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### Colorado Land Use Commission v. Board of County Com'rs of Larimer County

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FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO  
APR 19 1979

David W. Brezina

Honorable  
CONRAD J. BALL  
Judge

MEMORANDUM IN OPPOSITION TO MOTION TO STAY

Attorneys for Appellee  
Platte River Power Authority

NO. 79SA47  
IN THE  
SUPREME COURT  
OF THE  
STATE OF COLORADO

COLORADO LAND USE COMMISSION,	)	
	)	
Appellant,	)	
	)	
v.	)	MEMORANDUM IN OPPOSITION
	)	TO MOTION FOR STAY
THE BOARD OF COUNTY COMMIS-	)	
SIONERS OF THE COUNTY OF	)	
LARIMER, et al.,	)	
	)	
Appellees.	)	

COMES NOW the Appellee, Platte River Power Authority ("Platte River") on behalf of itself and, due to the time constraints, its parent municipalities of Estes Park, Longmont, Loveland and Fort Collins (the "Municipalities") in opposition to the Motion to Stay filed herein by the Colorado Land Use Commission (the "Commission"). The granting of such a stay is constitutionally and statutorily prohibited. The Commission's action in seeking such a stay disregards legally protected local government sovereignty and constitutes unwarranted harrassment.

The underlying facts in this controversy are obfuscated by the brief, motions and other supporting documents filed to date. This background summary is included in an effort to supplement the Stipulation of Facts filed herein and to provide the Court with a better understanding of the underlying factors leading to this rather bizarre case.

BACKGROUND SUMMARY

Platte River was established by the Municipalities to generate and supply their electric power and energy requirements. It is a political subdivision wholly owned and controlled by the

Municipalities as their agency and instrumentality. The Municipalities will need an additional source of generating capacity by late 1984. Beginning in 1974 various generation alternatives were studied and evaluated and by 1976 the area north and east of Fort Collins was identified as the most promising site for a generating facility. Platte River initially favored a site in Weld County but in December of 1976 concluded that the plant would be a continuing source of controversy if located in Weld County since it would not pay property tax. At that time the Platte River Board decided to pursue an equally acceptable site in Larimer County where over three-fourths of the County residents are supplied by Platte River. A special task force was appointed by the Larimer - Weld Regional Council of Governments in February of 1977 to study and evaluate the proposal of Platte River. The task force report was completed in August of 1977.

The proposed Rawhide site and the review procedure to be followed was discussed with Larimer County. On June 28, 1977, Larimer County, on its own motion, held a public hearing on whether or not to follow the procedure of C.R.S. 1973 Art. 24-65.1. It decided instead to process the Rawhide Project under its existing land use regulations as a rezoning and use by special review matter. Platte River agreed to this procedure even though the governing board of a municipal utility has the power to locate its facility in the unincorporated area of a county over the objection of the county. More importantly, Platte River also agreed to abide by reasonable land use decisions of Larimer County thereby contractually relinquishing its power to override Larimer County. The Intergovernmental Agreement formalizing this procedure was executed on August 25, 1977.

On August 26, 1977 the Commission issued its formal requests to Larimer County all as more specifically set forth in the Stipulation of Facts filed herein. On October 25, 1977 Larimer County, in response to the formal requests of the Commission, held a second hearing on whether or not to follow the procedure of C.R.S. 197

Art. 24-65.1 and again decided to process Rawhide under its existing land use regulations as a local matter and as contemplated by the Intergovernmental Agreement. In February of 1978 the Commission initiated this action pursuant to C.R.S. 1973 § 24-65.1-407(c).

Since October of 1977, the obligations of Platte River and Larimer County under the August 25, 1977 Intergovernmental Agreement have been fully performed. Platte River has spent in excess of \$600,000 for detailed, exhaustive and thorough environmental studies and the compilation of an Environmental Impact Analysis of the Rawhide Project, a copy of which is attached hereto. \$150,000 was provided Larimer County for costs related to the review process. The bulk of these funds were used by Larimer County to retain Thorne Ecological Institute as a special consultant to Larimer County on the Rawhide Project. Numerous additional public hearings have been held by Larimer County, Platte River and the Larimer County Planning Commission. The Platte River applications for rezoning of the plant site and authorization for the Rawhide Project as a use by special review were processed under the existing Larimer County zoning regulations. The Larimer County Planning Commission unanimously recommended approval of the Rawhide Project and on March 26, 1979 the Larimer County Commissioners by a 2 1 vote approved the rezoning and use by special review.

Contrary to the inferences of the Commission, the Rawhide Project was subjected to a responsible, comprehensive and objective analysis and evaluation. The Rawhide Project minimizes environmental impacts and is generally acknowledged to be a good environmentally-acceptable and cost-effective solution to the generation requirements of the Municipalities. However, the controversy is not really about the merits of the Rawhide Project. The Commission is unhappy because it cannot inject itself into the land use review process without the consent of the local government and because the procedure spelled out in C.R.S. 1973 Art. 24-65.1 is not mandatory

and exclusive. The Commission is hoping to get this Court to give it powers over local governments which were removed from the original bill by the Senate before it would allow the compromise legislation to pass in 1974.

#### LEGAL CONSIDERATIONS

The primary reason the motion to stay filed by the Commission should be denied is because Section 35 of Article V of the Colorado Constitution denies to the Commission the power to seek such a stay. Section 35 of Article V of the Colorado Constitution is clear and unequivocal. It provides:

Delegation of Power. The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.

This section applies to the Colorado Public Utilities Commission (PUC). Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158 (1924). See also, City of Lamar v. Town of Wiley, 80 Colo. 18, 248 P. 1009 (1926). It would also apply to the LUC. The Holyoke case, supra, defines a special commission as:

a body distinct from the city government, created for a different purpose, or one not connected with the general administration of municipal affairs . . .

75 Colo. at 294, 226 P. at 160-61. The constitutional prohibition is not, however, limited by the fact that the term special commission is used, the reasoning applies to general commissions as well. Id.

People ex. rel PUC v. City of Loveland, 76 Colo. 188, 230 P. 399 (1924) reaffirmed by City of Loveland v. Public Utilities Commission, \_\_\_\_\_ Colo. \_\_\_\_\_, 580 P.2d 381 (1978), held that the Public Utilities Commission was prohibited, from seeking an injunction to halt Loveland's construction of a hydroelectric plant outside its city limits because of Section 35 of Article V. The present fact situation is indistinguishable.

Also relevant to consideration of the Commission's motion for stay is C.R.S. 1973, § 24-65.1-105, which provides in relevant part:

24-65.1-105. Effect of article - public utilities. (1) With regard to public utilities, nothing in this article shall be construed as enhancing or diminishing the power and authority of municipalities, counties, or the public utilities commission. (Emphasis added).

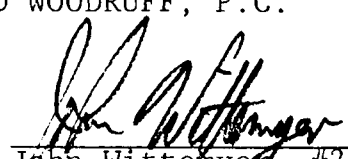
This limitation does not apply to only a part of C.R.S. 1973, Art. 24-65.1. It restricts the applicability of all provisions of the article in their application to public utilities of municipalities. C.R.S. 1973, § 24-65.1-407(c), cannot, as the Commission asserts, constitute the statutory authority for staying construction of the Rawhide Project without violating the provisions of Section 105.

The Commission stipulated that Platte River is a power authority and an electrical utility established as a separate governmental entity by the Municipalities to supply their wholesale power and energy requirements. Certainly the power and authority of the Municipalities and Platte River would be diminished if their construction of facilities could be stayed solely as the result of a provision originating with C.R.S. 1973, §24-65.1-407(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within  
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herein by depositing copies of same in the United States  
mail, postage prepaid, at Boulder, Colorado, this 19th day  
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