10-21-1983

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

SUPREME COURT OF THE STATE OF COLORADO

Case No. 83-SA-252

BRIEF OF AMICUS CURIAE, THE CITY OF THORNTON, acting by and through its Utilities Board

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THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ADAMS; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON; JESSE FERGE; and KATHLEEN FERGE, Plaintiffs-Appellees, v. THE DENVER BOARD OF WATER COMMISSIONERS; THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, a municipal corporation; WILLIAM H. McNICHOLS, Mayor; and THE DENVER PLANNING BOARD, Defendants-Appellants.	Appeal from the District Court in and for the County of Denver, State of Colorado No. C-51288, Courtroom 19, Honorable William M. Ela, Judge

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BROADHURST & PETROCK
Kenneth L. Broadhurst - #1659
J. J. Petrock - #2881
Frederick A. Fendel, III - #10476
Ronald D. Hutchinson - #_____
1630 Welton Street - Suite 200
Denver, Colorado 80202
(303) 534-0702

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ISSUES PRESENTED

I. IN HOLDING THAT DENVER IS A PUBLIC UTILITY, DID THE DISTRICT COURT PROPERLY APPLY THE DEFINITION OF A "PUBLIC UTILITY" DEVELOPED BY STATUTE AND BY THIS COURT IN PREVIOUS CASES?

Although numerous issues are raised by this appeal, Thornton will deal only with this aspect of the case.

STATEMENT OF THE CASE

Thornton adopts the Statement of the Case by Denver, with the following additional comments.

Thornton sought amicus curiae status because some principles involved in this appeal potentially apply to its operations. While the facts of Thornton's outside service are not identical, there are enough superficial similarities to give Thornton a substantial interest in the outcome of Denver's appeal.

Like Denver, Thornton is a home-rule city. Thornton currently operates the fourth largest water and sewer utility in the Metro Area. It provides water and sewer service to approximately 65,000 customers, of whom 20,000 are located outside the city limits. Thornton has a reliable and growing water supply. There is much potential for growth of service within and without the city. Thornton competes aggressively with other purveyors of water and sewer service, for service contracts in the northeast quadrant of the Metro Area. Competing municipal and quasi-municipal entities in this area include Westminster, South

Adams County Water and Sanitation District, Brighton, Crestview Water and Sanitation District, and Denver.

Thornton is a party to the Metropolitan Water Development Agreement, a comprehensive agreement among Denver and more than fifty suburban municipal and quasi-municipal governments for joint development of future water projects. As an outgrowth of the Metropolitan Agreement agreements for the development of particular projects such as, Two Forks Reservoir are now pending.

Thornton has had differences with the PUC in the past, City of Thornton v. PUC, 154 Colo. 431, 391 P.2d 374 (1964). City of Thornton v. PUC, 157 Colo. 188, 402 P.2d 194 (1965). It is Thornton's hope that this appeal will clarify the applicable law sufficiently so that its affairs may, if necessary, be arranged to avoid any repetition of such controversies in the future.

SUMMARY OF ARGUMENT

Express statutory language permits cities to provide extraterritorial water and sewer service free of regulation by the State. This Court has so interpreted the applicable statutes and that interpretation has been ratified by the people and the General Assembly.

Robinson v. Boulder is distinguished by its facts and the applicable law. Englewood v. Denver remains the controlling precedent because the law is unchanged and the facts as found do not establish that Denver is a public utility.

Subjecting Denver to PUC regulation would have impermissible effects on Denver's service contracts and the Metropolitan Water Development Agreement, in the absence of all signatories as parties.

The District Court must be reversed and the Complaint dismissed. In the alternative, all indispensable parties must be joined for a new trial.

ARGUMENT

The term "public utility" is defined by statute, C.R.S. 1973, §40-1-103(1), as follows:

> "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."

In City of Englewood v. City & County of Denver, 123 Colo. 290, 229 P.2d 667 (1951), (hereinafter cited as "Englewood"), this Court set forth the most commonly quoted interpretation of the statutory definition:

> "We find little need to enter into a lengthy discussion of what is or what is not a public utility, because we would ultimately apply the almost universally accepted test, which summarized is, that 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 enforceable right to demand it." 229 P.2d 672, 673.

This definition has been applied repeatedly in cases including Robinson v. City of Boulder, 190 Colo. 357, 547 P.2d 228 (1976), (hereinafter cited as "Robinson"), which the District Court also determined was important to its decision in this matter.

The District Court considered Englewood and Robinson to be the two most important precedents.

In Englewood, this Court determined in 1951 that under the facts and law existing at that time Denver did not meet the accepted legal definition of a public utility. Its rates could not be subject to regulation by the Public Utilities Commission ("PUC"). In Robinson, twenty-five years later, this Court held that, under the facts in that case, the City of Boulder had become a public utility in the immediate vicinity of Robinson's development and must provide service.

The District Court reasoned that the facts of Denver's outside service have changed significantly since the date of the Englewood case. Therefore Englewood was not considered a binding precedent. Further, according to the lower Court, those changed facts are quite similar to those found in Robinson. Therefore, Robinson is considered a binding precedent.

The District Court was, of course, correct in determining that a number of circumstances have changed since Englewood was decided in 1951. In order to conclude, however, that Denver has become a public utility at some time in the last thirty-two years, it is necessary to find that there has been a change in circumstances as to each of the elements of the test of public utility status articulated by the Englewood Court. As to at least three critical elements of that test the present facts and law are substantially the same as they were at the time of Englewood.

I. REGULATION OF EXTRATERRITORIAL WATER AND SEWER SERVICE BY CITIES IS EXPRESSLY FORBIDDEN BY STATUTE.

One circumstance that has not changed since Englewood is the express statutory authority for cities to provide water and sewer service outside their boundaries at rates and under conditions set by the city. C.R.S. 1973, §31-35-402(b) (Appendix "A") expressely authorizes any municipality to operate water and sewer facilities for use both inside and outside its territorial boundaries. Subparagraph (f) of that section provides authority for cities to set rates, fees, tolls, and charges for such services "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;..."

C.R.S. 1973, §31-15-708(d) authorizes the governing body of a city:

> "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 municipality may impose by ordinance." (Emphasis added)

Pursuant to C.R.S. 1973, §31-1-102 this authority is available to home-rule cities such as Denver and Thornton unless inconsistent with their charters. Colorado Open Space Council v. City and County of Denver, 190 Colo. 122, 543 P.2d 1258 (1975).

The District Court did not address either statutory provision in its Order. Yet both statutes are entirely inconsistent with the District Court's holding that the PUC must regulate Denver's outside service rates and contracts. These statutes can be harmonized with the public utilities laws (Articles 1 through 7 of Title 40, C.R.S.) only by holding that a city is not a public utility in furnishing water and sewer service outside its city limits.

This was the conclusion reached in Englewood. This Court, in its opinion in Englewood, addressed the apparent conflict between the predecessor of C.R.S. 1973, §31-15-708(d) (referred to in the Opinion as "the 1911 Act") and the Public Utility Act. This Court stated:

> "We may rightfully assume that the 1913 Public Utility Act was passed with full knowledge of the existence of the 1911 statute. It may further be assumed that the legislature did not consider the 1913 Act to be on the same subject as the 1911 Act. If such was the legislative assumption, it was correct. The two Acts are not on related subjects...." 229 P.2d 667 at 673 (Emphasis added)

This Court determined as a matter of law that the General Assembly did not intend the Public Utilities Act to affect the extraterritorial sale of water and sewer service by a municipality. The extensive evidence in this case of changed circumstances since 1951 is simply not material to the question of public utility status because the law is unchanged. Based on the statutes cited and this Court's holding in Englewood, Denver cannot, as a matter of law, be regulated by the PUC in its sales of water and sewer service.

This construction is still the law. It has never been altered by this Court. City and County of Denver v. PUC, 181 Colo. 38, 507 P.2d 871 (1973). More importantly it has been ratified by a subsequent constitutional amendment and by legislation.

Shortly after the Englewood decision the People amended the Colorado Constitution in a manner instructive in this regard. In 1954 Article XXV of the Constitution was added which provides as follows:

> "In addition to the powers now vested in the General Assembly of the State of Colorado, 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 as 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; provided however, nothing herein shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; and provided, further, that nothing herein shall be construed to apply to municipally owned utilities.
>
> Added November 2, 1954. (See Laws 1955, p. 693.)" (Emphasis added)

This amendment specifically referred to the authority to regulate public utilities as then defined. It also specifically affirmed the authority of the General Assembly to amend that definition by statute. The definition of the term in force in 1954 included the 1951 construction by this Court in Englewood. For twenty-one years following Constitutional ratification of the existing construction of the term the General Assembly did not act. In 1975, the General Assembly did act. It revised and re-enacted portions of the laws governing municipal powers but did not alter C.R.S. 1973, §31-15-708(d) quoted above. Where the legislature re-enacts without change a provision previously construed by the Courts, such re-enactment is considered as including a ratification of the construction given by the Courts. Harvey v. Travelers Insurance Company, 18 Colo. 354, 32 P. 935 (1893); Tompkins v. DeLeon, 197 Colo. 569, 595 P.2d 242 (1980) Cf. Schlagel v. Hoelsken, 162 Colo. 142, 425 P.2d 39 cert. denied 389 U.S. 827 (1967).

These statutes do not appear to have been addressed in any reported public utility case since Englewood. In particular, no mention appears in Robinson. Englewood has been cited by this Court in recent water and sewer public utility cases, including Robinson and Matthews v. Tri County

Water Conservancy District, _____ Colo. _____, 613 P.2d 889 (1980). The Court's construction in Englewood is still the law. Municipal water and sewer sales are, by statute, not subject to any outside administrative regulation. This includes such sales by Denver, Thornton, and notwithstanding Robinson, Boulder.

The statutory exemption was not cited by the Court in Robinson. The facts in Robinson established that in denying service Boulder went substantially beyond those matters exempted from regulation by C.R.S. 1973, §31-35-402(f) and §31-35-708(d). Such denial gave rise to certain equitable considerations. Boulder had actively prevented other water agencies from serving Mr. Robinson's development and simultanteously withheld service, all for the clearly improper purpose of giving extraterritorial effect to its own zoning regulations.

The statutory exemptions from regulation did not apply to Boulder's activities. Boulder suffered the consequences of its ill-conceived attempt to couple the provision of municipal water service outside its City's limits, with strict adherence to the City's zoning requirements. The Court was necessarily concerned with the inequity of the situation. Boulder, through its own conduct created a situation in which it would have been inequitable for that City to deny water service to Robinson. The circumstances warranted the relief granted. Boulder was not entitled to withhold service for the reason it cited. PUC regulation of Boulder was not involved, and did not follow the decision.

In this case, no such extraordinary circumstances exist, and the relief requested is different. As is discussed

further below, Denver has retained extensive control over its outside service by contract. The contractual restrictions imposed by Denver serve appropriate utility-related purposes such as protecting public health, the engineering integrity of its facilities, and capital facility planning. This is a far cry from Boulder's efforts indirectly to extend its zoning authority.

II. EVEN ACCEPTING THE TRIAL COURT'S REASONING, THE PRESENT FACTS OF DENVER'S OUTSIDE SERVICE DO NOT MEET THE REQUIREMENTS OF PUBLIC UTILITY STATUS.

A. THE FACTS AS FOUND SHOW NO HOLDING OUT AS READY AND WILLING TO SERVE THE PUBLIC INDISCRIMINATELY.

If present circumstances are to be considered as controlling without regard to the statutory exemption, the conclusion remains that Denver is not a public utility. Other critical facts remain unchanged. Denver retains contractual control only over the providers of water service, not the recipients. The contracts are between Denver and municipal, quasi-municipal, and mutual companies, and define service within the boundaries of the contracting parties. Denver's right is to enforce its contracts. Service is provided by contracting parties who regulate the use of the service within the boundaries. Denver provides water to these entities, retaining certain controls. This fact negates the District Court's conclusion that Denver holds itself out as intending to serve the public indiscriminately.

This Court has treated each of the elements in the Englewood definition as being necessary to public utility

status. Public Service Company of Colorado v. PUC, 142 Colo. 135, 350 P.2d 543 (1960). The absence of the element of public holding out has been cause for holding that a business is not a public utility. PUC v. Colorado Interstate Gas Company, 142 Colo. 361, 351 P.2d 241 (1960). Parrish v. PUC, 134 Colo. 192, 301 P.2d 343 (1956).

This Court has also approved the idea that a corporation may structure its affairs so as to avoid regulation by the PUC. PUC v. Colorado Interstate Gas Company, supra. This has usually been accomplished by selection of customers and limiting service to negate any inference of public holding out. The statutory definition of a public utility includes the requirement:

> "....in no uncertain terms that one must be 'supplying the public.' It is well settled that those words mean all of the public within its capacities-it means indiscriminately." PUC v. Colorado Interstate Gas Company, supra., at 351 P.2d 241, 248. (Emphasis in original)

In the Colorado Interstate Gas Company case, Colorado Interstate Gas Company had for years carefully selected its own customers, making clear that it was not attemping to serve the public at large. For that reason, it was not a public utility. In Public Service Company of Colorado v. PUC, supra., the Supreme Court approved a ruling by the PUC that Union Rural Electric Association, Inc. had not held itself out as ready and willing to serve the public because it made membership in the cooperative a condition of service. Union had made membership a very simple and almost automatic procedure. The PUC held, and the Supreme Court approved, that this was still a conditional offer of service that did not amount to a holding out of the Company as ready

and willing to serve all members of the public indiscriminately. Public Service Company of Colorado v. PUC, 351 P.2d 543, 547, 548.

In this case, as in Englewood thirty-two years ago, Denver has put numerous service-related contractual conditions on the provision of service. It has refused service to a number of individual applicants outside areas already served. The District Court made numerous references in its findings of fact to Denver's continued contractual control and the fact that Denver does not serve the public indiscriminately. Of particular relevance is Paragraph 5(h) of the District Court's findings, in which the Court found that Denver must approve all tap applications and expansion of service areas sets all significant policies, may unilaterally delete unserved territory from that which a contracting district may serve, and may deny any future taps. These conditions all relate to proper utilization of Denver water resources. They are designed to protect water quality and provide an adequate supply of water to the people of Denver.

These findings of fact expressely negate the District Court's conclusion that Denver has held itself out as intending to serve the public indiscriminately to the extent of its capacity. The examples used by the District Court of the cases of Mr. C. B. McMahon and Mr. Michael E. Ernsten, who were unable to unable to obtain service from Denver, likewise negate this inference.

Compare these facts with those in Englewood. The ordinance there in question provided in Section 3:

> "This right of way is granted upon the further condition that permission shall be granted to the inhabitants of the City of Englewood to make connections with said water mains for domestic supply of water under the Rules and Regulations of the said Denver Union Water Co., its successors and assigns,...." (Emphasis added)

Denver, as a successor of the Denver Union Water Co., had retained control through its rules and regulations over its customers and service in the City of Englewood. This was one of the critical factors that led to the conclusion that Denver was not then a public utility. As the District Court found, the fact of Denver's continued control has not changed. Likewise, the conclusion that Denver is not a public utility should remain unchanged because Denver has never attempted to serve all of the public indiscriminately.

B. DENVER HAS CAREFULLY INSURED THAT THERE IS NO ENFORCEABLE RIGHT OF THE PUBLIC TO OBTAIN SERVICE.

The McMahon and Ernsten examples highlight another attribute of public utilities which is absent from this case - an enforceable right to demand service.

In Parrish v. PUC, the Supreme Court had before it the question of whether a privately operated distribution system was subject to regulation by the PUC. This Court stated at 301 P.2d 343, 345:

> "Under our statute defining public utilities, Cobb's pipe-line operations must be impresssed with the public interest. That it is not so impressed is readily determined by the fact that plaintiffs here, and the public, have no right to demand the service."

The absence of this element of the definition of a public utility, lead this Court to determine that the operation in question there was not a public utility. Englewood reached a similar conclusion, at 229 P.2d 667, 672:

> "It is at once to be seen that the act of supplying water to users beyond the territorial limits under the circumstances here does not impress the business with a public interest, because the outside users in Englewood have no right to demand the service. Englewood was the author of the ordinance under which it claims and it did not,...., exact as a condition therefor that the water company would furnish water to its residents."

The contracts under which Denver provides outside service define the right of the contracting parties to obtain service. All applications for service by non-contracting inhabitants of a contracting district are subject to Denver's review under Denver's rules. No enforceable right to service exists in the inhabitants. Such a right could only exist in a party to a service contract, under its terms. Absent the right of the public to compel service, Denver is not a public utility.

This argument applies directly to potential users in areas within districts now served by Denver. It applies indirectly to potential users outside areas under contract with even greater force. Surely a potential user in an area with no contractual relationship to Denver can have no greater right to demand service than one in a contract area.

In spite of the absence of an enforceable right to service, the District Court concluded that Denver is a public utility. This purportedly follows from the Robinson

case. The Court in Robinson did not need or purport to alter the definition of a public utility. In fact Englewood was cited for the definition of a public utility. Boulder had not reserved the right to select its customers as Denver has. On the contrary, Boulder had both contractually and otherwise "staked out" the area surrounding Robinson's development for exclusive service by, among other things, actively preventing other potential providers from serving the area.

As shown above, this case is distinguished by the absence of any active effort by Denver to eliminate competing utilities. Boulder had actively eliminated its competition while openly stating its intent to control utility service in the area. Denver has done neither. The District Court's conclusion that Denver is a monopoly results not from any active exclusion of competion by Denver, but from testimony that no other municipal utility has competed effectively.

This case is further distinguished by the absence of any effort by Denver to illegally extend its zoning laws beyond its limits. This matter is argued at length in the Briefs of Denver and Amicus Curiae the City of Colorado Springs. Thornton adopts the arguments of Denver and Colorado Springs.

The District Court has drawn incorrect conclusions from some of its other findings of fact. These findings may be analogous to Thornton's situation and are therefore addressed. Among the important changed circumstances found by the District Court, was an amendment to the Charter of the City and County of Denver, passed in 1959, specifically

allowing permanent distribution of water to outside users on something other than an annual basis. (See Paragraph 5(b) of the District Court's Order) This development is directly analogous to a similar change in the Articles of Incorporation of the Union Rural Electric Association which was at issue in Public Service Company of Colorado v. PUC, supra., where this Court stated:

> "Nor do we believe that the act of changing the charter changed Union's status. This was a private act, taken within the corporation. At most, it only authorized the corporation to serve the public; it did not require such service. It did not amount to a dedication of its property to the service of the public." 350 P.2d at 547.

The significance of the Denver Charter amendment is exactly the same. The Charter provision is permissive not mandatory. It does not constitute a dedication of Denver's facilities and water rights to outside use. Dedication must be shown by unambiguous actions evidencing the unequivocal intent to make a dedication. It is never presumed without such evidence. City of Northglenn v. City of Thornton, 193 Colo. 536, 569 P.2d 319 (1977).

The same conclusion must apply to Water Court decrees which confirm Denver's appropriations of water for use both within and outside the city limits of Denver. Such decrees are permissive not mandatory. A further distinction also applies. While the place of use of water must be declared in order to obtain a decree for a water right, such a public declaration is directed to a particular segment of the public - other water users on the source stream system who may be affected by the appropriation. It is not a statement

directed to potential customers that they may demand that Denver make such water available to them.

III. SERVICE INSIDE A SPECIAL DISTRICT CANNOT BE REGULATED BY THE STATE.

Further consideration must be given to the effects of the District Court's decision if implemented on water service within and without districts currently contracting with Denver. The District Court has ordered that all service outside Denver must be regulated by the PUC. Since most outside service is provided inside special districts, the Court's Order requires the PUC to exercise its jurisdiction over service within those districts. This Court has previously held that a sanitation district, because of its nature, is not a public utility, Schlarb v. North Suburban Sanitation District, 144 Colo. 590, 357 P.2d 647 (1960) and that an individual in the analogous position of carrying water supplied by Denver to private customers is also not a public utility. Parrish v. PUC, supra. These cases, by very close analogy eliminate the possibility of PUC regulation within a water and sanitation district contracting with a municipality for water or sewer service.

IV. REGULATION OF OUTSIDE SERVICE MAY NOT BE ORDERED WHERE THE DISTRICTS CURRENTLY PROVIDING SUCH SERVICE ARE NOT BEFORE THE COURT. THE DISTRICTS ARE INDISPENSABLE PARTIES.

Even if PUC regulation of service inside a special district is not forbidden as a matter of law, the District Court was without jurisdiction to order such regulation

because the affected districts are indispensable parties not before the Court. C.R.C.P. 19(a) provides in part:

> "A person who is properly subject to service of process in the action shall be joined as a party in the action if: ....(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may; (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

The contracting districts are persons properly subject to service of process. The districts claim an interest relating to the subject of the action. The practical impairment of the districts' ability to protect their interest can be seen by considering: (1) the terms of their contracts with Denver and the potential affects of PUC regulation, and (2) the effect of state control on a supposedly autonomous local government.

PUC regulation would interfere with and alter the present contractual relations between Denver and the districts. Denver and the districts have allocated the various benefits and obligations of their intergovernmental relationships through their contracts. Some of the contractual provisions which would be altered by PUC regulation are intended as protections for the districts and their customers.

For example, rates charged to users outside of Denver are tied by contract to rates charged inside Denver. (Paragraph 5(c) and (d), Exhibit 6; Paragraph 2(a) and (b), Exhibits 4 and 5). Under the Trial Court's ruling, outside

rates would be tied to the rules and regulations of the PUC and would deprive the districts of the restraint on rate increases imposed by the citizens of Denver on the Denver Water Board. Likewise, water policies and standards are tied to policies applicable within Denver. (Paragraph 1, Exhibit 6). The districts are permitted to make their own rules and regulations regarding service, not inconsistent with those of Denver. (Paragraph 6, Exhibit 6; Paragraph 11, Exhibits 4 and 5). This authority would be restricted by further review under the rules and regulations of the PUC. Customers in the districts therefore have some of the most important terms of service tied to the service Denver must furnish to its own residents. This protection may disappear if service is regulated by state-imposed standards.

A provision that appears only in the "total service contract," an example of which is Exhibit 6, makes an even stronger case for joinder. Paragraph 21 of the total service contract provides:

> "The parties shall not be deemed to have agreed that the benefits and obligations created by this contract have been modified by any amendment hereafter made to the Constitution or laws of the State of Colorado or the Charter of the City and County of Denver unless actually agreed to by the parties hereto."

The District Court's Order subjecting the relationship of Denver and the twenty-three total service districts to PUC regulation is an amendment to the laws of the State of Colorado which modifies the benefits and obligations created by the contract. Denver and the districts cannot, by this paragraph, create a private right to ignore the Court's

order. The contract does not expressly provide what will happen if the parties do not actually agree to a modification imposed by law. The provision implies that the contract would be terminated in that case. While termination of twenty-three contracts for public water supply will not necessarily result from the Court's decision, it is possible. The possibility should not be considered without having both contracting representatives of the public before the Court.

The effects of PUC regulation on potential water service customers outside existing contracting district similarly show that the districts must be made parties before the matter can be fully adjudicated. The basic structure of Denver's outside service involves dealing with individual customers through the districts. In the past, most additional customers have been served by bringing them within an existing or a new district. Once a customer comes into a district, the rule of the Schlarb case prevents further regulation by the PUC.

Because of this restriction on regulation the PUC may force Denver to provide service by contracts or arrangements made directly with end users. In such a case, Denver will enter into competition with the districts that it now supplies cooperatively. Those districts will be deprived of the opportunity to expand their tax and rate bases.

PUC - mandated service even outside the boundaries of districts with contracts with Denver will have impacts on those contractual relations. Even as to these matters the districts must be considered as indispensable parties to this action.

The impact of the Court's decision results directly from the substitution of PUC regulation for the previously agreed upon allocation of benefits and burdens between Denver and these other governmental entities. The fact that the districts may be able to participate in or appeal from any decision of the PUC in a particular case will not prevent this result. This type of interest is one that C.R.C.P. 19 is designed to protect. The districts are indispensable parties as defined in Woodco v. Lindahl, 152 Colo. 49, 380 P.2d 234 (1963) and Potts v. Gordon, 34 Colo. App. 128, 525 P.2d 500 (1974).

V. PUC REGULATION WILL HAVE IMPERMISSIBLE IMPACTS ON THORNTON AND THE OTHER PARTIES TO THE METROPOLITAN WATER DEVELOPMENT AGREEMENT. ALL PARTIES TO THE METROPOLITAN AGREEMENT ARE ALSO INDISPENSABLE TO THIS ACTION.

The Court's ruling will have an enormous impact on the relationships established by the Metropolitan Water Development Agreement. The PUC regulates not only rates and service areas but construction of facilities as well. The Metropolitan Agreement provides for numerous suburban water and sewer providers to jointly finance and own projects developed by Denver. The prospect of PUC regulation and review of these projects raises problems similar to those addressed above in regard to the contracting districts. PUC review of these projects will necessarily involve regulation of water and facilities in which Thornton will have a partial ownership interest. The facilities will be used by Thornton to provide service within its own boundaries. Regulation of such service would violate the principle of non-interference with municipal utilites. City of Thornton

v. PUC, supra., Colorado Constitution Article XXV. Regulation of projects in which Thornton participates would affect the availability of water to Thornton, Thornton's rates and its bargained-for contractual relations. As is the case with the special districts such interference in Thornton's affairs is expressly forbidden and certainly cannot be ordered without Thornton's presence in the suit as an indispensable party.

This matter is particularly important to Thornton and other cities that serve outside their city limits. Thornton provides water and sewer service to a number of different areas outside its city limits. These are areas where growth has occurred and service is required but where annexation is not, for various reasons, feasible or appropriate. Nevertheless, Thornton attempts to structure its outside service so as to avoid the evils which PUC regulation is designed to prevent and to avoid public utility status. Thornton will only supply water outside its municipal boundaries by contract, and then only to an entitiy with perpetual existence-typically a special district or mutual water company.

As noted, the goal of avoiding public utility status has been approved by this Court in PUC v. Colorado Interstate Gas Company, supra. In that case, the PUC had applied its own definition of a public utility rather than following the admittedly vague statutory definition. This Court criticized the PUC's altered definition for a number of reasons including that:

> "....any business seeking to conduct its affairs in such manner as to avoid becoming a public utility under PUC's announced rule could never have any worthwhile opinion as to its then status."

Further the Court stated:

> "It (the PUC definition) contains no standards whereby it could be applied with any degree of uniformity; it furnishes no guide whereby the supplier or the customer could determine the utility or nonutility status of the supplier." 351 P.2d 241, 248

Prior cases have defined a "safe harbor," in which one will not be subject to regulation. Denver, Thornton and undoubtedly others have sought to stay within this safe harbor by selecting their outside customers and retaining sufficient control over service as to avoid the implication that they have held themselves out as ready to supply the public indiscriminately. This "safe harbor" arises from the statutory definition of a public utility. It can be removed only by amending the statutory definition. The District Court's holding that Denver is a public utility despite Denver's retention of control over these various elements of service goes directly against prior interpretations of the statutory definition. This confusion must be cleared up, so that Denver, Thornton and others can have worthwhile opinions of their status and structure their affairs accordingly.

CONCLUSION

There is express statutory authority for cities to provide outside water and sewer service free of state regulation. The statutory provisions have been interpreted by this Court in Englewood as precluding PUC regulation. That decision has been ratified by this Court by the General Assembly, by the people themselves, and is the law of the State of Colorado.

Further, the present facts do not fit the definition of a public utility. Denver has not held itself out as ready and willing to serve the public indiscriminately. This is shown by its contractual control over elements of outside service and by the fact that there is no enforceable right in the public to demand service. Robinson is distinguishable on its facts - a truely unique case. Denver has not actively sought to eliminate competition for outside water and sewer service. Denver has not actively sought to extend its zoning laws to areas outside the city. There has been no holding out for service to the public at large.

Outside service within special districts cannot be regulated by the state without interfering with the functions of those districts. Even if it could be such regulation cannot be ordered here because the districts are not parties to this case.

Construction of new facilities under the Metropolitan Agreement cannot be regulated without interference in the affairs of Thornton and the other contracting parties. At the least, Thornton and the other contracting parties are indispensable to a proper decision.

The District Court must be reversed. Outside water and sewer service by a city is not subject to regulation by the PUC or any other body.

DATED this 21st day of October, 1983.

Respectfully submitted,
BROADHURST & PETROCK
Kenneth L. Broadhurst - #1659
J. J. Petrock - #2881
Frederick A. Fendel, III, #10476
Ronald D. Hutchinson - #_____

By: _____
Attorneys for Amicus Curiae, the
City of Thornton, acting by and
through its Utilities Board
1630 Welton - Suite 200
Denver, CO 80202
(303) 534-0702

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that I have placed a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE, THE CITY OF THORNTON, acting by and through its Utilities Board in the United States mail, postage prepaid, this 24th day of October, 1983, addressed to the following:

Robert R. Flynn, Esquire
3333 South Bannock Street
Suite 500
Englewood, CO 80110

John Dingess, Esquire
Patrick Kowaleski, Esquire
1470 South Havana Street
Suite 820
Aurora, CO 80012

James G. Colvin, II, Esquire
P. O. Box 1575
30 South Nevada Avenue
Colorado Springs, CO 80901

Edward H. Widmann, Esquire
Kevin E. O'Brien, Esquire
HALL & EVANS
717 - 17th Street - Suite 2900
Denver, CO 80202

Paul W. Beacom, Esquire
Kevin Maggio, Esquire
450 South 4th Street
Brighton, CO 80601

Peter L. Vana, III, Esquire
James H. Heiser, Esquire
5334 South Prince Street
Littleton, CO 80166

Stephen H. Kaplan, Esquire
Brian Goral, Esquire
353 City & County Building
Denver, CO 80202

[CERTIFICATE OF MAILING CONTINUED ON NEXT PAGE]

Wayne D. Williams, Esquire
Michael L. Walker, Esquire
Casey S. Funk, Esquire
DENVER WATER BOARD
1600 West 12th Avenue
Denver, CO 80254

Patrick R. Mahan, Esquire
1700 Arapahoe Street
Golden, CO 80419

James M. Lyon, Esquire
Marcia M. Hughes, Attorney at Law
ROTHGERBER, APPEL & POWERS
1600 Broadway - 24th Floor
Denver, CO 80202

Leonard M. Campbell, Esquire
GORSUCH, KIRGIS, CAMPBELL,
WALKER & GROVER
1401 - 17th Street - Suite 1100
Denver, CO 80202

Diana L. Doolittle