10-24-1983

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

SUPREME COURT, STATE OF COLORADO

Case No. 83-SA252

OPENING BRIEF OF AMICUS CURIAE
COLORADO MUNICIPAL LEAGUE

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE, et al.,

Plaintiffs-Appellees,

v.

DENVER BOARD OF WATER COMMISSIONERS, et al.,

Defendants-Appellants.

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INTEREST OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

The Colorado Municipal League ("League") is a nonprofit voluntary association of 235 municipalities located throughout the State of Colorado, including all Colorado municipalities above two thousand population, and the vast majority of those having a population of two thousand or less.

The issues presented in this case are of substantial concern to these municipalities. In November, 1982, the League surveyed water and sewer practices of its members and published the results in "Municipal Services and User Charges in Colorado". Of the 153 responding municipalities which operated their own water systems, 110 served extraterritorial customers. Of those operating their own sewer systems, 70 municipalities served extraterritorial customers. None of these municipalities are now subject to regulation by the Public Utilities Commission ("PUC" or "Commission") in their extraterritorial water or sewer service. In fact, for at least the past 31 years, since the Court's decision in City of Englewood v. City and County of Denver, 123 Colo. 290, 229 P.2d 667 (1951), no municipality in Colorado has ever been subjected to PUC regulation over extraterritorial water or sewer service, to counsel's knowledge.

The two principal types of entities providing domestic water service to Colorado's citizens are municipalities and special districts (water districts, water and sanitation districts, or water conservancy districts). Municipalities are not required to provide water service outside their boundaries. Colorado Springs v. Kitty Hawk Development Co., 154 Colo. 535, 392 P.2d 467 (1964), cert. den. and app. dism. 379 U.S. 647 (1965). Many do so, however, at the request of outside property owners, most commonly because the municipality wishes to ensure that areas which logically will become a part of the municipality in the future receive initial service compatible to that of the municipality, and to avoid problems attendant with special district service.

Municipalities have no control over the creation or operation of special districts outside their boundaries and the exclusion from a special district of territory which has been annexed to a municipality is a difficult and time-consuming task. Special district service provided to property later annexed to a municipality can result in a variety of problems: different facility standards and increased costs necessary to conform facilities to municipal standards where municipal service is later desired; after annexation, payment of municipal taxes and continued obligation to pay special district taxes and fees until excluded from the district (with the potential for some

obligations continuing even after exclusion); diffusion of government services and an increase in the number of governments with attendant increased administrative costs; and confusion among citizens as to the governing entity responsible for particular services, often resulting in disinterest among electors. If municipalities are subjected to PUC regulation, or are uncertain as to the nature of the conduct which will result in public utility status, those unwilling to accept that burden may simply decline to provide extraterritorial service, resulting in an increase in the number of new developer-created special districts or expansion of existing special districts, and the resulting problems for affected citizens.

PUC regulation of extraterritorial municipal water service raises other potential municipal concerns: the wisdom of transferring local service decisions from affected property owners and local governing bodies to a statewide commission; the continued ability of municipalities to coordinate the provision of all municipal services to those developing areas which likely will become a part of the municipality; the effect on existing bonds issued with a variety of covenants which did not contemplate PUC regulation; the authority of the PUC to decide such matters as the sufficiency of storage, supply, plant and equipment, potentially imposing substantial additional costs on the

municipality's consumers; the difficulty of dividing a utility into PUC regulated and non-PUC regulated segments, with the potential "tail wags dog" effect of PUC regulation on inside municipal service; the lack of familiarity of the PUC with water utilities, and particularly municipal water utilities;* the lack of familiarity of municipalities providing water with PUC regulation and procedures; the additional cost imposed on all of a municipality's customers by compliance with PUC regulation in terms of revised operating and accounting procedures, and application, hearing and review requirements; the delay caused by the PUC decision making process; and the additional cost to the state's taxpayers to finance the added administrative burden which would be placed on the PUC.

As a result of these concerns and for sound legal and policy reasons, which will be discussed in this brief, the League submits that municipal extraterritorial water services should not be subject to PUC jurisdiction and that the tests to determine public utility status should be clearly defined and consistently applied to provide guidance to potentially affected municipalities.

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*Currently, only 10 small private investor-owned water companies are regulated by the PUC, with the largest having some 20,000 customers. See Record, Galligan (January 28, 1983), p.4.

STATEMENT OF ISSUES

The League's argument is limited to two issues of particular concern to Colorado's municipalities statewide: under what circumstances does a municipality acquire public utility status in its extraterritorial service and, whether the Colorado Public Utilities Commission has jurisdiction over municipal extraterritorial water service which is provided as a public utility. The League will seek not to repeat arguments made in the brief of the Denver Board of Water Commissioners and City and County of Denver.

SUMMARY OF ARGUMENT

I. A MUNICIPALITY DOES NOT ACQUIRE PUBLIC UTILITY STATUS UNLESS IT EXPRESSES AN UNEQUIVOCAL INTENTION TO SERVE THE PUBLIC INDISCRIMINATELY TO THE EXTENT OF ITS CAPACITY OR IT AFFIRMATIVELY SEEKS TO BECOME THE EXCLUSIVE SERVICE PROVIDER WITHIN A DEFINED AREA.

II. A MUNICIPALITY PROVIDING EXTRATERRITORIAL WATER SERVICE AS A PUBLIC UTILITY IS NOT SUBJECT TO JURISDICTION OF THE PUBLIC UTILITIES COMMISSION.

ARGUMENT

I. A MUNICIPALITY DOES NOT ACQUIRE PUBLIC UTILITY STATUS UNLESS IT EXPRESSES AN UNEQUIVOCAL INTENTION TO SERVE THE PUBLIC INDISCRIMINATELY TO THE EXTENT OF ITS CAPACITY OR IT AFFIRMATIVELY SEEKS TO BECOME THE EXCLUSIVE SERVICE PROVIDER WITHIN A DEFINED AREA.

The test applied in determining public utility status is of crucial importance because it provides guidance to and governs the actions of those who wish to obtain or avoid that status. During the seventy years since enactment of the Public Utilities Law in 1913, the Colorado Supreme Court has developed tests for public utility status which it has consistently applied, but which were not applied or were misapplied by the District Court in this case. Specifically, the Supreme Court has determined that an entity will not be considered a public utility unless, at a minimum, it expresses an unequivocal intention to serve the public indiscriminately to the extent of its capacity or it affirmatively seeks to and does become the exclusive service provider within a defined area.

A. Expression of an unequivocal intention to serve the public indiscriminately to the extent of the utility's capacity.

To become a public utility, an entity must hold itself out "as serving or ready to serve all members of the public who may require it, to the extent of [the utility's] capacity." City of Englewood v. City and County of Denver, supra, 229 P.2d at 673; Parrish v. Public Utilities

Commission, 134 Colo. 192, 301 P.2d 343 at 345 (1956); Robinson v. City of Boulder, 190 Colo. 357, 547 P.2d 228, 229 (1976); Public Utilities Commission v. Colorado Interstate Gas Co., 142 Colo. 361, 351 P.2d 241, 248 (1960); and Cady v. City of Arvada, 31 Colo.App. 85, 499 P.2d 1203 (1972).

This dedication of private property to public use (or municipal property to non-municipal use) "can never be presumed, but must be supported by evidence of an unequivocal intention to make such dedication." Parrish v. Public Utilities Commission, supra, 301 P.2d at 345. (Emphasis added.) See also, City of Englewood v. City and County of Denver, supra, 229 P.2d at 672; Public Utilities Commission v. Colorado Interstate Gas Co., supra, 351 P.2d at 249-250; and City of Northglenn v. City of Thornton, 193 Colo. 536, 569 P.2d 319 (1977). Moreover, this unequivocal intention must be to serve all the public indiscriminately:

> "It is well settled that those words [supplying the public] mean all of the public within its capacities -- it means indiscriminately."

Public Utilities Commission v. Colorado Interstate Gas Co., supra, 351 P.2d at 248. (Emphasis by the Court.) See also Parrish v. Public Utilities Commission, supra, 301 P.2d at 345, and Matthews v. Tri-County Water Conservancy District, 200 Colo. 202, 613 P.2d 889, 893 (1980).

The District Court in this case did not apply or misapplied the established test. The lack of the necessary expression of "unequivocal intention" by Denver is illustrated throughout the Court's lengthy findings. Assuming the correctness of the Court's findings, it found for example that Denver provided certain extraterritorial service pursuant to contracts which retain in Denver substantial or total control to approve taps (Order, p.10), the expansion of the contracting district's service area (Order, p.11), and the deletion of undeveloped lands from the contract service area (Order, p.14); that in 1977, the City imposed a moratorium and strict limitation on granting service applications to outside users (Order, pp. 9 and 42); and that in 1977, the City inaugurated a tap allocation program (TAP) limiting the allocation of taps for service expansion to outside users (Order, pp. 9-10 and pp. 32-36). In fact, from a review of the Court's findings and conclusions, assuming their correctness, various formal actions of the Water Board reserved to the City the discretion to decide who would receive, and under what circumstances they would receive, the City's water service, thus providing the very basis for Plaintiffs' complaints. Limitation of service and denial of service certainly do not constitute an expression of unequivocal intention to serve all the public indiscriminately to the extent of the City's

capacity.

The Colorado courts have long held that, except in unique circumstances such as those present in Robinson v. City of Boulder, supra, the consequences of public utility status should result only where there exists the clearest intention to dedicate one's property to public use -- an intention which simply does not exist in this case.

B. Affirmative action by the utility to become the sole and exclusive service provider within a defined area.

Colorado courts have rarely imposed public utility status upon an unwilling entity. A principal instance is Robinson v. City of Boulder, supra. In Robinson, the Supreme Court held that a utility which affirmatively seeks to and does become the sole and exclusive service provider in a defined area should not be permitted to obtain the benefit of public utility status (exclusivity of service area) without the corresponding burden to serve the public indiscriminately to the extent of the utility's capacity. In these circumstances, no expression by the utility of an unequivocal intention to serve the public indiscriminately is required and public utility status is imposed by the courts.

The City of Boulder claimed in Robinson that it was not acting as a public utility in providing water service to the Gunbarrel area under the test set out in City of Englewood

and subsequent cases, i.e., the City had not expressed an intention to serve all members of the public to the extent of its capacity. Robinson v. City of Boulder, supra, 547 P.2d at 229. The Court, nevertheless, imposed public utility status on the unwilling City because the City had affirmatively sought to and did become the sole and exclusive supplier of water in the area. The Court's opinion emphasizes the actions taken by the City to ensure its status as the sole and exclusive service provider in the area:

> "(2) Boulder entered into agreements with other local water and sanitation districts and municipalities which had the effect of precluding these entities from servicing Gunbarrel residents.
>
> (3) Boulder opposed a water company's application before the Public Utilities Commission which would have provided water in a part of the city's delineated service area."

Robinson v. City of Boulder, supra, 547 P.2d at 230. The Court noted that Boulder's conduct was designed to make it the one and only servicing agency in the Gunbarrel area. It distinguished the facts in Robinson from those in City of Englewood v. City and County of Denver, supra, by stating that Boulder sought to become the sole supplier of water in the territory "by agreement with other suppliers to the effect that the latter would not service the Gunbarrel area and by opposing other methods or sources of supply...."

Public utility status was not imposed on Boulder because

of the mere fact or volume of extraterritorial service, or on any determination that the City could more efficiently or cheaply or reliably serve the area, or even because it was the sole source of supply in the area. Rather, the critical factor which caused the Court to dedicate the City's property to the service of non-residents was the City's effort to become the exclusive supplier of those non-residents by limiting their other sources of supply. Robinson is consistent with the Colorado courts' historical recognition that dedicating an entity's property to public use (e.g., dedicating a water system owned and developed by municipal residents to non-municipal residents) can never be presumed, but must be supported by evidence of "unequivocal intention." In essence the "unequivocal intention" in Robinson was found in the City's effort to exclude other sources of supply from the City's service area.

In this case, the District Court specifically found that "No evidence was produced to show Water Board direct opposition to competitors who would serve the metropolitan area...." (Order, p.43). Consequently, the Court erred in using Robinson to justify imposing public utility status on Denver.

II. A MUNICIPALITY PROVIDING EXTRATERRITORIAL WATER SERVICE AS A PUBLIC UTILITY IS NOT SUBJECT TO JURISDICTION OF THE PUBLIC UTILITIES COMMISSION.

The District Court assumed that, having imposed public

utility status on Denver, the City thereby became subject to the jurisdiction of the Colorado Public Utilities Commission. The Court stated on page 41 of its order that Robinson v. City of Boulder, supra, "crystallized the law to the effect that a city serving water to outsiders may become a PUC regulated public utility." On the contrary, the Court in Robinson made no reference to regulation by the PUC of Boulder's extraterritorial water service. Indeed, each decision of the Colorado Supreme Court addressing PUC jurisdiction over municipal extraterritorial water service has denied such jurisdiction based on the language of the Colorado Constitution and statutes: see, e.g., City of Englewood v. City and County of Denver, supra; and City of Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965). The brief of the Denver Water Board and the City and County of Denver addresses the constitutional issues in detail; consequently, this brief will focus on the statutory exemption of municipal extraterritorial water service from PUC regulation.

A. Principles of statutory construction prohibit the exercise of jurisdiction by the PUC over municipal extraterritorial water service.

Despite the fact that most municipal powers are confined within municipal territorial limits, the Colorado legislature early granted and has consistently expanded municipal authority over water and sewer services both

within and outside municipal boundaries. None of this legislation mentions the PUC, but rather vests broad authority in the municipality and municipal governing body over extensions and conditions of service.* As examples of statutory extraterritorial water service authority:**

> §31-15-708(1)(d): "The governing body of each municipality has the power ... [t]o 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." [Originally enacted in 1911.]
>
> §31-35-402(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:
>
> (a) To acquire by gift, purchase, lease, or exercise of 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 or partially without the municipality....
>
> (b) To operate and maintain water facilities or sewerage facilities or both for its own use and for the use of public and private consumers and users within and without the territorial boundaries of the municipality, but no water service or sewerage service or combination of them shall be furnished in any other municipality

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*Municipal utility services most extensively legislated upon are municipal water and sewer services. Legislation applicable to municipal gas or electric service is far less extensive and explicit.

**All of the following citations are to C.R.S., as amended through September 1983, except where otherwise specifically noted.

unless the approval of such other municipality is obtained as to the territory in which the service is to be rendered;

* * *

(f) To prescribe, revise, and collect in advance or otherwise, from any consumer or any owner or occupant of any real property connected therewith or receiving service therefrom, rates, fees, tolls, and charges, or any combination thereof for the services furnished by, or the direct or indirect connection with, or the use of, or any commodity from 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 collecting them...." [Originally applied to municipal water services in 1962 Session Laws of Colorado, Ch. 89.]

§31-35-403 "(1) The acquisition, construction, reconstruction, lease, improvement, betterment, or extension of any water facilities or sewerage facilities or both and the issuance, in anticipation of the collection of revenues of such facilities, of bonds to provide funds to pay the cost thereof may be authorized under this part 4 by action of the governing body of the municipality taken at a regular or special meeting by a vote of a majority of the members of the governing body." [Originally applied to municipal water services in 1962 Session Laws of Colorado, Ch. 89.]

§31-35-410 "... The water facilities or sewerage facilities or both may be acquired, purchased, constructed, reconstructed, improved, bettered, and extended, and bonds may be issued under this part 4 for said purposes ... without regard to the requirements, restrictions, debt, or other limitations or other provisons contained in any other law.... Insofar as the provisions of this part 4 are inconsistent with the provisions of any other law, the provisions of this part 4 shall be controlling." [Originally applied to municipal water service in 1962 Session Laws of Colorado, Ch. 89.]

§31-12-121 "Any municipality, as a condition precedent to the supplying of municipal services pursuant to contract, may require a contemporary agreement by such consumers, who are owners in fee of real property so supplied, to apply for or consent to the annexation of the area to be supplied with such municipal services to the supplying municipality at such future date as the area supplied, or any portion thereof, become eligible for annexation pursuant to the provisions of this part 1...." [Originally adopted in The Municipal Annexation Act of 1965, Ch. 306, 1965 Colo. Sess. Laws 1186, 1206 (1965).]

(1) The 1913 Public Utilities Law excepted municipal extraterritorial water service from jurisdiction of the PUC.

The Public Utilities Law, title 40 of C.R.S., was originally enacted in 1913, two years after the enactment of what is now §31-15-708(1)(d) (quoted previously), authorizing municipalities to serve water outside their boundaries and "to collect such charges upon such conditions and limitations as said municipality may impose by ordinance." In City of Englewood v. City and County of Denver, supra, Englewood's counsel recognized the broad scope of authority granted to the municipal governing body by this statute and argued in part that the Public Utilities Law repealed the statute by implication. The Colorado Supreme Court rejected the argument, concluding that the Public Utilities Law did not repeal by implication the 1911 municipal statute. The Supreme Court said:

"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 and, of course, no repugnancy exists."

City of Englewood v. City and County of Denver, supra, 229 P.2d at 673. One interpretation of this language is that municipal extraterritorial water service was excepted from operation of the Public Utilities Law by the explicit language of the preexisting statute vesting regulatory authority in the municipality. This interpretation is reenforced by language at the beginning of the opinion in which the Court quoted and referred to various constitutional and statutory provisions which it determined to be controlling, including the 1911 municipal extraterritorial water supply statute. City of Englewood v. City and County of Denver, supra, 229 P.2d at 671, 672.

Interpreting City of Englewood as recognizing a statutory exception from PUC jurisdiction for municipal extraterritorial water service is consistent with subsequent judicial and administrative decisions. Immediately after its decision in the City of Englewood case, the Supreme Court reversed a District Court decision which had affirmed a PUC determination that Colorado Springs was operating as a public utility in providing water service outside its boundaries and was therefore subject to PUC jurisdiction. See Exhibit A to this brief. Moreover, at the time of the City of Englewood decision, the PUC had at least five cases

pending before it on the issue of whether municipal extraterritorial water service was subject to PUC jurisdiction, cases involving Longmont, Loveland, Golden, Colorado Springs, and Westminster. In Decision No. 39604, dated October 30, 1952 [see Exhibit B to this brief], the Commission dismissed each case on the belief that the City of Englewood and Colorado Springs' decisions settled the issue of PUC jurisdiction as a matter of law:

> "In view of the Denver-Englewood case, further substantiated by the Musick-Colorado Springs case, the Commission believes that the matter of its jurisdiction over municipal utilities serving water to customers living outside the corporate limits has been decided. In view of the decisions of the Supreme Court mentioned above, the Commission feels that all of the matters now pending before it that have to do with water service by municipalities outside the corporate limits should be dismissed upon its own motion."

(2) Legislation subsequent to the 1913 Public Utilities Law excepts municipal extraterritorial water service from jurisdiction of the PUC.

Legislation enacted by the Colorado General Assembly subsequent to the 1913 Public Utilities Law and subsequent to the decision in City of Englewood v. City and County of Denver, supra, and particularly the broad powers granted in 1962 by the amendments to what is now part 4 of article 35 of title 31, C.R.S. (portions previously quoted), reinforces the exception of municipal extraterritorial water service from jurisdicion of the PUC.

In City of Thornton v. Public Utilities Commission,

supra, the PUC sought to assert jurisdiction over the sale of water and sewer facilities by Northwest Utilities Company to the City of Thornton. The facilities to be acquired by Thornton included substantial service areas in Adams County, outside the City's boundaries. See City of Northglenn v. City of Thornton, supra. The Supreme Court denied the PUC's attempted assertion of jurisdiction based upon both the constitution and statutes of the State of Colorado. The Court particularly emphasized the limits imposed on the Commission's jurisdiction by the municipal statutes, including what is now §31-15-708(1)(d) (previously quoted), part 4 of article 35 of title 31 (relevant portions previously quoted), and §31-15-707(1), C.R.S., as amended through September 1983 (relating to the acquisition and construction of municipal water works). Referring to these statutes, the Court concluded that:

> "... the legislature, in enacting laws authorizing cities to acquire water works and pertinent facilities, effectively avoided conferring upon the Commission any jurisdiction over such acquisition.
>
> * * *
>
> In summary, [these statutes] give full power to the municipality, subject only to the electorate, to purchase or acquire by condemnation at the fair market value thereof any water works or system and appurtenances necessary to the works or system. Such facilities may be wholly within or wholly without the municipality. The municipality is authorized to operate and maintain such water facilities or sewer facilities or both for its own use, for the use of public or private

> use, and for use within and without the territorial boundaries of the municipality. One section provides that the operation and the cost thereof shall be without modification, supervision or regulation of rates, fees, tolls or charges by any board, agency, bureau, commission or official other than the governing body as provided by ordinance in the municipality. A pertinent portion of C.R.S. 1963, 139-52-10 [now §31-35-410, C.R.S.), provides '*** In so far as the provisions of this article are inconsistent with the provisions of any other law, the provisions of this article shall be controlling.'
>
> A reading of the various pertinent statutes points to the inescapable conclusion that the acquisition by Thornton of the Northwest facilities could not be prevented or interfered with by any agency once the people of Thornton determined by their vote that the system was to be acquired."

City of Thornton v. Public Utilities Commission, supra, 402 P.2d at 197. (Emphasis by the Court deleted.)

The PUC sought to justify its jurisdiction over the sale by referring to a portion of the Public Utilities Law. The Court rejected that argument, however, concluding that where a conflict exists between the Public Utilities Law and other municipal laws, the municipal laws are controlling.

A similar statutory analysis was applied recently by the Supreme Court in Matthews v. Tri-County Water Conservancy District, 200 Colo. 202, 613 P.2d 889 (1980) in concluding that water conservancy districts are not subject to PUC regulation in fixing rates for the sale of water. The Court reviewed water conservancy district legislation enacted almost twenty-five years after the creation of the PUC,

legislation which included (similar to municipal water legislation) a statement that any acts in conflict with the water conservancy district act are nonoperative and noneffective as to the water conservancy district act. The Court stated:

> "Since the Act specifically grants to the water districts the authority to fix water rates for non-irrigation water, section 37-45-118(1)(g), without any reference to the ratemaking procedure of the PUC, it is clear that the legislature did not intend to make the district's authority to set water rates subject to the jurisdiction of the PUC."

Matthews v. Tri-County Water Conservancy District, supra, 613 P.2d at 893.

The same analysis applies in this case. Legislation enacted subsequent to the Public Utilities Law specifically grants broad authority to municipalities and municipal governing bodies to determine service and rates for extraterritorial customers. That legislation not only makes no reference to the PUC but in fact affirmatively states that rates shall be set without "modification, supervision, or regulation ... by any board, agency, bureau, commission, or official other than the governing body collecting them...." §31-35-402(1)(f). That same section refers to extraterritorial service and specifies only one limitation on that service: that water or sewer service provided within any other municipality must be approved by such other municipality. §31-35-402(1)(b). The extension of water

service may be made "without regard to the requirements, restrictions, debt, or other limitations or other provisions contained in any other law...." §31-35-410. To the extent the above described municipal powers in part 4 of article 35 of title 31 are inconsistent with any other law, these municipal powers control. §31-35-410.

Finally, §31-12-121 (originally adopted in 1965) specifically permits municipalities, as a condition precedent to supplying municipal water services pursuant to contract, to require a contemporary agreement that the property owners apply for and consent to annexation of the area at such time as the supplied area becomes eligible for annexation. This statutory provision is inconsistent with PUC authority to mandate municipal extraterritorial service.

(3) The principles of PUC regulation do not apply to municipal extraterritorial water service.

The PUC was designed in part to prevent duplication and competition of services among primarily profit-motivated utility companies. Western Colorado Power Co. v. Public Utilities Commission, 159 Colo. 262, 411 P.2d 785 (1966), reh'g denied, app. dism., 385 U.S. 22 (1966). Its principles do not apply readily to the allocation among competing interests of a limited resource provided by utilities not motivated by profit, the majority of which are not subject to PUC jurisdiction (e.g., special water districts, water conservancy districts, and municipalities

operating within municipal boundaries). In traditional PUC utility regulation, the regulated utilities obtain the "benefits" of an exclusive service area, free from the worry and cost of competition, with an authorized rate of return. They receive the "detriments" of rate and service regulation. Correspondingly, their customers receive the "benefits" of service and rate protection, but the "detriment" of no choice among service providers.

With respect to municipal extraterritorial water service, this delicate balance collapses. The PUC can't grant an "exclusive" service area to municipalities because it has no control over the creation or expansion of special water districts or water conservancy districts or municipal boundaries. An authorized rate of return is difficult to apply to governmentally-owned utilities not motivated by profit. On the other hand, the municipality and its residents suffer the detriments of PUC regulation, including loss of control over their property, services and rates. The municipality's extraterritorial water customers or potential customers would have the "benefits" of service and rate regulation but without the "detriment" of limited choice -- the potential customer retains whatever ability may now exist to obtain service from a special water district, water conservancy district, or other municipality willing to annex his or her property.

Neither the language nor the purposes of applicable legislation support the exercise of PUC jurisdiction over municipal extraterritorial water service.

CONCLUSION

For the reasons previously given and the authorities cited, the League urges the Court to hold that municipal extraterritorial water supply is not subject to jurisdiction of the PUC or that the Denver Water Board is not a public utility in its extraterritorial supply of water under the tests discussed in this brief.

Respectfully submitted,

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EXHIBIT A

(Decision No. 29[illegible])

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

A. L. MUSICK, Complainant,	)	
v.	)	CASE NO. 4282
THE CITY OF COLORADO SPRINGS, Defendant.	)	

October 29, 1952

Appearances: Bennett and Heinicke, Esqs., Colorado Springs, Colorado, for Complainant;
F. T. Henry, Esq., City Attorney, Colorado Springs, Colorado, for Defendant;
J. M. McNulty, Denver, Colorado, for the Commission.

S T A T E M E N T

By the Commission:

Mr. A. L. Musick filed a complaint with this Commission on July 3, 1948, under Section 45, Chapter 137, 1935 Colorado Statutes Annotated, alleging that the City of Colorado Springs was a public utility furnishing water to residents of areas outside the town boundary and had refused to give him water service under the terms and conditions of an ordinance establishing the City's policy as to such customers.

The Commission issued its order to the City of Colorado Springs on July 9, 1948, directing said City to satisfy or answer the complaint.

On August 4, 1948, the City filed its answer and an "Application and Motion to Dismiss." The answer disclaimed knowledge of the facts on which the complaint was based, and the motion to dismiss was based on the premise that the City was not a public utility and hence not under the Commission's jurisdiction.

The matter was set for hearing in Colorado Springs, Colorado, on September 30, 1948, before the Commission, and evidence was taken on the Motion to Dismiss and on the complaint itself. Briefs were submitted by the interested parties, and the Commission on August 2, 1949, by Decision No. 33143, entered its order in the case, finding that the City was a public utility subject to the jurisdiction of the Commission as to its water utility operations outside its municipal boundaries. The Commission also found that the complainant was entitled to water service from the City under the rules and regulations to be filed by the City and approved by the Commission.

The City applied to the Commission for a re-hearing in the matter, and on September 21, 1949, by Decision No. 33463, the Commission denied the re-hearing.

The City of Colorado Springs applied to the District Court within and for the County of El Paso, in Civil Action No. 28699, asking said Court in effect to review and set aside the Commission's Order. The Court, however, upheld the Commission's decision in its findings that Colorado Springs was a public utility when rendering water service outside its municipal boundaries. The City of Colorado Springs then took the matter before the State Supreme Court seeking to have the decision of the District Court reversed.

Subsequent to the decision of the District Court of El Paso County, the Supreme Court entered a decision in the case of Englewood v. Denver, 123 Colo. 290, 229 P. (2d) 667, determining that the City and County of Denver, in supplying water outside of its corporate limits, was not a public utility and not subject to the jurisdiction of the Public Utilities Commission as to such service. When the matter of Musick v. City of Colorado Springs came before the Supreme Court, the Court held that the decision in Englewood v. Denver, supra, was controlling in the Musick case in every respect.

The Supreme Court reversed the District Court of El Paso County with directions to said Court to dismiss the action and remand the case to the Public Utilities Commission, with instructions that it dismiss the complaint. On October 27, 1952, the Commission received the Order of the

District Court within and for the County of El Paso in Civil Action No. 28659, wherein the Court, in accordance with the Judgment and Order of the Supreme Court, instructed the Commission to dismiss the complaint of A. L. Musick, Complainant, v. City of Colorado Springs, Defendant.

F I N D I N G S

THE COMMISSION FINDS:

That the complaint of A. L. Musick, Complainant, v. The City of Colorado, Springs, Defendant, being Case No. 4982 before this Commission, should be dismissed in accordance with the Order of the District Court within and for the County of El Paso, State of Colorado, in Civil Action No. 28659.

O R D E R

THE COMMISSION ORDERS:

That Case No. 4982, in the matter of A. L. Musick, Complainant, v. The City of Colorado Springs, Defendant, be, and it hereby is, dismissed.

That this order shall become effective as of the day and date hereof.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners.

Dated at Denver, Colorado,
this 29th day of October, 1952.

ea

EXHIBIT B

(Decision No. 37604)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

RE PROPOSED RATE SCHEDULE, AS IT AFFECTS USERS OUTSIDE CORPORATE BOUNDARIES OF THE CITY OF LONGMONT, COLORADO.	INVESTIGATION AND SUSPENSION DOCKET NO. 204
IN THE MATTER OF THE SERVICE RULES AND REGULATIONS OF THE CITY OF LOVELAND, COLORADO, IN RELATION TO THE LOVELAND MUNICIPAL WATER WORKS.	CASE NO. 4962
CUSTOMERS OF CITY OF GOLDEN WATERWORKS, LIVING OUTSIDE OF CITY LIMITS, Complainants, v. CITY OF GOLDEN, Defendant.	CASE NO. 5000
MRS. LEAH HARTSOCK, ROUTE 1, COLORADO SPRINGS, COLORADO, Complainant, v. CITY OF COLORADO SPRINGS, MUNICIPAL WATER DEPARTMENT, Defendant.	CASE NO. 5008
OUTSIDE WATER USERS, TOWN OF WESTMINSTER, WATER DEPARTMENT, Complainants, v. TOWN OF WESTMINSTER, WATER DEPARTMENT, Defendant.	CASE NO. 5012

October 30, 1952

S T A T E M E N T

By the Commission:

All of the above entitled matters are pending before this Commission in various degrees of completion. All have been held in abeyance awaiting a clarification by the courts of the authority of this Commission as it pertains to jurisdiction of municipalities rendering water service outside their corporate boundaries.

Investigation and Suspension Docket No. 275 was instituted as a result of a proposed water rate schedule filed by the City of Longmont with the Commission on May 19, 1947, proposing to put into effect on July 1, 1947, a new water rate increase of 33-1/3% to all customers receiving water service outside the municipal boundaries of Longmont. Upon protest by the affected customers, the Commission suspended the proposed effective date of the proposed rate for a period of 120 days, or until October 29, 1947, unless otherwise ordered. A hearing was held on July 29, 1947, and after said hearing, the Commission by Order lifted the suspension temporarily as it applied to the proposed water rates, allowing them to go into effect, but keeping in suspension the rules and regulations as they pertain to the "connection charge," the "service charge," the "permit charge" and the "meter charge." On August 1, 1949, the Commission's Rules and Regulations governing the Service of Water Utilities became effective and said rules provided for certain charges that might be billed by municipalities serving outside their corporate limits for connection, service, permit and meter charges. These rules were adopted after a hearing in which all interested parties presented testimony, including the City of Longmont. On August 4, 1949, the Commission, by Decision No. 33146, entered its order permitting the rates as filed by the City of Longmont to become permanent but permanently suspending the proposed charges for connection, service, permit and meter as proposed by the city and ordering the City to file new rules and regulations with the Commission relating to the service to consumers outside the City, in conformance with the

Commission's Rules Governing Service of Water Utilities. The City of Longmont applied for a rehearing in the matter within the statutory time allotted, and the Commission on September 27, 1949, by Decision No. 33477, granted the rehearing to be held at a date later to be determined by the Commission. This matter has been held since that time pending the clarification above referred to.

Case No. 4962 was instituted by the Commission on its own motion on July 31, 1947 as a result of a complaint filed by Mr. Keith Dever, Masonville Route, Loveland, Colorado, as to certain water tap and connection charges made by the City of Loveland to customers connecting to the municipal water system outside the corporate limits. An Order to Show Cause was issued to the City and the matter was set for hearing at Loveland on August 19, 1947. The Commission by Decision No. 34625, subsequent to the hearing, issued its order finding that the tap charge made by the City to the Complainant was discriminatory and in violation of the Commission's rules, and that said charge should be returned to the Complainant. The Commission also found that it had jurisdiction over the City of Loveland as to its water utility operations outside of its municipal boundaries, and therefore ordered the City to bring its rules and regulations into conformance with the Commission's requirements. The City of Loveland applied to the Commission for a rehearing within the allotted statutory time so as to automatically suspend the Commission's order until further order of the Commission. This matter has been pending awaiting the outcome of the question as to the Commission's jurisdiction as heretofore stated.

Case No. 5000 was instituted by the Commission as a result of the filing of a petition by water users residing outside the corporate limits of the City of Golden. The petition was filed on July 12, 1949, and the Commission's order to Satisfy or Answer was issued July 29, 1949. The City of Golden replied to the above complaint on August 15, 1949, by filing an answer to the complaint and also a motion to dismiss on the grounds that the City of Golden was not a public utility. The matter was set for hearing, and heard, on November 16, 1949, by the Commission,

but to date no order has been issued by the Commission, pending clarification of its jurisdiction, as stated previously.

Case No. 5008 was instituted by the Commission as a result of a complaint made by Mrs. Leah Hartsock, in which she stated that she was unable to obtain water service from the City of Colorado Springs although she had a contract that entitled her to such service with the Northfield Land and Water Company, the predecessor company, serving water in the area. The City of Colorado Springs, by a previous application before this Commission, had purchased the physical assets of the Northfield Company, and had also acquired the certificate of public convenience and necessity issued by the Commission to said company. The City of Colorado Springs, in response to the Commission's order to Satisfy or Answer in the case, filed an Answer to the complaint and also a Motion to Dismiss, based on the grounds that the complaint was based upon a contract between Mrs. Hartsock and the City's predecessor and that such a contractual dispute would not come under the Commission's jurisdiction. The matter was set for hearing, and heard, on January 9, 1950 at Colorado Springs. At the hearing, the Commission took the matter of the Motion to Dismiss under advisement, and after some testimony by Mrs. Hartsock in support of her complaint, approved a Stipulation by and between the interested parties, to the effect that no further evidence would be taken in this matter until some future date to be fixed by the Commission. While the Commission, subsequent to this time, has endeavored to bring this matter up for further hearing, it has been unable to do so, due to conflicting time schedules between interested parties. It is now apparent that this matter comes within the category of all the other matters listed herein in regard to jurisdiction and can now be handled under the delineation of powers of the Commission as determined by the courts relative to municipal water service outside the corporate limits.

Case No. 5013 was instituted as a result of the filing with the Commission on March 23, 1949, of a petition signed by all but one of the rural users of water service receiving service from the Town of Westminster residing outside the corporate limits of said town. The Commission

[illegible] answer the complaint on March [illegible], [illegible], and [illegible] thereto on March [illegible], 195[illegible], [illegible] that [illegible] Commission [illegible] authority over [illegible] West [illegible] Water Department [illegible] to [illegible] water service [illegible] outside of [illegible] limits, [illegible] Commission [illegible] suspended, [illegible] its jurisdiction.

It can be readily seen that the Commission has [illegible] question of jurisdiction over [illegible] service [illegible] utilities serving water users outside their corporate limits. The claim that the Commission has such jurisdiction has, for the most part, been opposed by the municipalities involved, and the [illegible] has been sorely in need of clarification, due [illegible] the fact all of the Commission's orders issued in regard to these matters were attacked in motions for rehearing filed by the cities and towns involved.

During the time that these matters were pending before the Commission, the City of Englewood and the City of Denver became involved [illegible] litigation before the District Court in the City and County of Denver [illegible] water service that involved all of the questions that had heretofore [illegible] raised before the Commission in its numerous water cases. The City [illegible] Englewood, in its complaint before the Court, contended that Denver [illegible] a public utility subject to the jurisdiction of the Public Utilities Commission as to the sale of its surplus water outside the city limits, [illegible] further that Denver and Englewood had a contract with regard to [illegible] rates for water service.

The Commission was vitally interested in the outcome of the Denver-Englewood [illegible] that determination of the issues therein [illegible] help to clarify the question of its jurisdiction. The District [illegible] in its decision [illegible] held that Denver was not a public utility in the rendering of [illegible] water service, and also found that the contract was, in effect, [illegible] right-of-way and not a perpetual obligation. [illegible] matter [illegible] on appeal by writ of error to the Supreme Court [illegible] the interest of the Commission was such that it filed a brief in the

matter. [illegible] The Supreme Court upheld the District Court of the City and County of Denver in its finding that Denver was not serving as a public utility in the rendering of water service outside its corporate limits. (123 Colo. 290, 229 P. (2d) 667).

Prior to the decision of the Supreme Court in the Denver-Englewood case, which was issued on February 19, 1951, Case No. 4982 of A. W. Musick vs. the City of Colorado Springs was instituted before the Commission on a complaint from Mr. Musick in which he stated he was unable to obtain water service from the City of Colorado Springs, although said city was rendering service to the public generally under the terms and conditions of an ordinance adopted by the City in regard to water service outside the corporate limits. The Commission, in its decision in the Musick case, found that theCity of Colorado Springs was a public utility in the supplying of water to customers residing outside the limits of Colorado Springs. After the Commission had denied a rehearing to the City, the decision was appealed to the District Court in and for the County of El Paso and said Court affirmed the Commission's Findings and Order. The City of Colorado Springs then took the matter to the Supreme Court.

The decision by the Supreme Court in the Englewood vs. Denver case, supra, was issued subsequent to the decision of the District Court in the Musick case. When the Musick case came before the Supreme Court, the Court held that the Englewood vs. Denver case was controlling in the matter and therefore Colorado Springs was not a public utility subject to the jurisdiction of the Public Utilities Commission, and reversed the judgment of the District Court with instructions to remand the case to the Public Utilities Commission with instructions to dismiss the Musick complaint.

In view of the Denver-Englewood case, further substantiated by the Musick-Colorado Springs case, the Commission believes that the matter of its jurisdiction over municipal utilities serving water to customers living outside the corporate limits has been decided. In view of the decisions of the Supreme Court mentioned above, the Commission feels that all of the matters now pending before it that have to do with water service by municipalities outside the corporate limits should be dismissed upon its own motion.

F I N D I N G S

THE COMMISSION FINDS:

That on its own motion, I. & S. Docket No. 275-In Re: Proposed rate schedule as it affects users outside corporate boundaries of the City of Longmont, Colorado; Case No. 4962-In the matter of the service rules and regulations of the City of Loveland, Colorado, in relation to the Loveland municipal water works; Case No. 5000-Customers of City of Golden waterworks, living outside of city limits vs. The City of Golden; Case No. 5008-Mrs. Leah Hartsock, Rt. 1, Colorado Springs, Colorado vs. Colorado Springs Municipal Water Department; Case No. 5013-Outside water users, Town of Westminster, Water Department vs. Town of Westminster, Water Department, should be dismissed.

O R D E R

THE COMMISSION ORDERS:

That I. & S. Docket No. 275-In Re: Proposed rate schedule as it affects users outside corporate boundaries of the City of Longmont, Colorado; Case No. 4962-In the matter of the service rules and regulations of the City of Loveland, Colorado, in relation to the Loveland Municipal Water Works; Case No. 5000-Customers of City of Golden Water Works, living outside of city limits vs. The City of Golden; Case No. 5008-Mrs. Leah Hartsock, Rt. 1, Colorado Springs, Colorado vs. Colorado Springs Municipal Water Department; Case No. 5013-Outside Water Users, Town of Westminster, Water Department vs. Town of Westminster, Water Department, be, and they hereby are, dismissed.

That this order shall become effective twenty-one days from date.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners.

Dated at Denver, Colorado,
this 30th day of October, 1952.