10-21-1983

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

SUPREME COURT
STATE OF COLORADO

Case No. 83SA252

Appeal from the District Court
City and County of Denver, State of Colorado
Civil Action No. C51288
Honorable William M. Ela

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

Plaintiffs-Appellees,

v.

DENVER BOARD OF WATER COMMISSIONERS, CITY AND COUNTY OF DENVER,
STATE OF COLORADO, a municipal corporation;
WILLIAM H. McNICHOLS, Mayor; and
THE DENVER PLANNING BOARD,

Defendants-Appellants.

AMICUS BRIEF OF THE HOME BUILDERS ASSOCIATION OF METROPOLITAN DENVER

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I. STATEMENT OF ISSUE PRESENTED

Did the trial court err in holding that the Denver Water Board ("Board") is a public utility subject to Public Utilities Commission ("PUC") regulation for water provided outside the City and County of Denver, given the provisions of C.R.S. 1973, § 31-35-401, et seq., and C.R.S. 1973, § 30-20-401, et seq., which confer upon municipalities and counties exclusive authority to acquire, build, operate and maintain water facilities as well as to prescribe and collect rates, fees, tolls and other charges for provision of such service?

II. STATEMENT OF THE CASE

In September of 1973, the Boards of County Commissioners of Arapahoe, Adams and Jefferson Counties commenced an action against the Denver Board of Water Commissioners, the City and County of Denver, the Denver Planning Board and Mayor William McNichols, asserting eight claims for relief. The principal claims which were not dismissed during the course of the litigation were:

1. The City and County of Denver and its Board of Water Commissioners held its water rights as a constructive trustee for metropolitan water users of water rights, and the constructive trust had been violated by the Board;

2. Article XX, Section 6 of the Colorado Constitution (the right to self-government) had been violated by the Board, and constitutional and statutory county functions (i.e., land use and zoning) have been usurped by the Board;

3. The Board is a public utility subject to regulation by the PUC to the extent it provides water in excess of the needs of the citizens of Denver to areas outside the City and County of Denver; and

4. By its actions in securing water rights and representations made in connection with water rights and water projects, the Board was estopped from avoiding its obligation to supply water to the metropolitan area.

The case was heard by Judge William Ela. His initial decision and order was issued on November 5, 1982, and final judgment was entered on February 4, 1983. The motion for new trial by defendants was denied on April 14, 1983; notice of appeal was filed with this Court on May 10, 1983.

The motion of the Home Builders Association of Metropolitan Denver for leave to appear as amicus curiae in this case was granted by this Court on September 6, 1983.

III. SUMMARY OF ARGUMENT

The Denver Water Board does have responsibility to serve all of its customers, including those who live outside the boundaries of the City and County of Denver. Its responsibilities exist throughout its extended service area and are based on the contracts extending the service area, as well as the claims made by the Water Board in filing for water rights and water projects for many years. That responsibility, however, does not support the legal conclusion that the Denver Water Board is subject to regulation by the Public Utilities Commission. To the contrary, Article XXV of the Colorado Constitution authorizes the Legislature to delegate its power to regulate public utilities to such agencies as the Legislature designates. In C.R.S. 1973, § 31-35-402(1)(b) and C.R.S. 1973, § 30-20-402(1)(b), the Legislature specifically designated municipalities and counties as the exclusive agencies to establish and regulate water facilities, services, rates and charges, both inside and outside their boundaries, free from PUC regulation. These statutory provisions, as well as C.R.S. 1973, § 31-35-410 and C.R.S. 1973, § 30-20-422, which expressly provide that § 402 and § 422 supersede any law in conflict with its provisions, have been interpreted in the City of Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 674 (1965). This Court's decision in that case teaches that the operation and maintenance

of a waterworks system by a municipality or county is not subject to PUC review and requires this Court to reverse the trial court in this regard.

IV. ARGUMENT

A. THE TRIAL COURT ERRED BY FINDING THE DENVER WATER BOARD A PUBLIC UTILITY SUBJECT TO PUC REGULATION.

This Court has never held that provision of water services by a municipality or a county is subject to regulation by the Public Utilities Commission. The Colorado General Assembly has specifically stated that the PUC is not to regulate water service by either of such entities. Thus, through its legislative action, the Legislature has established a distinction between the provision of water service and that of other utility services.

Article XXV of the Colorado Constitution is the provision generally empowering the Legislature to delegate its power to regulate public utilities. This Article, adopted in 1954, states in part:

> ". . . [A]ll 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 operting 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 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 . . ., and provided, further, that nothing herein shall be construed to apply to municipally owned utilities."

Municipal corporations are agencies of the state, as are counties. See, City and County of Denver v. Sweet, 138 Colo. 41, 46-47, 329 P.2d 441 (1958); Davis v. City and County of Denver, 140 Colo. 30, 35, 342 P.2d 674 (1959). The Legislature has explicitly designated municipalities and counties to

develop, operate and regulate their own waterworks facilities without any supervision by any other agency. See, C.R.S. 1973, § 31-35-401, et seq., and C.R.S. 1973, § 30-20-401, et seq.

C.R.S. 1973, § 31-35-402(1) gives a municipality all the powers necessary to fully operate a municipal waterworks system including powers found as follows:

> "(a) To acquire by gift, purchase, lease or exercise the right of eminent domain to construct, to reconstruct, to improve, to better and to extend water facilities . . . wholly within or wholly without the municipality or partially within and partially without the municipality, and to acquire by gift, purchase or the exercise of the right of eminent domain lands, easements, and rights in land in connection therewith;
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> "(b) To operate and maintain water facilities . . . for its own use and for the use of public and private consumers and users within and without the territorial boundaries of the municipality . . .;
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> * * *
>
> "(e) To enter into joint operating agreements, contracts, or arrangements with consumers concerning water facilities . . . whether acquired or constructed by the municipality or consumer . . .;
>
> "(f) To prescribe, revise, and collect in advance or otherwise . . . 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 facilties . . . 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 . . . ." (Emphasis supplied.)

The Legislature has also provided in C.R.S. 1973, § 31-35-410 and C.R.S. 1973, § 30-20-422, that the provisions of these statutes govern whenever they are in conflict with any other law. Both sections state:

> "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."

Thus, the Legislature has made it clear that when water service is provided by a municipality or county, the governing body of the municipality or county is to be the regulatory body.[1] The PUC therefore has no regulatory authority over provision of water service by a municipality or county.

B. THE COLORADO CONSTITUTION AND INTERPRETIVE CASE LAW DICTATE THAT THE PROVISION OF WATER SERVICE BY A MUNICIPALITY OR COUNTY IS NOT TO BE REGULATED BY THE PUC.

The trial court, failing to address C.R.S. 1973 § 30-20-401, et seq., and C.R.S. 1973 § 31-35-401, et seq., mistakenly grounded its holding on Robinson v. Boulder, ____ Colo. ____, 547 P.2d 228 (1976), and on a decision of the Boulder District Court, Boulder Valley Water and Sanitation District v. City of Boulder, No. 80CV0137-5 (July 21, 1980).[2]

This Court has directly answered in the negative the question of whether a municipality will be regulated by the Public Utilities Commission in its activities governing provision of water service. In City of Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965), this Court reviewed a situation in which Thornton had purchased water and sewerage facilities from a private utility which provided services to persons within and without the city's boundaries. The PUC attempted to regulate the sale by the private utility to the municipality. Thornton appealed, claiming that the Commission had no jurisdiction in the area. This Court held that, under the Constitutional provisions of Article V, Section 35, Article XXV, and the statutory provisions authorizing municipalities to operate municipal facilities, the Commission had no jurisdiction to regulate Thornton's activities. Id. 157 Colo. at 194.

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1 Denver by charter has established the Denver Water Board as this agency. C.4.14 - C.4.35.

2 This decision, of course, is without precedential value and was settled prior to a decision on appeal to this Court.

The Court noted that while the Commission is given broad powers, there are "certain definite and expressed prohibitions" which limit its powers. Id. at 193. The Court stated that the Constitutional and statutory provisions "give full power to the municipality, subject only to the electorate, to purchase or acquire by condemnation . . . any waterworks system or appurtenance necessary to the waterworks system." The Court went on to explicitly state the broad authority that municipalities have regarding operation of waterworks systems:

> "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 . . . . Insofar as the provisions of this article are inconsistent with the provisions of any other law, the provisions of this article shall be controlling." Id. at 195.

This recitation of what is now § 31-35-402(1)(f) sets forth explicitly the legislative intent that the PUC is not to regulate in this area. The Thornton decision is fully on point with the case at bar and is controlling in this matter.

The court below erred in its reading of Robinson v. Boulder, 190 Colo. 357, 547 P.2d 228 (1976), its misapplication of Englewood v. Denver, 123 Colo. 290, 229 P.2d 667 (1951), and in its failure to apply the Thornton rule. First, the trial court made elaborate factual findings determining that significant differences existed between the factual situation in Denver's provision of water services to outside Denver customers which existed at the time of the decision of Englewood v. Denver, supra. (In Englewood, this Court decided that Denver was not then operating as a public utility, essentially because its service to outside Denver customers was only

incidental to its operation. Subsequent to that decision, Article XXV was adopted.) The trial court failed to address the import of that Article, the legislative delegation of authority to municipalities and counties for this area and the Thornton decision. Second, the court below made its decision based on factual changes since the Englewood decision and a misapplication of Robinson v. Boulder, supra.

In Robinson v. Boulder, supra, the Court held that the City of Boulder was a public utility which was required to serve potential customers in its service area unless it could not do so for utility-related reasons. The City of Boulder had refused service to an area outside its municipal boundaries in order to accomplish land use controls. This Court said that such regulation could only be imposed by the appropriate jurisdiction within which the district was located (i.e., the county of Boulder), not the City of Boulder. This Court never stated nor implied that the City's utility activities were to be regulated by the PUC. This Court merely prohibited the withholding of utility services to accomplish land use regulation.[3]

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[3] As a matter of fact, an attempt was made to secure PUC regulation under the Robinson decision. On May 14, 1979, a complaint was filed with the PUC alleging the Commission had authority to regulate water and sewer rates assessed by the appellant City of Boulder. On November 27, 1979, the Commission ordered that the complaint be dismissed, finding that it did not have jurisdiction to regulate municipal water services outside the municipaltiy in light of C.R.S. 1973, § 30-20-401, et seq., and C.R.S. 1973, § 31-35-401, et seq. The ruling was appealed to the District Court of the County of Boulder, which ruled that the Commission did have authority to regulate the rates charged. Boulder Valley Water and Sanitation District v. City of Boulder, No. 80CV0137-5 (July 21, 1980). Although that decision was appealed to the Supreme Court, a later motion to dismiss was granted on January 13, 1983.

The decision in Matthews v. Tri-County Water Conservancy District, Colo. ____, 613 P.2d 889 (1980), is also relevant. This Court held that a water conservancy district is also not subject to the jurisdiction of the PUC. Pursuant to C.R.S. 1973, § 37-45-101, et seq., water districts are specifically granted authority to fix water rates. Furthermore, the statute states that any acts in conflict with the conservancy district act are non-operative. Id. at 893. Thus, in light of §§ 31-35-402(1)(b), 402(1)(f), and 410, and the comparable statutes empowering counties, the interpretation of these provisions in Thornton, as well as the interpretation of similar statutes reached by this Court in Matthews, it is obvious that the Legislature did not intend to make a municipality's or county's authority to operate and maintain water systems subject to the jurisdiction of this Commission.

Of great importance to the Home Builders Association is that this Court hold, as it did in Robinson, that the City of Denver in operation of its water system has a responsibility to provide service outside the city to the extent of its ability to do so. If Denver arbitrarily withholds provision of water services when it is able to provide such service to any customer within its entire service area, charges inequitable rates, or in any other manner does not provide fair and equitable service to its non-Denver resident customer base, then the customer or customers should have the same remedy as was available to the Plaintiffs in Robinson -- viz, a court order that water service cannot be withheld.

V. CONCLUSION

The trial court in this case made the correct findings but fashioned the wrong remedy. The Denver Water Board does have the obligation to fully serve all of its customers, or potential customers, throughout its expanded service area, which it has staked out. If any customer or customers believe that service is inappropriately refused, or that rates, system development charges, or any other fees are inappropriately assessed, then any customer, or entity believing it has a right to be a customer, has a remedy in court as was the case for the plaintiffs in the Robinson decision.

The Legislature has made it abundantly clear that it intended to give municipalities and counties exclusive control in the purchase, development, operation and maintenance of waterworks systems, C.R.S. 1973, § 30-20-401, et seq., and C.R.S. 1973, § 31-35-401, et seq., free from PUC regulation. This Court has already recognized and given interpretation of those statutes in the Thornton decision. The decision in this matter should simply apply the Thornton rule and reverse the trial court.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing AMICUS BRIEF was placed in the United States mails, postage prepaid, on the 21st day of October, 1983, duly addressed to:

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