' intervention aspect of this appeal (consolidated with this action), the thrust of the Board's argument is focused upon potential possibilities.

Robinson v. Boulder again serves to defeat the Board's contention. There, the distributor district (the Boulder Valley Water and Sanitation District) brought suit to require PUC regulation after the termination of the underlying Robinson v. Boulder litigation. Conversely, recourse to judicial intervention respecting an attempt to prevent PUC regulation must come after, not contemporaneously with, this action. Simply stated, the three districts do not have a case or controversy ripe for judicial review. Consequently, they are not necessary or indispensable parties. Thorne v. Board of County Commissioners,

supra; Special Jet Services, Inc. v. Federal Insurance Co., supra; cf. Norby v. Bold, 195 Colo. 231, 577 P.2d 277 (1978).

None of the cases cited by the Board are relevant to this action. They are all cases in which the third parties were clearly indispensable because of their direct interest in the subject matter of the subject litigation such as where the validity of a tap fee assessment by a municipal entity is being litigated without the presence in the suit of the water users in the service area who are directly affected by the assessment. See, e.g., Arvada v. Denver, 36 Colo.App. 146, 539 P.2d 1294 (1975).

For the foregoing reasons, the trial court correctly ruled that the water districts were not indispensable parties (Vol.1, p.289-294).

D. The Counties Have Standing to Maintain This Action.

The proper inquiry in determining whether a party has standing is whether he has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions. Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535 (1977).

Initially, the Counties note that they do have standing under the doctrine of parens patriae. In West Virginia v. Pfizer, 440 F.2d 1079 (2nd Cir. 1971), an antitrust action was

brought against certain drug companies wherein the Court briefly discussed the doctrine of parens patriae as a basis of standing. The Court stated:

> Parens patriae. . . refers traditionally to the role of the state as sovereign and guardian of persons under a legal disability. . . Recently the doctrine has been used to allow the state to recover damages to quasi-sovereign interests wholly apart from recoverable injuries to individuals residing within the state. These quasi-sovereign interests have included the health, comfort and welfare of the people. . . water rights. . . protection of the air from interstate pollutants, and the general economy of the state.

440 F.2d at 1089.

Moreover, Section 30-11-101(a), C.R.S. 1973 (1983 Cum. Supp.), specifically grants to counties the power to sue. The counties have the power to provide water facilities, §30-20-402(1), C.R.S. 1973 (1983 Cum.Supp.); to plan and develop unincorporated territories, §30-28-103, C.R.S. 1973 (1983 Cum. Supp.); to zone and determine land use in the unincorporated areas, §30-28-111, C.R.S. 1973 (1983 Cum.Supp.); and to classify land uses and distribute land development and utilization, §30-28-115(1), C.R.S. 1973 (1983 Cum.Supp.).

In Board of County Commissioners v. Thornton, 629 P.2d 605 (Colo. 1981), the court held the city of Thornton had standing to challenge the actions of the Adams County Commissioners

in amending the county's comprehensive plan and in rezoning certain property adjacent to the city boundary. The court stated:

> . . . a complaining property owner, such as a city here, has a legally protected interest in insulating its property from adverse effects caused by the legally deficient rezoning of adjacent property.

629 P.2d at 609. Also see Colorado Springs v. State of Colorado, 626 P.2d 1122 (Colo. 1980).

Further, §30-28-115(1), C.R.S. 1973 (1983 Cum.Supp.) provides that a county should enact regulations to protect its tax base. In Denver v. Miller, 151 Colo. 444, 379 P.2d 169 (1963) and Elkins v. Denver, 157 Colo. 252, 402 P.2d 617 (1965), the Supreme Court of Colorado recognized that a county is the proper party plaintiff to protect its tax base and to bring an action on behalf of its citizens and residents.

In this case, the trial court recognized that:

> The Water Board has total control of where water is going to go and the ultimate land use that goes with it . . . . If the commissioners had had the allocations of taps available to them as a planning tool, they could have rotated taps available to all districts within their county in order to plan the development as they found it to best serve their county.

(Vol.2, pp.358-359.) Moreover, the court found that, with respect to the moratorium imposed by the Board in the early 1970's on tap allocations (see Vol.1, p.1-12):

> ... the real reason for such moratorium was to allow the water board to require annexa-

> tion of any area before water would be supplied to it... The immediate and continued loss of territory to the plaintiff caused serious problems in planning, serious problems in zoning, and a serious loss of tax base.

(Vol.2, p.356.)

The Board's argument that the Counties did not have standing to maintain this action is without merit. Their attempt to divert this Court from the obvious statutory provisions granting them a legally protected interest in the foregoing matters by narrowly discussing the doctrine of parens patriae is a red herring. As a matter of law, the Counties had standing to maintain this action. See Wimberly v. Ettenberg, supra.

E. The Trial Court Correctly Denied the Board's Motion to Reopen the Case to Take Additional Evidence.

The Board is correct in asserting that the reopening of a case to allow for additional evidence is within the trial court's discretion. Hoagland v. Celebrity Homes, Inc., 40 Colo. App. 215, 572 P.2d 493 (1977); Lord v. Guyot, 30 Colo. 222, 70 P. 683 (1902); Plummer v. Struby-Estrabrokke Merchantile Co., 23 Colo. 190, 47 P. 294 (1896). A ruling within the trial court's discretion will not be disturbed on review, absent a showing of an abuse of that discretion. Federal Lumber Co. v. Wheeler, 643

P.2d 31 (Colo. 1981); Moseley v. Lamirato, 149 Colo. 440, 370 P.2d 450 (1962).

The Board's contention, however, that the trial court abused its discretion is without merit and spurious. The record contains no information suggesting such an abuse. In fact, the record clearly indicates that denial of the motion was proper and within the sound discretion of the court.

The Board's motion to reopen was in direct opposition to the express provisions of the "Letter of Understanding," an agreement executed after trial was concluded on March 17, 1982, by Marguerite S. Pugsley, then president of the Denver Board of Water Commissioners and by representatives of each County board.

The letter, a copy of which was made part of the record in the Counties' opposition to the motion to reopen, and which is attached hereto as Exhibit "D", specifically provides that at no time would either side move to reopen for any purpose, including the offering of additional evidence. Despite such explicit language to the contrary, the Board moved to reopen the case.

Moreover, the court's refusal to allow the contents of the "Metropolitan Water Development Agreement" into evidence does not show abuse of discretion. The provisions of the agreement which was executed after trial of the case have no bearing upon the issues raised in this lawsuit. Additionally, the agree-

ment does not address the present allocation of taps, the problem of discriminatory service, and the interference by the Board in the land use planning function of the Counties. Finally, the agreement does not contribute to judicial consideration of PUC regulation.

The Board does not have an arbitrary right to have the case reopened. The request to reopen occurred well after the evidence was closed, and after the judge's order was rendered. Given the "Letter of Understanding," and the nature of the "Metropolitan Agreement," the trial court's exercise of discretion in this instance was sound and just, and, therefore, must not be disturbed. Federal Lumber Co. v. Wheeler, supra.

VI. CONCLUSION

The trial court heard evidence from numerous witnesses, many of whom were experts, reviewed exhibits which were replete with detail and technical information, and issued extensive findings of fact and conclusions of law which in essence recognized the defendant Water Board for what it has become, a public utility. The evidence has demonstrated and the Court has found that the defendant City of Denver has created an agency, i.e., the Denver Water Board, that through extra-territorial acts and transactions can control the tax base, growth, zoning, planning and development of its neighbor counties. The substantial and widespread growth

of the Denver Water Board, its appropriation of numerous water decrees based upon representations of service to the metropolitan area and other facts clearly demonstrate that the Water Board has, through a detailed and sophisticated engineering system, developed and staked out an area for service which includes the plaintiff Counties. By virtue of these acts and transactions, the Denver Water Board is a public utility, yet it argues that it should somehow be above the law.

Various entities have filed amicus curiae briefs in which it is argued that the trial court made correct findings but fashioned the wrong remedy (Homebuilders, p.9), and that public utilities regulation will constitute a judicial or bureaucratic interference with the system as it now exists. (Colorado Springs, pp.3 and 6). The Constitution of the State of Colorado, the statutes enacted pursuant thereto, and Colorado case law affirms that under the circumstances and facts of this case, the Denver Water Board is a public utility and is subject to appropriate regulation by the PUC. A municipal utility, even though created by the law, cannot be above the law and must comply with the requirements of regulation when it chooses to become a

public utility. For these reasons, the trial court's findings, conclusions and judgments should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

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IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF BOULDER
STATE OF COLORADO

ACTION NO. 80CV0137-5

BOULDER VALLEY WATER AND SANITATION DISTRICT, ET AL. Complainants, vs. THE CITY OF BOULDER, COLORADO, Respondent.	RULING AND ORDER ON PETITIONERS PETITION FOR WRIT OF CERTIORARI OR REVIEW OF MANDAMUS

JUDGE: MURRAY RICHTEL CLERK: ANGELA JINSEY REPORTER: JANE CAMPBELL

On July 21, 1980 the following actions were taken in the above-captioned case and the Clerk is directed to enter these proceedings in the register of actions:

APPEARANCES: No parties appearing.

I

C.R.S. 1973, 40-3-102 authorizes the Public Utilities Commission ("P.U.C.") to govern and regulate the rates charged by "every public utility" in the State of Colorado.

In Robinson v. City of Boulder, 190 Colo. 357, 547 P.2d 228 (1976) the Colorado Supreme Court found:

> That by agreements with other suppliers to the effect that the latter would not service the Gunbarrel area and by opposing other methods or sources of supply, Boulder has secured a monopoly over area water and sewer utilities.

190 Colo. at 360, 547 P.2d at 230, and concluded that:

> Inasmuch as Boulder is the sole and exclusive provider of water and sewer services in the area...it is a public utility.

190 Colo. at 362, 547 P.2d at 232 (emphasis added).

Relying on Robinson, petitioners, Boulder Valley Water and Sanitation District ("B.V.W.&S.D.")[1] and tax-paying electors residing therein, filed a Formal Complaint with the P.U.C. alleging that under Section 40-3-102, the Commission had jurisdiction to regulate the rates charged by the City for extra-territorial water and sewer services furnished to customers in the B.V.W.&S.D.; challenging the City's rate structure on several substantive grounds; and seeking appropriate relief.

The City filed a motion to dismiss petitioners' complaint for lack of subject-matter jurisdiction. Following a hearing on the City's motion, the hearing examiner concluded that the exclusive authority to prescribe rates and other charges for water and sewer services delegated to the City by C.R.S. 1973, 31-35-402(f) and 31-35-410 pre-empted the jurisdiction over "every public utility" conferred on the Commission by C.R.S. 1973, 40-3-102. He, therefore, recommended dismissal of petitioners' complaint. Thereafter, by Decision No. C79-1857, the P.U.C. overruled petitioners' Exceptions and Motion for Oral Argument and adopted the examiner's Findings of Fact, Conclusions of Law and Order recommending dismissal of the complaint. Petitioners' Motion for Reconsideration, Reargument or Rehearing was denied by Commission Decision No. C80-7.

Having exhausted its administrative remedies, petitioners have now filed a Petition for Writ of Certiorari or Review and Writ of Mandamus Pursuant to C.R.S. 1973, 40-6-115 asking this Court to set aside as unlawful the final decision of the Commission and to order the Commission to hear the substantive matters raised by their complaint.

A certified copy of the record of the proceedings conducted before the P.U.C. has been lodged with the Court. No additional briefs have been filed, the parties having elected to stand upon the memoranda submitted to the Commission. Having considered the petition, the record, the briefs and

the oral argument of counsel, the Court finds, for reasons appearing more fully below, that the Commission erroneously concluded that it lacked jurisdiction over the subject-matter.

II

The question raised by this appeal is whether C.R.S. 1973, 31-35-401 et seq. is to be construed as an exercise of the Legislature's constitutional power[2] to exempt from the regulatory jurisdiction of the P.U.C.[3] the rates charged by a municipally owned water and sewerage utility for public utility services provided to customers outside the municipality's territorial boundaries. C.R.S. 1973, 31-35-401 et seq. authorizes a municipality:

> To operate and maintain water facilities and sewerage facilities or both...for the use of public and private consumers within and without the territorial boundaries of the municipality... .

C.R.S. 1973, 31-35-402(1)(b)(emphasis added), and

> To prescribe...rates, fees, tolls and charges... for the services furnished by...such water facilities or sewerage facilities or both... without any modification, supervision or regulation of any such rates, fees, tolls or charges by any board, agency, bureau, commission or official other than the governing body (of the municipality) collecting them... .

C.R.S. 1973, 31-35-402(1)(f)(emphasis added), and additionally, provides that:

> Insofar as the provisions of this part 4 are inconsistent with the provisions of any other law, the provisions of the part 4 shall be controlling.

C.R.S. 1973, 31-35-410.

As noted above, the City of Boulder, as the exclusive supplier of water and sewer services to customers in the B.V.W.&S.D., has aceded to the status of a "public utility." Robinson v. City of Boulder, 190 Colo. 357, 547 P.2d 228 (1976). Notwithstanding the provisions of Colo. Const. Art V, Sec. 35[4] and Art XXV, which exempt municipally owned utilities from the P.U.C.'s regulatory jurisdiction, see, e.g., People ex rel.

Public Utilities Commission v. City of Loveland, 76 Colo. 188, 230 P. 399 (1924); Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158 (1924), the Colorado Supreme Court has consistently held that:

> (I)t is essential that the P.U.C. be allowed to regulate the public utility services provided by municipalities outside their boundaries.

City of Loveland v. Public Utilities Commission, 195 Colo. 298, 303, 580 P.2d 381, 385 (1978)(emphasis added). The basis for the constitutional distinction the Court has drawn between a municipal utility's intra-territorial and extra-territorial services was elucidated in K.C. Electric Association v. Public Utilities Commission, 191 Colo. 96, 550 P.2d 871 (1976):

> The rationale of Art XXV (and Art V, Section 35) ...is that when a municipally owned utility operates within the municipality, there is no one who needs the protection of the P.U.C. 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 discontent at the next municipal election.
>
> When a municipally owned utility provides utility services outside the municipality, those receiving the service do not have a similar recourse on election day. They have no effective way of avoiding the whims and excesses of the municipality in the absence of state regulation by the P.U.C.

191 Colo. at 100, 550 P.2d at 873-76 (emphasis added). Accord City of Loveland v. Public Utilities Commission; City and County of Denver v. Public Utilities Commission, 181 Colo. 38, 507 P.2d 871 (1973); City of Lamar v. Town of Wiley, 80 Colo. 18, 248 P. 1009 (1926).

Apparently in light of City of Lamar and its progney, respondents concede that Commission jurisdiction over water and sewer services furnished by the City to customers in the B.V.W.&S.D. is not precluded by either Art. V, Sec. 35 or Art. XXV of the Colorado Constitution. However, they contend that C.R.S. 1973, 31-35-402(1)(f) and 410 deprive the Commission of the

regulatory atuority it would otherwise wield over these services, arguing that the statutes execute the Legislature's constitutional power to divest the P.U.C. of jurisdiction over the rates charged for water and sewer utility services provided to extra-territorial customers by designating the municipality itself as the "agency of the State of Colorado"[5] in which exclusive regulatory authority is to be vested.

Respondents' construction of C.R.S. 1973, 31-35-402(1)(f) and 410 relies heavily on the authority of City of Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965). In that case the Court reversed an order of the P.U.C. purporting to set aside a consumated sale of water and sewerage facilities by a private utility company to the City of Thornton. The Court held that:

> 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.

157 Colo. at 193, 402 P.2d at 196 (emphasis added). The constitutional provisions upon which the Court drew were Colo. Const., Art. V, Sec. 35 and Art. XXV. As this Court has already observed, these provisions do not curtail the Commission's jurisdiction over the services supplied by a municipally owned public utility to customers outside municipal boundaries. However, the Supreme Court also invoked C.R.S. 1973, 31-35-401 et seq. as grounds for its conclusion. The Court noted that these statutes:

> Give full power to the municipality, subject only to the electorate...to operate and maintain...water facilities or sewer facilities...for use within and without the territorial boundaries of the municipality...without...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 provision of

> (C.R.S. 1973, 31-35-410) provides "...Insofar as the provisions of this article are inconsistent with the provision of any other law, the provisions of this article shall be controlling.

157 Colo. at 195, 402 P.2d at 197-98 (emphasis in original). It then held that since the statutes conferred complete power on Thornton to acquire and operate water and sewer facilities without submitting to the Commission's jurisdiction, the P.U.C. had no authority to interfere with or set aside the sale of the facilities to the City.

Despite the Thornton Court's failure to expressly reconcile its conclusion with the distinction between intra-territorial and extra-territorial municipal utility services drawn by City of Lamar v. Town of Wiley and its progney, the case would be a cogent argument for respondents' construction of C.R.S. 1973, 31-35-502(1)(f) and 410 had the breadth of its holding not been drawn into question by the recent decision in Matthews v. Tri-County Water Conservancy District, No. 79SC83 (Colo. July 7, 1980). In Matthews the Court held that a statutory water conservancy district was not a "public utility" within the meaning of Section 40-1-103 of Colorado's Public Utilities Law. One of the reasons given for this conclusion was the statutory prohibition against sale, leasing or delivery of water outside the boundaries of the conservancy district. In this connection the Court noted:

> A municipal corporation[6] which operates as a public utility and limits its services to the inhabitants of the municipality only is not subject to P.U.C. regulation...Thornton v. P.U.C., 157 Colo. 188, 402 P.2d 194 (1965)... .

Matthews v. Tri-County Water Conservancy District, slip op. at 8 (emphasis added). The Court's citation to City of Thornton as a case holding that only the intra-territorial services of a municipal utility are exempt from the P.U.C.'s regulatory jurisdiction casts grave doubt on

respondents' argument that because City of Thornton relied on C.R.S. 1973, 31-35-401 et seq. it also exempts the City's extra-territorial public utility services from Commission regulation.

In view of City of Thornton's ambiguous precedential value and the Supreme Court's often reiterated admonition that, absent recourse to the ballot box, a municipal utility's extra-territorial customers "have no effectiveway of avoiding the whims and excesses of the municipality in the absence of state regulation by the P.U.C., "K.C. Electric Association v. Public Utilities Commission, 191 Colo. at 100, 550 P.2d at 874,[7] this Court concludes that C.R.S. 1973, 31-35-402(1)(f) and 410 were not intended to deprive the P.U.C. of regulatory jurisdiction over the rates charged by a municipally owned water and sewage utility for public utility services provided to customers outside the municipality's territorial boundaries.

This construction of C.R.S. 1973, 31-35-401 et seq. is reinforced by the otherwise uncannalized procedural discretion these statutes appear to delegate to municipal governing bodies. When the Legislature enacted the Public Utilities Law, C.R.S. 1973, 40-1-101 et seq., it was careful to ensure that Commission rate-making proceedings, although legislative in character, Public Utilities Commission v. Northwest Water Corporation, 168 Colo. 154, 451 P.2d 266 (1969), incorporated procedural safeguards intended to promote accurate, impartial fact-finding. See C.R.S. 1973, 40-6-101 et seq. Thus, although the P.U.C. is not directly accountable to the electorate, it is requiredto observe rules of procedure which both minimize the risk of "whim and excess" ab initio and, concomittantly, facilitate meaningful judicial review of its findings and conclusions. See generally, Elizondo v. State Department of Revenue, 194 Colo. 113, 570 P.2d 518 (1977). C.R.S. 1973, 31-35-401 et seq., on the other hand, afford the extra-territorial customers of municipal water and sewer utilities little or no protection against abuses of a municipality's rate-making power. As City of Lamar v.

Town of Wiley and subsequent cases have emphasized, non-residents cannot correct abuses at the ballot box. Nor do the provisions of C.R.S. 1973, 31-35-401 et seq. afford them even the rudimentary assurance of fairness furnished by a statutory requirement that rates be made on the record after a hearing and an opportunity to be heard. Moreover, in the absence of procedural safeguards, judicial review will often be incapable of remedying abuses concealed behind the opaque and conclusory record of municipal rate-making proceedings. Therefore, although the due process clauses of the state and federal constitutions may not compel municipalities to adopt even the simplest trial-type procedures when making rates, the Court finds it inconceivable that the Legislature, which exhibited a meticulous concern with fairness and procedural regularity when it drafted the Public Utilities Law, meant C.R.S. 1973, 31-35-401 et seq. to give those municipalities which have aceded to the status of public utilities, exclusive authority to fix the rates charged to their extra-territorial customers for water and sewerage services. Instead, the Court believes that the Legislature intended to submit these rates to the impartial scrutiny of the P.U.C.

III

Accordingly, P.U.C. Decision No. C79-1857 is hereby set aside as unlawful and the Commission is ordered to hear the substantive matters set forth in petitioners' Formal Complaint.

MURRAY RICHTEL
DISTRICT JUDGE

cc: William D. Bremer (R. Box: Dietze...)
Tucker Trautman (R. Box: City Attorney)

The above and foregoing were placed into the ... process to the persons ... indicated.
Date: 7/22/80 By: ...

Tucker Trautman (Mail: 1675 Broadway, Suite 2600, Denver, CO 80202)

The above and ... placed into the ... process to the persons or ... indicated.
Date: ... By: ...

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1 The "Gunbarrel area" referred to in Robinson lies within the B.V.W.&S.D's boundaries.

2 In pertinent part, Colo. Const., Art XXV provides:

> (A)ll power to regulate the facilities, services and rates and charges therefor...of every corporation... defined as a public utility by the laws of the State of Colorado, is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate.
> Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado;...provided...that nothing herein shall be construed to apply to municipally owned utilities.

(emphasis added).

3 C.R.S. 1973, 40-3-102 provides:

> The power and authority is hereby vested in the public utilities commission of the State of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges and tariffs of such public utilities of this state; and to generally supervise and regulate every public utility in this state... .

(emphasis added).

4 Colo. Const., Art V, Sec. 35 provides:

> The general assembly shall not delegate to any special commissions, private corporation or association any power to make, supervise or interfere with any municipal improvement, money, property or effects...or to...perform any municipal functions whatsoever.

Art XXV provides that the regulatory powers of the P.U.C. do not extend to municipally owned utilities. See footnote 2, supra. See also C.R.S. 1973, 40-1-103(1).

5 Colo. Const., Art XXV.

6 Under C.R.S. 1973, 37-45-112(7) a water conservancy district has the powers of a municipal corporation.

7 It should be noted that the Tri-County Water Conservancy District was not only statutorily forbidden to sell water outside district boundaries, but was also electorally accountable to its customers. Matthews, slip op. at 6. Thus, Matthews, unlike City of Thornton (at least as read by respondents), is easily reconciled with City of Lamar v. Town of Wiley and its progney.

and reasonable rate must be based upon evidentiary facts, calculations, known factors, relationship between known factors, and adjustments which may affect the relationship between known factors. Mountain States Tel. & Tel. Co. v. Public Util. Comm'n, 182 Colo. 269, 513 P.2d 721 (1973).

A utility is entitled to a reasonable return on the value of the property which is used and useful to the rendering of its service to the public. Peoples Natural Gas Div. of N. Natural Gas Co. v. Public Util. Comm'n, 193 Colo. 421, 567 P.2d 377 (1977).

Portion of capital structure included in calculation of rates. It is proper and within the public utility commission's authority to include only that portion of the capital structure which finances the rate base in the calculation of just and reasonable rates. Peoples Natural Gas Div. of N. Natural Gas Co. v. Public Util. Comm'n, 193 Colo. 421, 567 P.2d 377 (1977).

It is within the power of the commission to pierce corporate structures of corporations which also operate nonutility divisions or subsidiaries to impute a capital structure for the utility operation, which is reflective of the capitalization actually backing the utility operation. Peoples Natural Gas Div. of N. Natural Gas Co. v. Public Util. Comm'n, 193 Colo. 421, 567 P.2d 377 (1977).

Historic test-year procedure as a basis for rate fixing is not inherently unsound, but rather, the use of the most recent test year available is a reliable guideline in fixing rates to be charged for telephone service. Mountain States Tel. & Tel. Co. v. Public Util. Comm'n, 182 Colo. 269, 513 P.2d 721 (1973).

Relationship between costs, investment, and revenue in the historic test year is generally a constant and reliable factor upon which a regulatory agency can make calculations which formulate the basis for fair and reasonable rates to be charged. Mountain States Tel. & Tel. Co. v. Public Util. Comm'n, 182 Colo. 269, 513 P.2d 721 (1973).

But blind adherence to such relationship without weighing certain other factors is error. Blind adherence in a rate case to the relationship between costs, revenue, and average investment in the historic test period without weighing the factors involved with proper in-period and out-of-period adjustments would be erroneous. Mountain States Tel. & Tel. Co. v. Public Util. Comm'n, 182 Colo. 269, 513 P.2d 721 (1973).

What out-of-period adjustment involves. An out-of-period adjustment involves a change which has occurred or will occur or is expected to occur after the close of the test year. Mountain States Tel. & Tel. Co. v. Public Util. Comm'n, 182 Colo. 269, 513 P.2d 721 (1973).

Such adjustments may be used to test the reasonableness of requested rate increases. Mountain States Tel. & Tel. Co. v. Public Util. Comm'n, 182 Colo. 269, 513 P.2d 721 (1973).

Commission may not question reasonableness of rate authorized by federal agency. Where the rate or acquisition cost is subject to federal regulation and authorized by a federal regulatory agency, the public utilities commission may not question its reasonableness. Public Serv. Co. v. Public Util. Comm'n, 644 P.2d 933 (Colo. 1982).

Telephone company's proposed use of projected costs or budget estimates for future period would be an unreliable guideline for setting rates to be charged, as it would not be in the public interest to fix rates on pure conjecture. Mountain States Tel. & Tel. Co. v. Public Util. Comm'n, 182 Colo. 269, 513 P.2d 721 (1973).

Rate of return on common equity of telephone company of 11.4 percent is not unlawful as being in violation of this statute. Mountain States Tel. & Tel. Co. v. Public Util. Comm'n, 182 Colo. 269, 513 P.2d 721 (1973).

Review. If the rate of return allowed is just and reasonable, and there is competent evidence to support the finding of the public utility commission, then a reviewing court may not substitute its judgment for that of the commission. Peoples Natural Gas Div. of N. Natural Gas Co. v. Public Util. Comm'n, 193 Colo. 421, 567 P.2d 377 (1977).

Applied in Colorado Mun. League v. Public Util. Comm'n, 198 Colo. 217, 597 P.2d 586 (1979); City of Montrose v. Public Utils. Comm'n, 629 P.2d 619 (Colo. 1981).

40-3-102. Regulation of rates - correction of abuses. The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise

of such power, and to enforce the same by the penalties provided in said articles through proper courts having jurisdiction; except that nothing in this article shall apply to municipal natural gas or electric utilities for which an exemption is provided in the constitution of the state of Colorado, within the authorized service area of each such municipal utility except as specifically provided in section 40-3.5-102.

Source: Amended, L. 83, p. 1552, § 1.

Law reviews.

For article, "Retail Competition in the Electric Utility Industry", see 60 Den. L.J. 1 (1982).

Broad powers under color of state law. The Colorado general assembly has bestowed broad powers upon the public utilities commission. Public utilities, even though privately financed and owned, operating pursuant to the regulation of the commission, are granted existence by virtue of state law, and thereafter carry on business under color of state law. Denver Welfare Rights Organization v. Public Util. Comm'n, 190 Colo. 329, 547 P.2d 239 (1976).

In the area of utility regulation, the commission has broadly based authority to do whatever it deems necessary or convenient to accomplish the legislative functions delegated to it. City of Montrose v. Public Utils. Comm'n, 629 P.2d 619 (Colo. 1981).

General assembly has vested commission with considerable discretion in its choice of the means used to fix rates. Colorado Ute Elec. Ass'n v. Public Util. Comm'n, 198 Colo. 534, 602 P.2d 861 (1979).

Duty of commission to protect public interest. Under the Colorado statutory scheme, the public utilities commission is charged with protecting the interest of the general public from excessive, burdensome rates. Public Util. Comm'n v. District Court, 186 Colo. 278, 527 P.2d 233 (1974).

The commission has a general responsibility to protect the public interest regarding utility rates and practices. City of Montrose v. Public Utils. Comm'n, 629 P.2d 619 (Colo. 1981).

A primary purpose of utility regulation is to insure that the rates charged are not excessive or unjustly discriminatory. Cottrell v. City & County of Denver, 636 P.2d 703 (Colo. 1981).

Preferential rate-making restricted. Although the public utilities commission has been granted broad rate making powers by art. XXV, Colo. Const., the commission's power to effect social policy through preferential rate making is restricted by section 40-3-106 (1) and this section, no matter how deserving the group benefiting from the preferential rate may be. Mountain States Legal Foundation v. Public Util. Comm'n, 197 Colo. 56, 590 P.2d 495 (1979).

The commission unlawfully delegated its rate-making obligation to a utility when it conferred upon it the discretion to determine whether or not a developer should receive a refund of the underground component of its cash advances and whether to charge underground customers higher rates. Baca Grande Corp v. Public Util. Comm'n, 190 Colo. 201, 544 P.2d 977 (1976).

Rate-making is not exact science, but a legislative function involving many questions of judgment and discretion, and that judgment or discretion must be based upon evidentiary facts, calculations, known factors, relationship between known factors, and adjustments which may affect the relationship between known factors. Colorado Ute Elec. Ass'n v. Public Util. Comm'n, 198 Colo. 534, 602 P.2d 861 (1979); City of Montrose v. Public Utils. Comm'n, 629 P.2d 619 (Colo. 1981).

And commission not bound by prior decisions. Because of the legislative character of rate-making, the commission is not bound by its prior decisions or by any doctrine similar to stare decisis. Colorado Ute Elec. Ass'n v. Public Util. Comm'n, 198 Colo. 534, 602 P.2d 861 (1979).

So that the making of rates, etc.

In accord with original. See Public Util. Comm'n v. District Court, 186 Colo. 278, 527 P.2d 233 (1974); City of Montrose v. Public Utils. Comm'n, 629 P.2d 619 (Colo. 1981).

The judiciary must refrain from any semblance of rate-making. Public Util. Comm'n v. District Court, 186 Colo. 278, 527 P.2d 233 (1974).

Public utilities law forbids estoppel of public utility from collecting established rate. Goddard v. Public Serv. Co., 43 Colo. App. 77, 599 P.2d 278 (1979).

A public utility must have adequate revenues for operating expenses and to cover the capital costs of doing business. Public Util. Comm'n v. District Court, 186 Colo. 278, 527 P.2d 233 (1974).

The revenues must be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to

attract capital. Public Util. Comm
Court, 186 Colo. 278, 527 P.2d 23

**Reasonable rate determine
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method employed, which determ
a rate is just and reasonable. City
v. Public Utils. Comm'n, 629 P.2
1981).

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States Tel. & Tel. Co. v. Public U
182 Colo. 269, 513 P.2d 721 (1973).

**The right of a utility customer
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the service and product provided.
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upon either the posting of what is
indemnity bond or the assertion
founded claim that would justify
er's refusal to pay for the servic
rendered. Denver Welfare Right
v. Public Util. Comm'n, 190 Co
P.2d 239 (1976).

**Earnings of the stockholders
prime consideration** in rate case
States Tel. & Tel. Co. v. Public U
182 Colo. 269, 513 P.2d 721 (1973).

**Cost of capital must be given a
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Tel. Co. v. Public Util. Comm'
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**Portion of capital structure inclu
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40-3-103. Utilities to file

Law reviews.

For article, "Retail Competition
tric Utility Industry", see 60 D
(1982).

40-3-104. Changes in ra

New rates not held invalid. Th
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ARTICLE 3.5

Regulation of Rates and Charges by Municipal Utilities

40-3.5-101. Application - reasonable charges - adequate service. (1) This article shall be applicable within the authorized electric and natural gas service areas of each municipal utility which lie outside the jurisdictional limits of such municipality. Insofar as municipal utilities establish rates, charges, and tariffs and any regulations pertaining thereto in accordance with the provisions of this article, the provisions of section 40-1-104 and articles 4, 6, and 7 of this title shall not apply. Nothing in this article shall be construed as limiting the applicability of article 5 of this title.

(2) All charges made, demanded, or received by any municipal utility for any rate, product, or commodity furnished or to be furnished or any service rendered or to be rendered shall be just, reasonable, and sufficient.

(3) Every municipal utility shall furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, its employees, and the public, and as shall in all respects be adequate, efficient, just, and reasonable.

(4) For the purposes of this article, "municipal utility" means a municipal natural gas or electric utility.

Source: Added, L. 83, p. 1553, § 2.

40-3.5-102. Regulation of rates. The power and authority is hereby vested in the governing body of each municipal utility and it is hereby made the duty of each such governing body to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of its municipal utility within its authorized electric and natural gas service areas which lie outside the jurisdictional limits of the municipality. No rate, charge, or tariff shall unjustly discriminate between or among those customers or recipients of any commodity, service, or product of the municipal utility within the authorized service area. In the event that any rate, charge, or tariff established within the authorized service area which lies outside the jurisdictional limits of the municipality varies from the rate, charge, or tariff established for the same class of customers or recipients of any such service within the authorized service area which lies inside the jurisdictional limits of the municipality, such rate, charge, or tariff shall not become effective until reviewed and approved by the commission. Such review and approval shall be in accordance with the provisions of article 3 of this title; except that in no event shall the commission modify or establish such rate, charge, or tariff to an amount lower than that established by the municipality for the same

class of customers or recip
service area which lies insid

Source: Added, L. 83, p.

40-3.5-103. Rate schedu
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Source: Added, L. 83, p.

40-3.5-104. Changes in
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changes shall be published

class of customers or recipients of any utility service within the authorized service area which lies inside the jurisdictional limits of the municipality.

Source: Added, L. 83, p. 1553, § 2.

40-3.5-103. Rate schedules. Municipal utilities shall print and keep open for public inspection schedules showing all rates and charges collected or enforced, or to be collected or enforced, together with all rules, regulations, contracts, privileges, and facilities which in any manner affect or relate to rates and service within the authorized electric and natural gas service areas of the municipal utility which lie outside the jurisdictional limits of the municipality.

Source: Added, L. 83, p. 1553, § 2.

40-3.5-104. Changes in rates - notice and public hearing. (1) (a) No change shall be made by any municipal utility in any rate or charge or in any rule, regulation, or contract relating to or affecting any base rate, charge, or service, or in any privilege or facility, except after thirty days' notice to the public. Such notice shall be given by keeping open for public inspection new schedules stating plainly the changes to be made in the schedules then in force and the time when the changes will go into effect. In addition, such notice shall be given by publishing the proposed new schedule, or if that is impractical due to the size or bulk of the proposed new schedule, by publishing a notice of the availability of the proposed new schedule for public inspection, at least once in at least one newspaper of general circulation in the authorized service area at least thirty days and no more than sixty days prior to the date set for public hearing on and adoption of the new schedule.

(b) In addition to the notice provided for in paragraph (a) of this subsection (1), if a municipal utility serves customers who live outside the municipal corporate boundaries, notice of any change in any rate or charge or in any rule, regulation, or contract relating to or affecting any base rate, charge, or service or any change in any privilege or facility shall be given by mailing to such customer notification of any such change.

(2) The notice required by subsection (1) of this section shall also specify the date, time, and place at which the public hearing shall be held by the governing body of the municipal utility to consider the proposed new schedule. The notice shall specify that each municipal utility customer shall have the right to appear, personally or through counsel, at such hearing for the purpose of providing testimony regarding the proposed new schedule. Said public hearing shall be held on the date and time and at the place set forth in the notice; except that the governing body of the municipal utility may adjourn and reconvene said hearing as it deems necessary.

(3) The governing body of the municipal utility, for good cause shown, may allow changes without requiring the thirty days' notice and public hearing by an order specifying the changes to be made, the circumstances necessitating the change without requiring the thirty days' notice and public hearing, the time when the changes shall take effect, and the manner in which the changes shall be published.

(4) Insofar as municipal utilities establish rates, charges, and tariffs and any regulations pertaining thereto in accordance with the provisions of this article, any conflict shall be resolved by the commission in accordance with the procedures contained in article 6 of this title upon the filing of a complaint by no less than five percent of the affected electric or natural gas customers outside the corporate limits of the municipality or by five such customers, whichever number is greater. Any such complaint shall be filed with the commission within thirty days after the final decision by the governing body of the municipality to change a rate, charge, or tariff or any regulation pertaining thereto. If such complaint is heard by the commission and is deemed not frivolous, all reasonable costs as determined by the commission, including reasonable attorney fees, shall be paid by the utility. In any hearing conducted pursuant to the provisions of this section, the burden of proof shall be sustained by the municipal utility.

Source: Added, L. 83, p. 1554, § 2.

40-3.5-105. Free and reduced service prohibited - exceptions. Except as otherwise provided in this section, no municipal utility shall charge, demand, collect, or receive a greater or lesser or different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates and charges applicable to such product, commodity, or service as specified in its schedules on file and in effect at the time, nor shall any such municipal utility refund or remit, directly or indirectly or in any manner or by any device, any portion of the rates and charges so specified nor extend to any corporation or person any form of contract or agreement or rule or regulation or any facility or privilege except one which is regularly and uniformly extended to all corporations and persons. The governing body of the municipal utility may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable.

Source: Added, L. 83, p. 1555, § 2.

40-3.5-106. Advantages prohibited - graduated schedules. (1) No municipal utility, as to rates, charges, service, facilities, or in any other respect, shall make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No municipal utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either between localities or between any class of service. The governing body of each municipal utility shall determine the reasonableness of any such difference.

(2) Nothing in this article shall prohibit a municipal utility engaged in the production, generation, transmission, distribution, or furnishing of heat, light, gas, or power from establishing a graduated scale of charges subject to the provisions of this article.

(3) Nothing contained in this article shall exempt from the public utilities commission of the state of Colorado the power and authority to regulated

the rates, charges, tariffs
of natural gas by a municip

Source: Added, L. 83, p.

40-3.5-107. Fees. Muni
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Source: Added, L. 83, p.

40-4-101. Regulations, servic
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40-4-101. Regulations, s
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Source: Amended, L. 80,

Broad powers under color of stat
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broad powers upon the public utiliti

the rates, charges, tariffs and any regulations pertaining thereto of the sale of natural gas by a municipal utility to another public utility.

Source: Added, L. 83, p. 1555, § 2.

40-3.5-107. Fees. Municipal utilities authorized to serve areas which lie outside their municipal corporate limits shall be subject to providing annual reports of gross operating revenues, computation of fees, and payment of such fees relating to those areas.

Source: Added, L. 83, p. 1555, § 2.

ARTICLE 4

Service and Equipment

40-4-101. Regulations, service, and facilities prescribed. (1) Whenever the commission, after a hearing upon its own motion or upon complaint, finds that the rules, regulations, practices, equipment, facilities, or service of any public utility or the methods of manufacture, distribution, transmission, storage, or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, equipment, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed and shall fix the same by its order, rule, or regulation.

(2) The commission shall prescribe rules and regulations for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and upon proper tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

(3) The commission shall prescribe rules and regulations for the termination of gas and electric service to residential customers. Said rules and regulations shall require that the customer be given reasonable notice and an opportunity to be heard by the terminating utility company before termination of gas or electric service and that such service may not be terminated during certain periods if the customer establishes that termination of the service would be especially dangerous to the health or safety of the customer and that he is unable to pay for the service as regularly billed by the utility, or that he is able to pay but only in reasonable installments.

Source: Amended, L. 80, p. 748, § 1.

Broad powers under color of state law. The Colorado general assembly has bestowed broad powers upon the public utilities commission. Public utilities, even though privately financed and owned, operating pursuant to the regulation of the commission, are granted

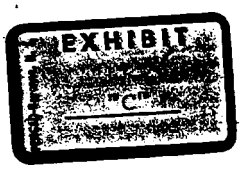
First Regular Session

Fifty-fourth General Assembly

LDO NO. 83 0581/1 HOUSE BILL NO. 1283

STATE OF COLORADO

Business Affairs & Lal



BY REPRESENTATIVE Hamlin

A BILL FOR AN ACT

CONCERNING REGULATION BY THE PUBLIC UTILITIES COMMISSION OF RATES AND CHARGES BY MUNICIPAL NATURAL GAS AND ELECTRIC UTILITIES.

Bill Summary

(Note: This summary applies to this bill as introduced and does not necessarily reflect any amendments which may be subsequently adopted.)

Provides for changes in the manner of regulation of the rates of municipally owned electric and natural gas service in areas outside the municipal boundaries. Requires such municipal utilities to publish rate schedules, and requires public notice and hearing for rate changes. Allows municipal utilities to grant special privileges to classes of users and to use graduated charges.

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

SECTION 1. Section 40-3-102, Colorado Revised Statutes 1973, is amended to read:

40-3-102. Regulation of rates - correction of abuses. The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and

Capital letters inc[illegible] new material to be added to existing statute.
Dashes th[illegible] words indicate deletions from

regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in said articles through proper courts having jurisdiction, EXCEPT THAT NOTHING IN THIS ARTICLE SHALL APPLY TO MUNICIPAL Natural GAS or Electric UTILITIES FOR WHICH AN EXEMPTION IS PROVIDED IN THE CONSTITUTION OF THE STATE OF COLORADO, WITHIN THE AUTHORIZED SERVICE AREA OF EACH SUCH MUNICIPAL UTILITY EXCEPT AS SPECIFICALLY PROVIDED IN SECTION 40-3.5-102.

SECTION 2. Title 40, Colorado Revised Statutes 1973, as amended, is amended BY THE ADDITION OF A NEW ARTICLE to read:

ARTICLE 3.5

Regulation of Rates and Charges by Municipal Utilities

40-3.5-101. Application - reasonable charges - adequate service. (1) This article shall be applicable within the authorized electric and natural gas service areas of each municipal utility which lie outside the jurisdictional limits of such municipality. Insofar as municipal utilities establish rates, charges, and tariffs and any re-

pertaining thereto in accordance with the provisions of this article, the provisions of section 40-1-104 and articles 4, 6, and 7 of this title shall not apply. Nothing in this article shall be construed as limiting the applicability of article 5 of this title.

(2) All charges made, demanded, or received by any municipal utility for any rate, product, or commodity furnished or to be furnished or any service rendered or to be rendered shall be just, reasonable, and sufficient.

(3) Every municipal utility shall furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall in all respects be adequate, efficient, just, and reasonable. (4) For purposes of this article "municipal utility" means municipal natural gas or electric utility.

40-3.5-102. Regulation of rates. The power and authority is hereby vested in the governing body of each municipal utility and it is hereby made the duty of each such governing body to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of its municipal utility within its authorized electric and natural gas service areas which lie outside the jurisdictional limits of the municipality. No rate, charge, or tariff shall unjustly discriminate between or among those customers or recipients of any commodity, service, or product of the municipal utility within the authorized service area.

In the event that any rate, charge, or tariff established within the authorized service area which lies outside the jurisdictional limits of the municipality varies from ~~exceeds~~ the rate, charge, or tariff established for the same class of customers or recipients of any such service within the authorized service area which lies inside the jurisdictional limits of the municipality, such ~~higher~~ rate, charge, or tariff shall not become effective until reviewed and approved by the commission. Such review and approval shall be in accordance with the provisions of article 3 of this title; except that, in no event shall the commission modify or establish such rate, charge, or tariff to an amount lower than that established by the municipality for the same class of customers or recipients of any utility service within the authorized service area which lies inside the jurisdictional limits of the municipality.

40-3.5-103. Rate schedules. Municipal utilities shall print and keep open for public inspection schedules showing all rates and charges collected or enforced, or to be collected or enforced, together with all rules, regulations, contracts, privileges, and facilities which in any manner affect or relate to rates and service within the authorized electric and natural gas service areas of the municipal utility which lie outside the jurisdictional limits of the municipality.

40-3.5-104. Changes in rates - notice and public

hearing. (1) No change shall be made by any municipal utility in any rate or charge or in any rule, regulation, or contract relating to or affecting any base rate, charge, or service, or in any privilege or facility, except after thirty days' notice to the public. Such notice shall be given by keeping open for public inspection new schedules stating plainly the changes to be made in the schedules then in force and the time when the changes will go into effect. In addition, such notice shall be given by publishing the proposed new schedule, or if that is impractical due to the size or bulk of the proposed new schedule, by publishing a notice of the availability of the proposed new schedule for public inspection, at least once in at least one newspaper of general circulation in the authorized service area at least thirty days and no more than sixty days prior to the date set for public hearing on and adoption of the new schedule.

(2) The notice required by subsection (1) of this section shall also specify the date, time, and place at which the public hearing shall be held by the governing body of the municipal utility to consider the proposed new schedule. The notice shall specify that each municipal utility customer shall have the right to appear, personally or through counsel, at such hearing for the purpose of providing testimony regarding the proposed new schedule. Said public hearing shall be held on the date and time and at the place set forth in the notice; except that the governing body of the municipal

utility may adjourn and reconvene said hearing as it deems necessary.

(3) The governing body of the municipal utility, for good cause shown, may allow changes without requiring the thirty days' notice and public hearing by an order specifying the changes to be made, the circumstances necessitating the change without requiring the thirty days' notice and public hearing, the time when the changes shall take effect, and the manner in which the changes shall be published.

40-3.5-105. Free and reduced service prohibited - exceptions. Except as otherwise provided in this section, no municipal utility shall charge, demand, collect, or receive a greater or lesser or different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates and charges applicable to such product, commodity, or service as specified in its schedules on file and in effect at the time, nor shall any such municipal utility refund or remit, directly or indirectly or in any manner or by any device, any portion of the rates and charges so specified nor extend to any corporation or person any form of contract or agreement or rule or regulation or any facility or privilege except one which is regularly and uniformly extended to all corporations and persons. The governing body of the municipal utility may by rule or order establish such exceptions from the operation of this prohibition as it may consider just and reasonable.

40-3.5-106. Advantages prohibited - graduated schedules. (1) No municipal utility, as to rates, charges, service, facilities, or in any other respect, shall make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No municipal utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either between localities or between any class of service. The governing body of each municipal utility shall determine the reasonableness of any such difference.

(2) Nothing in this article shall prohibit a municipal utility engaged in the production, generation, transmission, distribution, or furnishing of heat, light, gas, or power from establishing a graduated scale of charges subject to the provisions of this article.

SECTION 3. Repeal. 40-3-106 (5), Colorado Revised Statutes 1973, as amended, is repealed.

SECTION 4. 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.

(3) see 3/28/83 Amendment in Finance Committee

Referred to Committee indicated:

H.B. 1118 amended—Rereferred to Judiciary.

The Chairman moved the adoption of the Committee of the Whole Report. As shown by the following roll call vote, a majority of those elected to the House voted in the affirmative, and the Report was **adopted.**

YES 65		NO 0		EXCUSED 0		ABSENT 0	
Allison	Y	Dyer	Y	Knox	Y	Reeves	Y
Armstrong	Y	Entz	Y	Kopel	Y	Robb	Y
Arnold	Y	Faatz	Y	Larson	Y	Schauer	Y
Artist	Y	Fenlon	Y	Lee	Y	Scherer	Y
Bath	Y	Fine	Y	Lucero	Y	Shoemaker	Y
Bird	Y	Fleming	Y	Markert	Y	Skaggs	Y
Bowen	Y	Gillis	Y	Martinez	Y	Strahle	Y
Brown	Y	Groff	Y	McInnis	Y	Taylor	Y
Bryan	Y	Hamlin	Y	Mielke	Y	T-Little	Y
Burkhardt	Y	Heim	Y	Minahan	Y	Tebedo	Y
Campbell	Y	Hernandez	Y	Moore	Y	Trujillo	Y
Castro	Y	Herzog	Y	Neale	Y	Underwood	Y
Dambman	Y	Hover	Y	Owens	Y	Wattenberg	Y
Davoren	Y	Hume	Y	Pankey	Y	Webb	Y
DeFilippo	Y	Johnson	Y	Paulson	Y	Wright	Y
Dunning	Y	Kirscht	Y	Prendergast	Y	Younglund	Y
						Mr. Speaker	Y

REPORTS OF COMMITTEES OF REFERENCE

BUSINESS AFFAIRS AND LABOR

The Committee recommends the following:

H.B. 1283 be amended as follows, and as so amended, be referred to the Committee of the Whole with favorable recommendation:

Amend printed bill, page 2, line 12, after "MUNICIPAL", insert "NATURAL GAS OR ELECTRIC".

Page 3, after line 15, insert "(4) For the purposes of this article, "municipal utility" means municipal natural gas or electric utility.".

Page 4, line 3, strike "exceeds" and substitute "varies from"; line 7, strike "higher".

JUDICIARY

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H.B. 1248 b

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FINANCE

The Committee recommends the following:

H.B. 1074 be amended as follows, and as so amended, be referred to the Committee on Appropriations with favorable recommendation:

Amend the Transportation committee amendment as printed in House Journal, March 11, page 589, line 14, strike "two cents" and substitute "one cent".

H.B. 1198 be amended as follows, and as so amended, be referred to the Committee of the Whole with favorable recommendation:

Amend printed bill, page 2, line 8, strike "Thirty" and substitute "Twenty-four", and strike "three" and substitute "ten";

line 11, strike "nine" and substitute "two thousand four";

line 25, strike "eighteen" and substitute "twelve".

Page 3, line 1, strike "fifty" and substitute "forty";

line 2, strike "four" and substitute "three";

line 5, strike "two hundred" and substitute "one hundred twenty".

H.B. 1283 be amended as follows, and as so amended, be referred to the Committee of the Whole with favorable recommendation:

Amend printed bill, page 7, after line 16, insert the following:

"(3) Nothing contained in this article shall exempt from the public utilities commission of the state of Colorado the power and authority to regulate the rates, charges, tariffs and any regulations pertaining thereto of the sale of natural gas by a municipal utility to another public utility.

40-3.5-107. Fees. Municipal electric and natural gas utilities authorized to serve areas which lie outside their municipal corporate limits shall be subject to providing annual reports of gross operating revenues, computation of fees, and payment of such fees relating to those areas.".

CHAPTER 451

UTILITIES

REGULATION OF RATES AND CHARGES

HOUSE BILL NO. 1283. BY REPRESENTATIVES Hamlin, Bath, Bird, Dunning, Larson, Neale, Paulson, Reeves, and Tebedo:
Also SENATORS Beatty and Soash.

AN ACT

CONCERNING REGULATION BY THE PUBLIC UTILITIES COMMISSION OF RATES AND CHARGES BY MUNICIPAL NATURAL GAS AND ELECTRIC UTILITIES.

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

Section 1. 40-3-102, Colorado Revised Statutes 1973, is amended to read:

40-3-102. Regulation of rates - correction of abuses. The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in said articles through proper courts having jurisdiction; EXCEPT THAT NOTHING IN THIS ARTICLE SHALL APPLY TO MUNICIPAL NATURAL GAS OR ELECTRIC UTILITIES FOR WHICH AN EXEMPTION IS PROVIDED IN THE CONSTITUTION OF THE STATE OF COLORADO. WITHIN THE AUTHORIZED SERVICE AREA OF EACH SUCH MUNICIPAL UTILITY EXCEPT AS SPECIFICALLY PROVIDED IN SECTION 40-3.5-102.

Section 2. Title 40, Colorado Revised Statutes 1973, as amended, is amended BY THE ADDITION OF A NEW ARTICLE to read:

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

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EXHIBIT

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LETTER OF UNDERSTANDING

RE: The Board of County Commissioners of Arapahoe Adams and Jefferson, et al.
v. The Denver Board of Water Commissioners, et al.
Civil Action No. C-51288

It is agreed by the parties to the above captioned matter that trial of same will continue on March 17, 1982, until completion of all evidence and closing argument. At that time each side will rest with the specific understanding that the case will not be re-opened for any purpose, including the offering of additional evidence.

It is agreed by the parties to the above captioned matter that the Court should withhold issuance of Findings of Fact and Conclusions of Law for sixty (60) days, or until such further time as may be mutually agreed upon.

BY: _____
Board of County Commissioners of the County of Adams

BY: _____
Board of County Commissioners of the County of Arapahoe

BY: _____
Board of County Commissioners of the County of Jefferson

BY: _____
The Denver Board of Water Commissioners

Dated this 18th day of March, 1982.