Decision No. C04-1347

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 00D-261G

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IN THE MATTER OF THE PETITION OF K N WATTENBERG TRANSMISSION, LLC, FOR A DECLARATORY ORDER THAT THE COLORADO PUBLIC UTILITIES COMMISSION HAS NO JURISDICTION OVER ITS DELIVERY LATERAL WHICH INTERCONNECTS WITH THE TRANSMISSION LINE OF COLORADO INTERSTATE GAS COMPANY AND IS USED TO DELIVER GAS TO TWO INDUSTRIAL USERS FOR WHOM THE LATERAL WAS BUILT.

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DOCKET NO. 00A-635G

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IN THE MATTER OF THE APPLICATION OF K N WATTENBERG TRANSMISSION LIMITED LIABILITY COMPANY FOR SUCH AUTHORITY AS MAY BE NECESSARY FOR THE COMMISSION TO ASSUME THE EXERCISE OF REGULATORY SUPERVISION OVER THE TRANSPORTATION OF INTERSTATE GAS THROUGH A FIVE-MILE LATERAL FROM AN INTERCONNECTION WITH THE TRANSMISSION PIPELINE OF COLORADO INTERSTATE GAS COMPANY TO TWO INDUSTRIAL CUSTOMERS LOCATED ON THE OUTSKIRTS OF THE CITY OF FORT MORGAN, COLORADO, INCLUDING: 1) A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, 2) AUTHORIZATION TO PROVIDE SUCH SERVICE IN ACCORDANCE WITH EXISTING CONTRACT TERMS, CONDITIONS AND RATES, AND/OR 3) SUCH OTHER AUTHORITY AS THE COMMISSION MAY FIND TO BE NECESSARY OR DESIRABLE.

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**DECISION DENYING APPLICATIONS FOR REHEARING, REARGUMENT, OR RECONSIDERATION**

Mailed Date: November 16, 2004
Adopted Date: October 8, 2004

## I. BY THE COMMISSION

### A. Statement

1. This matter comes before the Commission for consideration of Applications for Rehearing, Reargument, or Reconsideration (RRR) by K N Wattenberg Transmission Limited

Liability Company (KNW),[1] the City of Fort Morgan (City or Fort Morgan), and Staff of the Commission (Staff). The parties request reconsideration of Decision Nos. C02-1224 (Mailed November 1, 2002) (Decision I) and C04-0510 (Mailed May 17, 2004) (Decision II). In Decision I, we determined that: (1) KNW, by virtue of its ownership and operation of the Fort Morgan pipeline,[2] was subject to the Commission's jurisdiction as a public utility; and (2) the Commission possesses the authority to grant a certificate of public convenience and necessity (CPCN) to KNW for continued operation of the Fort Morgan pipeline, if we determined that the City had failed to provide adequate service to customers Excel Corporation (Excel) and Leprino Foods Company (Leprino). Decision I remanded this case to the Administrative Law Judge to consider whether the City was unable or unwilling to provide adequate service to Excel and Leprino. We deferred the filing of Applications for RRR to Decision I until the Commission's decision on the remanded proceedings. In Decision II, a ruling on Exceptions, we determined that the City failed to provide adequate service to Excel and Leprino, and, therefore, issued a CPCN to KNW for continued operation of the Fort Morgan pipeline. The parties, through their Applications for RRR, request reconsideration of various determinations made in Decisions I and II.

2. The Applications, for the most part, reiterate arguments addressed in Decisions I and II, and for the reasons stated in those Decisions, we deny the Applications.

[1] Excel Corporation (Excel) and Leprino Foods Company (Leprino) join in KNW's Application for RRR.

[2] This is the natural gas pipeline constructed by KNW in the Fort Morgan area to provide gas transportation service to two customers, Excel and Leprino. Prior to construction of KNW's pipeline, Excel and Leprino were served by the City over its gas public utility facilities.

**B. Ruling on Motions**

3. Staff filed a Motion for Leave to Late-File Application for Rehearing, Reargument, or Reconsideration. Applications for RRR to the Decisions were due on June 7, 2004. Under Rule 7(a), Commission Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, pleadings must be filed at the Commission's office during normal business hours, 8:00 a.m. through 5:00 p.m., and any pleading received by the Commission after normal business hours will be deemed filed as of 8:00 a.m. the following business day. Staff did file its Application for RRR on June 7, 2004 but at 5:04 p.m. Therefore, its Application was, according to Rule 7(a), deemed filed on June 8, 2004. Staff requests that we accept and consider its Application for RRR.

4. We note that the time period for filing applications for RRR is set by statute (§ 40-6-114(1), C.R.S.), and the Commission cannot waive that statutory requirement.[3] Here, however, Staff's Application for RRR has been deemed untimely by operation of Rule 7(a) (*i.e.*, the specification of Commission business hours as ending at 5:00 p.m.), not by operation of the statute. The Commission may grant a variance of its procedural rules for good cause. *See* Rule 3, Commission Rules of Practice and Procedure, 4 CCR 723-1. Since Staff's Application was actually filed only four minutes after the close of business on June 7, 2004, we waive Rule 7(a), and will consider the Application as timely filed.

5. The Commission's rules do not allow responses to applications for RRR. *See* Rule 22, Commission Rules of Practice and Procedure. However, KNW filed a Motion to be Allowed to Respond to the Application for RRR by the City, and its Response to the City's

[3] Under § 40-6-114(1), C.R.S., applications for RRR must be filed 20 days after a Commission decision, or within such additional time as the Commission may authorize upon request made within that 20-day period.

Application. The City opposes KNW's motion to file a response, suggesting that the arguments in City's Application are not new, but have been extensively addressed by the parties throughout this proceeding. According to the City, no reason exists to waive Rule 22 to allow a response to its Application for RRR, since the Application did not raise new arguments.

6. We deny KNW's motion to respond to the City's Application for RRR. The City correctly notes that its arguments are not new and those arguments have already been discussed extensively by the parties. There is no need to allow additional pleadings regarding the City's contentions.

### C. Application for RRR by Staff

7. The essential argument in Staff's Application is that the principle of regulated monopoly does not apply to municipal public utilities operating within municipal boundaries. According to Staff, the protections of the regulated monopoly principle—this principle assigns exclusive service territories to operating public utilities and generally prohibits duplication of public utility facilities—apply only to public utilities subject to the Commission's regulatory jurisdiction. The Commission has no authority to regulate municipal public utilities. *See* Colorado Constitution, Article XXV (Commission's power to regulate public utilities does not apply to municipally owned utilities). Since the City is not subject to Commission regulation, Staff suggests, it is not entitled to protection against competition under the regulated monopoly principle.

8. Decision I (pages 25 through 30) fully addressed this issue. In part, the Decision points out that municipal utilities are public utilities under § 40-1-103(1)(a), C.R.S., and the regulated monopoly principle, which is grounded in § 40-5-105, C.R.S., applies to public

utilities. The Decision also points out that the regulated monopoly principle is intended to avoid duplication of public utility facilities; interpreting that principle as not applicable to municipal utilities (or other public utilities not regulated by the Commission) would directly contravene the statutory goal of avoiding duplication of facilities. Finally, the Decision notes that there is no authority for finding that regulation by the Commission is necessary in order for the regulated monopoly principle to apply.

9. We affirm these determinations. Therefore, we deny Staff's Application for RRR.

**D. Application for RRR by KNW**

10. In general, KNW suggests that the Commission is collaterally attacking the Federal Regulatory Energy Commission's (FERC) findings and rulings. That suggestion is incorrect. Decision I (pages 13 through 15) rejected KNW's arguments that it did not require a CPCN from the Commission because FERC had previously authorized construction of the pipeline.[4] The Decision points out that jurisdiction to rule on the pipeline on the part of the Commission, in light of FERC's eventual Hinshaw ruling, means the Commission has authority to approve *or deny* KNW's application for a CPCN.

11. KNW disputes the statement in Decision I that KNW should have known that the pipeline was subject to state rather than federal jurisdiction, and requests that we "vacate" this "finding." However, we observe that this statement was *dicta*; the eventual rulings by the Commission were not based upon this statement. Further, we did not rule upon the issue as to whether KNW acted reasonably in applying to FERC before coming to the Commission, nor

[4] KNW suggested this even though FERC's decision was reversed by the 10th Circuit Court, and, subsequently, FERC vacated its grant of a CPCN for the pipeline because the pipeline is subject to state jurisdiction under the Hinshaw Amendment to the Natural Gas Act.

upon any issue as to whether KNW acted imprudently or in bad faith in first applying to FERC. Given the nature of our observation, there is no need to "vacate" the statement.

12. KNW also objects to statements in Decision I that FERC lacked the power to authorize construction of the facilities, and that KNW no longer possesses federal authority for construction of the pipeline. We point out that these statements, to the extent made by the Commission itself (as opposed to simply summarizing the City's arguments), were made: (1) either in the context of discussing KNW's assertion that it was unnecessary to obtain Commission authority for *continued* operation of the Fort Morgan pipeline even in light of FERC's eventual ruling that the pipeline was a Hinshaw pipeline (Decision I, pages 13 through 15); or (2) simply as statements of the procedural history of the case at FERC and the Commission itself. These statements did not constitute collateral attacks on FERC's rulings on KNW's pipeline, but, rather, related to the Commission's authority to grant a CPCN for the Fort Morgan pipeline given FERC's ruling that the pipeline was a Hinshaw pipeline. In addition, these statements did not constitute determinations whether KNW lawfully constructed the pipeline *at the time*, in light of then outstanding FERC orders. Again, there is no reason to vacate these statements in the Decision.

13. Finally, KNW objects to the characterization in Decision II (page 4) that its service *displaced* the City's service to Leprino and Excel. The Decision used the term displace, not as a legal term of art, but according to its common, ordinary usage. In fact, the City was serving Leprino and Excel prior to KNW's construction of the pipeline, the City did not serve those customers after KNW constructed its pipeline, and the reason for the City's discontinuance

of service was that KNW began serving the customers over the newly constructed pipeline. The characterization of the situation was appropriate and need not be changed.

14. For the foregoing reasons, we deny KNW's Application for RRR.

**E. Application for RRR by the City to Decision I**

15. The City reiterates its arguments that provisions in the Colorado Constitution, Article V, Section 35 and Article XXV, preclude the Commission from issuing a CPCN for the Fort Morgan pipeline. According to the City, the Commission lacks the authority to determine that a municipal utility is unwilling or unable to serve customers within municipal boundaries, unless the municipal utility unequivocally and voluntarily relinquishes its right to be the monopoly provider.

16. Decision I (pages 21 through 25) fully addressed these arguments. The Decision points out that the issuance of a CPCN to KNW (upon a determination that the City is unwilling or unable to provide adequate service) does not constitute an attempt to regulate the City's utility operations (an action prohibited by Article XXV). Additionally the Decision notes that the constitutional provisions cited by the City, as interpreted by the Colorado courts, contemplate *direct* Commission action against a municipal utility. Here, the Commission is not attempting to regulate the City in its operation of its gas utility. Our legal ruling must be put into context: We ruled that the Commission could certify KNW to operate in the City *only if the City was unable or unwilling to provide adequate utility service.* This justification for certifying another public utility to operate within the City, if met, does not constitute improper interference with municipal property.

17. The City also reiterates its argument that the Commission cannot grant a CPCN to KNW because KNW has not obtained a required City permit, citing §§ 40-5-102 and 40-5-103(1), C.R.S. This contention was fully addressed by the Decision (pages 30 through 32). The Decision points out that, according to § 40-5-102, C.R.S., a public utility may not exercise any authority granted under any franchise or permit prior to obtaining a CPCN from the Commission. This is not the same circumstance assumed in the City's argument (*i.e.*, that a utility must have a permit before obtaining a CPCN). In addition, the Decision notes that, according to § 40-5-103(1), C.R.S., an "applicant for a certificate to exercise franchise rights" must submit to the Commission evidence that applicant has received the required permission from the municipality. Here, KNW did not require permission to exercise franchise rights, because the pipeline did not cross any City streets or other rights-of-way when built. Apparently, the City does not dispute that assertion.

18. For the reasons stated in Decision I, we deny the City's Application for RRR to that Decision.

**F. Application for RRR by the City to Decision II**

19. The City reargues essentially all of the issues it raised in its Exceptions. The Commission adequately addressed most of these issues in Decision No. C04-1224, and we uphold that Decision. We do provide clarification in a few areas, as discussed below.

20. On page 9 of its Application, the City argues that the Commission held the City to a standard of perfection rather than adequacy, focusing on the needs of two customers rather than the public generally. We disagree. In Decision II we found that firm transportation is a necessary service for large customers, and is a distinct service separate from interruptible transportation or

firm sales service. We uphold that finding here. The City's refusal to offer firm transportation demonstrates that it was unwilling to provide a necessary service. This rises to the level of a substantial inadequacy; this was not a minor inadequacy, nor did this constitute a bare consideration of the desires of two customers.

21. On page 16 of its Application, the City states that its transportation service is consistent with the Commission's transportation Rule 17-2.4(b), and argues that several Commission findings with respect to this issue are incorrect. The City generally makes four separate arguments with respect to this rule.

a) First, the City takes issue with the Commission's reference to the City's industrial sales service. The City states that it has no "industrial retail service." The Customers were served under commercial sales service or transportation. In Decision II we incorrectly referred to industrial sales service in our analysis of whether the City's service complies with the Commission's Rule 4 CCR 723-17.[5] However, the same discussion and conclusion is applicable to the Customers under commercial sales service.[6] For a given customer class, whether industrial or commercial, the City's tariffs place that customer in a subordinate position under transportation service compared to sales service. We fully discuss this analysis in paragraphs 18 through 31 of Decision II.

b) Second, the City argues that its service meets the requirements of Rule 17-2.4(b) because all of its customers under transportation service are subject to the same priority of interruption as other transportation customers, and all of its customers under commercial sales

[5] *See* paragraphs 18 through 31, and 53, of Decision II.

[6] We note that though the City served the Customers under "commercial" sales service, the Customers' use of natural gas would best be classified as "industrial."

service are subject to the same interruption priorities as other commercial sales customers. We disagree that the City's service meets the rule requirement. Rule 17-2.4(b) requires the utility to treat transportation interruptions equitably when considering other customers in the same class. This rule requires the utility not only to interrupt a transportation customer equitably when considering other transportation customers, but also considering sales customers of that same class. We provide a thorough discussion of this issue in paragraphs 18 through 31 of Decision II, including examples of tariffs of jurisdictional utilities that are consistent with the requirements of Rule 17-2.4(b).

c) Third, the City asserts that its interruption difference between sales and transportation customers is "equitable" within the meaning of Rule 17-2.4(b) because it protects the general body of ratepayers. We disagree. In footnote 5 of Decision II we addressed this issue:

> We recognize that Public Service and Kinder Morgan provide interruption priorities between industrial sales and transportation that are "equal," even though Rule 2.4(b) requires interruption on an "equitable" basis. As stated in the Recommended Decision, Leprino and Excel do not have alternate fuel capability and have a legitimate need for firm service. Therefore, the City's practice of offering either firm sales or interruptible transportation service to its industrial customers cannot meet the requirement of Rule 2.4(b) to interrupt on an equitable basis within a class. *See* section E, Adequacy of City's transportation service, for a detailed discussion of the City's interruptible transportation service.

d) Fourth, the City states that any difference in interruptions between sales and transportation is a policy decision within the City's exclusive jurisdiction. We agree that the City has the authority to decide what services it will offer, as a policy decision within its exclusive jurisdiction. However, the City's decision not to offer firm transportation service then warrants the award of a CPCN for such a service to another utility. The Commission has the authority to

assess whether a service exists that would be duplicative of the firm transportation service offered by KNW. Through this assessment, the Commission found that the City's decision not to offer firm transportation service warrants the award of a CPCN to KNW.

22. On page 24 of its Application for RRR, the City states that the Commission has no jurisdiction, erred as a matter of law, and abused its discretion by including, as a crucial ingredient of its findings, that the City broke an agreement with the Customers. The City argues that there is no record evidence that the City broke an agreement with the Customers. The City argues that the Commission does not have jurisdiction to determine whether any party has breached a contract. Further, the City states that contracts between customers and a utility are always subservient to the utility tariffs as the same exist and as the same may be lawfully changed from time to time. First, we clarify that the finding that the City breached an agreement was not a "crucial finding" for our decision. Rather, we considered the City's actions with respect to the agreement in assessing the overall character of the City's service. Regardless of whether the agreement was lawfully broken, or whether the City initially made a commitment that was improper or unrealistic, the City's actions here demonstrate actions inconsistent with adequate service.

23. On page 25 of its Application, the City states that the Commission abused its discretion and erred as a matter of law in finding inadequate service because the City Council broke an appointment with the Customers. The City argues that the meeting at issue was to discuss rates only, and it is inconsistent for the Commission to acknowledge that rates cannot be the basis for a finding of inadequate service, yet cite this event as showing inadequate service. The City goes on to state that neither Commissioners nor its jurisdictional utility executives are

required to meet with customers, and the City Council is in a similar position. Therefore, the Customers had no right to a meeting with the City Council or the Mayor.

24. As a general matter, the Commission did not find that the City's service was inadequate because the City Council failed to meet with the Customers. Again, the Commission considered the City's actions in assessing the overall service of the utility. As to the City's specific arguments, we disagree that the cancellation of a meeting has any relevance to rate issues. The Commission considered the City's actions here in the context of how it administered its service and interacted with customers, without regard to any issues that may or may not have been raised at the meeting. We agree that the Commission does not require jurisdictional utility executives or Commissioners to meet with customers. However, the fact that the City allowed the meeting to be set, then cancelled it after the Customers' representatives traveled in from out of town relates to adequacy of service.

## II. CONCLUSION

25. Clearly, this is a difficult case. On one hand, the City never interrupted or threatened to interrupt the customers, and even installed facilities to serve them. On the other hand, the City offered interruptible transportation service and chose not to offer firm transportation service, as demonstrated by the City's refusal to insert the word "firm" in its transportation contracts, two City directors of Utilities stating that the City's service is interruptible, and the City maintaining tariffs that terminate transportation service in a manner inconsistent with firm transportation.

26. The Commission and parties have expended considerable effort to investigate the adequacy of the City's transportation service. The Commission remanded the issue to an

Administrative Law Judge specifically for the purpose of assessing service adequacy. The lengthy record and timeline in this case demonstrates that the Commission erred on the side of caution to avoid issuing decisions based on incomplete information or a hurried analysis. Ultimately, we found that KNW met its burden to show that its firm transportation service does not duplicate the interruptible service provided by the City. This case provides a ruling on issues never before addressed by the Commission. We have never before ruled on municipal service adequacy, or whether firm transportation is an essential service. In the end, we believe that our ruling properly implements our statutory duties, in a manner that is consistent with our rules and industry standards.

## III. ORDER

### A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration by Staff of the Commission is denied consistent with the above discussion.

2. The Application for Rehearing, Reargument, or Reconsideration by K N Wattenberg Transmission, LLC is denied consistent with the above discussion.

3. The Application for Rehearing, Reargument, or Reconsideration by the City of Fort Morgan is denied consistent with the above discussion.

4. The Motion for Leave to Late-File Application for Rehearing, Reargument, or Reconsideration by Staff of the Commission construed as a request to waive Rule 7(a) and is granted consistent with the above discussion.

5. The Motion to be Allowed to Respond to the Application for Rehearing, Reargument, or Reconsideration by the City of Fort Morgan filed by K N Wattenberg Transmission, LLC is denied.

6. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING October 8, 2004.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

COMMISSIONER CARL MILLER NOT PARTICIPATING.

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