A Brief History of Municipal Electricity in Colorado

By Joe Wilson, Esq.

Early Origins of Electricity in Colorado

The nation's first commercial electric distribution system began operations in Appleton, Wisconsin in 1882. This and Thomas Edison's Pearl Street Station, which began commercial operations in New York City three weeks later, were direct current systems serving less than a square mile each. At the time Colorado had been a state for only six years and had a population of 194,327.[1] In 1882 there were 53 incorporated cities within Colorado.

Colorado adopted its first general municipal enabling statutes during the 1870s. From the outset, municipalities were authorized to engage in water distribution services. The statutes of 1887 authorized the provision of municipal gas utility services. The municipal code was amended again in 1893 to authorize the provision of municipal electric service. In 1893 the population of Colorado had increased to 412,198[2] and there existed 107 incorporated cities. The distribution of electric current had been proven feasible only ten years before and the economics of such systems were still in question. Few electric utility systems were in operation, and these tended to be embedded within large population centers.

The 1893 statute placed the authority to regulate the operations and rates charged by municipal electric systems with the local government. The law required that the rates charged be cost based in that they must "be sufficient to pay the expenses of running, repairing and operating such works." The statute further required that "gas should be charged for by the foot and electric lights by the light." Later this language was changed so that both gas and electricity were charged according to "use" (as distinguished from water). These guidelines were established a full 20 years before the passage of the Public Utilities Law and the creation of the Public Utilities Commission.

In 1902, by a vote of the people, Colorado adopted the concept of home rule for municipalities. The home rule provisions were included within the Colorado Constitution as Article XX.[3] The home rule amendment contains an explicit authorization allowing home rule municipalities to offer electric utility service both within and outside municipal limits.

[1] 1880 Census. This is less than the current population of Aurora, which was 249,855 as of 1997. In 1880 approximately 40,000 persons lived in Arapahoe County -- which contained the City of Denver prior to the adoption of Article XX of the Colorado Constitution. The second most populous county was Lake County with 24,000. No other county had a population in excess of 9,700.

[2] 1890 Census. Arapahoe County had a population of 132,135.

[3] This addition to the Constitution, which created the City and County of Denver, occurred during the progressive era, which is commonly correlated with the rise of the American city. Home rule, municipal franchise authority and the city manager form of government were some of the most significant municipal reforms identified with the progressive era.

Electricity Comes to Rural Colorado Communities

Particularly in remote rural areas, municipalities used the referenced statutory authority to bring electricity to their residents. By 1910 the cities of Aspen (then Ute City), Fort Morgan, Gunnison, Haxtun, Holyoke, Julesburg, and Wray were each offering municipal electric service. By 1920 municipal systems also had been established in the cities of Burlington, Lamar and Longmont.

Creation of the Colorado Public Utilities Commission

Another hallmark of the progressive area was the creation of independent regulatory commissions imbued with the authority to regulate the operations of private businesses. Colorado adopted a comprehensive Public Utilities Law in 1913, which created the Public Utilities Commission. Included within the Public Utilities Law was the following definition of a "public utility":

> The term "public utility", when used in this act, includes every common carrier, pipe line 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 now or hereafter declared by law to be affected with a public interest, . . .

This language remains virtually unchanged and continues to appear in C.R.S. § 40-1-103(1).

The adoption of the Public Utilities Law created a significant jurisdictional issue: What authority does the PUC have over municipal utilities, which are defined as "public utilities" within the language quoted above?

Local Control Prevails

The issue was resolved through two Colorado Supreme Court cases: Town of Holyoke v. Smith, 75 Colo. 286, 226 P 158 (1924), and City of Lamar v. Town of Wiley, 80 Colo. 18, 248 P 1009 (1926). In a fact situation instructive for those who doubt the efficacy of local regulation, the Holyoke town council had established a rate schedule for electric service. Subsequently, the Public Utilities Commission asserted jurisdiction and established a higher rate schedule.

In limiting the jurisdiction of the PUC, the court relied upon Article V, Section 35 of the Colorado Constitution, which prohibits the general assembly from establishing any special commission with regulatory control over municipal improvements or facilities. In doing so, Town of Holyoke v. Smith judicially recognizes the primacy of local regulation over the operations of municipal utilities. In reaching this conclusion, the court reasoned:

> The central idea of government in this country was and is that in local matters municipalities should be self governing . . . It is said that one of the vital ideas in the American form of government is "that local affairs shall be managed by local authorities, and the general affairs by the central authority."

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> The operation of the electric light plant by the town of Holyoke is the performance of a municipal function, specifically authorized by statute.
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> A plant owned and operated by consumers can never become a monopoly, nor can it be an instrument of oppression. Hence there is no room for the exercise of the police power [of the Public Utilities Commission]. The fixing of rates by the consumers through their agents, the Town trustees, cannot be an evil from which they need protection. On principle it would seem entirely unnecessary to give a commission authority to regulate the rates of a municipally owned utility. The only parties to be affected by the rates are the municipality and its citizens, and, since the municipal government is chosen by the people, they need no protection by an outside body. If the rates for electric light or power are not satisfactory to a majority of the citizens, they can easily effect a change, either at a regular election, or by the exercise of the right of recall.

The Town of Holyoke v. Smith case recognizes that the most effective regulatory control over municipal utility activities, including the rates charged by the municipal utility, is not the police power of the state but rather the authority of the citizenry exercised through the ballot box. This principle remains fundamental today.

In City of Lamar v. Town of Wiley, the court looked again at the Article V, Section 35 limitations and the broad definition of public utility contained within the Public Utilities Law. Extending the Town of Holyoke v. Smith logic, the court ruled that when a municipality provides service to customers beyond municipal limits it is operating as a public utility subject to the regulatory jurisdiction by the Public Utilities Commission. In effect, the police power of the state as a regulator is necessary because there is no recourse to the ballot box.

The only significant modification to the jurisdictional boundaries established by the Town of Holyoke v. Smith and City of Lamar v. Town of Wiley cases occurred in 1983 when the Colorado Legislature adopted C.R.S. § 40-3.5-101 et seq. During the period 1927 through 1983, municipal utilities, which provided service outside municipal boundaries, were required to file rate cases with the Public Utilities Commission for those areas of service beyond municipal limits, whereas under Town of Holyoke v. Smith, service within municipal limits was regulated by the local governing body. This dual regulatory structure was not only costly, but also ripe with the potential for conflicting regulatory decisions. Consequently, through the adoption of Article 3.5, the Legislature limited the PUC regulatory jurisdiction in instances in which the municipal utility charged identical rates within and outside municipal boundaries. The assumption underlying this legislation is that ballot box regulation is a sufficient substitute for the state's police power in those limited instances in which service territories extend beyond municipal limits. Under Article 3.5 when rates are identical within and outside municipal limits, the Commission retains limited complaint authority over rates but otherwise Articles 4, 6 and 7 and Section 40-1-104 of the Colorado Public Utilities Law do not apply to municipal utilities. Since its adoption in 1983 there have been no complaints filed with the PUC under this statute.

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Electric Utilities Enter the Modern Era

During the 20th Century the electric industry moved from localized and isolated utility systems to an integrated network; the interstate transmission system now interconnects numerous distribution systems and generation resources. During this period investor-owned utilities have attempted to place themselves in a more favorable position to take advantage of economies of scale through consolidations. Municipal utilities and rural electric associations have attempted to take advantage of economies of scale through cooperative action. For municipal utilities such cooperative efforts are effected through joint-action power authorities. The authority of municipalities to act jointly with other municipalities or private companies for purposes of developing generation and transmission was added to the Colorado Constitution in 1974. Colo. Const., Art XI, § 2. Shortly thereafter C.R.S. § 29-1-204 was enacted which set forth procedures for the formation, governance and financing of municipal power authorities. Subsequent to the adoption of this statute in 1975, the Platte River Power Authority and the Arkansas River Power Authority were formed. Each of these entities provide generation and transmission resources for their members through strategies involving either the construction and operation of these assets or their procurement through contracting. A number of Colorado municipal utilities are also members of the Municipal Energy Agency of Nebraska, which provides wholesale electric supply and transmission services to its members.

Municipal power authorities are locally regulated through a board of directors appointed by and representing the member municipalities. Power authorities are not subject to PUC regulation and are subject to limited Federal Energy Regulatory Commission jurisdiction (limited to their activities as Transmitting Utilities as that term is defined in the Federal Power Act).