

<p style="text-align: center;">DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO</p> <p>Court Address: 1777 6th Street Boulder, Colorado 80302</p>	<p style="text-align: right;">DATE FILED: June 3, 2014 11:40 AM FILING ID: FEFA54295441D CASE NUMBER: 2014CV30681</p>
<p>Plaintiff: PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation v.</p> <p>Defendants: THE CITY OF BOULDER, COLORADO; THE CITY COUNCIL for the CITY OF BOULDER, COLORADO; MATTHEW APPELBAUM, in his official capacity as MAYOR; GEORGE KARAKEHIAN, in his official capacity as MAYOR PRO TEM; and MACON COWLES, SUZANNE JONES, LISA MORZEL, TIM PLASS, ANDREW SHOEMAKER, SAM WEAVER, and MARY YOUNG, in their official capacities as members of the CITY COUNCIL</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case No.:</p> <p>Division:</p>
<p>Attorneys for Plaintiff: John R. Sperber, #22073 Daniel D. Williams, #38445 Matthew D. Clark, #44704 FAEGRE BAKER DANIELS LLP 1470 Walnut Street, Suite 300 Boulder, Colorado 80302 Phone Number: (303) 447-7700 Fax Number: (303) 447-7800 E-mail: jack.sperber@faegreBD.com dan.williams@faegreBD.com matthew.clark@FaegreBD.com</p>	
<p>COMPLAINT</p>	

Plaintiff, Public Service Company of Colorado (“Public Service” or “Plaintiff”), for its Complaint against Defendants: the City of Boulder, Colorado; Matthew Appelbaum, in his official capacity as Mayor for the City of Boulder, Colorado; George Karakehian, in his official capacity as Mayor Pro Tem for the City of Boulder, Colorado; and Macon Cowles, Suzanne Jones, Lisa Morzel, Tim Plass, Andrew Shoemaker, Sam Weaver, and Mary Young, in their official capacities as members of the City Council for the City of Boulder, Colorado (collectively “Boulder,” “the City,” or “Defendants”), alleges and states as follows:

INTRODUCTION

1. Public Service brings this action for declaratory relief and an Order voiding the City of Boulder's May 6, 2014, ordinance creating a light and power utility. The ordinance is *ultra vires* because the Boulder City Council ("City Council" or "Council") exceeded the voter-mandated limits on its authority set forth in the 2011 amendment to the City's Charter. This amendment granted Council conditional authority to create a light and power utility **only if** the Council can first demonstrate, with third-party independent validation, that specified metrics relating to financial viability and service reliability are satisfied. As a matter of law, because the City Council does not yet know the scope of any proposed utility or what customers it will serve, the City Council cannot demonstrate compliance with the Charter cost and reliability requirements at this time. Additionally, it did not secure a truly independent verification sufficient to satisfy the Charter requirements before proceeding.

2. The City Council's formation of the light and power utility is premature. Boulder cannot demonstrate compliance with the Charter metrics at this time as a matter of law for at least the following three reasons:

- a. ***All of Boulder's analyses and findings are predicated upon two critical assumptions that are dependent upon pre-condemnation approvals from the Colorado Public Utilities Commission (the "PUC" or the "Commission") that have not been evaluated by the City.***
 - o First, Boulder has identified an "acquisition area" that extends far beyond Boulder's city limits and has assumed that Boulder would automatically become the electric utility provider for more than 7,000 customers located outside city limits in this unincorporated area.
 - o Second, Boulder has assumed that by acquiring Public Service facilities in the acquisition area and serving the county customers located inside the acquisition area, it can minimize the costs it would be required to pay to separate its new utility from Public Service's remaining system.

The PUC has now ruled that the Commission possesses the constitutional and statutory jurisdiction to determine whether Boulder can serve these county customers. The Commission also ruled that it has jurisdiction over Public Service's facilities to protect the reliability, safety, and service quality of electricity services provided to unincorporated Boulder County, and to safeguard the integrity of the system statewide. It therefore ruled that the PUC must investigate and determine how the facilities should be assigned, divided, or jointly used to protect these interests. Thus, all of the base line assumptions underlying Boulder's studies are dependent upon the outcome of PUC proceedings that have not been commenced.

Boulder has admitted that it has no “Plan B” and has not evaluated any other option for a municipal utility that is not dependent upon these assumptions. In light of this, the City cannot currently demonstrate that the Charter requirements for any City light and power utility can be satisfied.

- b. ***The City directly contradicted the Charter requirements its purported to satisfy by admitting immediately before and shortly after adopting the ordinance that it has not yet determined what assets it ultimately may attempt to acquire or whether operating its own light and power utility is actually feasible.***
- c. ***The limitations that the City placed on its evaluator rendered the consultant’s work not an independent evaluation, as required by Boulder’s Charter.***

3. There was no reason for the City to pass a light and power utility ordinance now. Public Service specifically objected prior to Council’s consideration of the May 6, 2014 ordinance that its enactment at that time would be premature. It explained that the Charter does not allow the City to form a light and power utility based on only speculation – it requires “demonstrat[ion]” and “verification” that the financial and reliability metrics in the Charter can be satisfied by the proposed light and power utility **before** the Council creates the utility. The Council rejected Public Service’s objection and enacted its ordinance on May 6, 2014 without first demonstrating satisfaction of the Charter constraints and complying with Colorado law.

4. Doing so was illegal. City Council’s action forming a utility now -- without knowing what customers any City utility may legally serve or the proposed scope of any such system -- gets the process backward, and risks causing permanent and irreparable injury to Public Service. City Council first needs to determine what its proposed utility would consist of and how that system will be separated from Public Service’s system before the City can accurately analyze whether it can comply with the Charter metrics for financial viability and system reliability. City Council’s decision to form its utility without doing so creates the real risk that Public Service’s assets will be taken by the City without Council **ever** demonstrating that it actually can satisfy the voter-mandated limitations set forth in the City’s Charter based on the utility Council actually proposes to operate, which currently is unknown. The City’s approach, therefore, necessitates this lawsuit at this time so that Public Service can protect itself against this harm.

5. To prevent this harm to Public Service, this Court should require the City to comply with its own Charter and the limitations imposed upon it by its citizens, declare the Utility Ordinance to be *ultra vires*, null, void, and of no effect, and require the City Council to defer consideration of the creation of the utility until it can demonstrate that the charter requirements can be met.

PARTIES

6. Public Service is a Colorado corporation and public utility in good standing with a principal place of business at 1800 Larimer Street, Suite 1100, Denver, CO 80202. Public Service

has provided electric service consistently, reliably and affordably to the City of Boulder for more than 90 years. Public Service pays various taxes to the City both on its own behalf and remitted on behalf of its customers. Public Service provides electric, gas and steam service in Colorado under the trade name of Xcel Energy.

7. Defendant, City of Boulder, is a home-rule municipality of the State of Colorado, with its administrative offices located at 1777 Broadway, Boulder, CO 80306.

8. Defendant, City Council for the City of Boulder, Colorado is the governing body of the City of Boulder, Colorado, and, as such, possesses the authority to make final decisions and determinations regarding, among other things, the approval of ordinances.

9. Defendants, Macon Cowles, Suzanne Jones, Lisa Morzel, Tim Plass, Andrew Shoemaker, Sam Weaver, and Mary Young are named in their official capacities as members of the City Council for the City of Boulder, Colorado, who have the authority to enact ordinances for the City.

10. Defendant, Matthew Appelbaum, in his official capacity as the Mayor for the City of Boulder and as a member of the City Council for the City of Boulder, Colorado, has authority to enact ordinances for the City.

11. Defendant, George Karakehian, in his official capacity as the Mayor Pro Tem for the City of Boulder and as a member of the City Council for the City of Boulder, Colorado, who has authority to enact ordinances for the City.

JURISDICTION AND VENUE

12. This lawsuit concerns the City's unlawful decision to adopt Ordinance No. 7969 (the "Utility Ordinance"), which purports to establish a light and power utility. A copy of the Utility Ordinance, as adopted, is attached as Exhibit A.

13. Plaintiff seeks declaratory relief concerning the Utility Ordinance under Colo. R. Civ. P. 57. In the alternative, and only if the Court determines that a claim for declaratory relief is unavailable, Plaintiff also seeks judicial review under Colo. R. Civ. P. 106(a)(4) of the City's decision to adopt the Utility Ordinance.

14. This Court has jurisdiction over this matter pursuant to Colo. R. Civ. P. 57, C.R.S. § 13-51-106, and Colo. R. Civ. P. 106(a)(4).

15. Venue is proper under Colo. R. Civ. P. 98 because the Utility Ordinance affects real property and utilities in Boulder County, Colorado.

GENERAL ALLEGATIONS

Public Service's Provision of Electric Service in Boulder

16. For almost a century, Public Service has served as the City's, and much of the State of Colorado's, power and light utility. It operates in the City of Boulder and throughout Boulder County pursuant to an exclusive Certificate of Public Convenience and Necessity ("CPCN") issued by the PUC. The CPCN gives Public Service the exclusive right and the legal obligation to provide electric utility service to customers located in a service territory spanning Adams, Gilpin, Larimer, Weld, and Boulder counties, including customers located outside the City limits that Boulder has assumed it can serve. Public Service also holds other CPCNs authorizing it to serve in many other areas throughout Colorado and all of these areas are served through an integrated statewide electric system.

17. Public Service has made enormous investments to build and operate its electric system in Boulder and across Colorado in order to provide effective, reliable and safe electric service to its customers. As the General Assembly found in 2000, "[e]lectric power is transmitted by means of an interconnected grid system serving every area of the state," and "impacts on the electric grid system or natural gas pipelines in one area of the state may have impacts on other areas of the state." The portion of Public Service's system directly serving customers within the City flows in and out of the City limits and surrounding local jurisdictions based on good engineering practices and design, not municipal boundaries.

Voter-Imposed Limitations on Boulder Forming Its Own Utility

18. In November 2011, voters of the City adopted Ballot Question 2C, amending the Boulder Home Rule Charter to give City Council limited authority to establish a municipal power and light utility.

19. The authority granted to City Council was conditional. Voters authorized City Council to create a power and light utility only if Council *first* demonstrated that its electric utility could satisfy certain preconditions.

20. Specifically, Article XIII, Section 178(a) of the Boulder Home Rule Charter mandates as follows: "The city council shall establish a light and power utility *only if* it can demonstrate, *with verification by a third-party independent expert*, that [1] the utility can acquire the electrical distribution system in Boulder and [2] charge rates that do not exceed those rates charged by Xcel Energy at the time of acquisition and [3] that such rates will produce revenues sufficient to pay for operating expenses and debt payments, plus an amount equal to twenty-five percent (25%) of the debt payments, and [4] with reliability comparable to Xcel Energy and [5] a plan for reduced greenhouse gas emissions and other pollutants and increased renewable energy...." (Emphasis and bracketed numbers added). The full text of Section 178 is attached as Exhibit B.

21. City Council is aware of these limitations on its authority to create a light and power utility and has formally acknowledged in ordinances that the “Charter amendment requires that the City Council make certain findings prior to the creation of a new light and power utility.”

22. Section 188 of the Charter, approved by the voters in the November, 2013 elections, also limits to \$214,000,000, the amount of debt the City can take on to acquire assets from Public Service and to cover a complete payment for stranded costs.

23. The Charter requirements most relevant to this Complaint concern the City’s ability to acquire a system that: (1) can meet the required financial metrics for rates not exceeding Public Service’s, while simultaneously generating enough funds to pay operating expenses, debt, and reserves and meeting the stated renewable energy goals (collectively, the “Financial Viability Metric”); and (2) can operate with stability and reliable performance comparable to what Public Service provides (the “Reliability Metric”).

24. With regard to the Financial Viability Metric, the City has indicated that its proposed utility is not feasible if the total costs to acquire Public Service’s electric distribution business and pay stranded costs exceed the \$214 million debt limitation provided for in Section 188 of the Charter.

25. Such acquisition costs will include payments for the fair market value of the assets, property, and service rights associated with Public Service’s electric business and, in addition, payment for damages to Public Service’s remaining system. These damages include costs caused by the need to separate and then reconnect portions of the Public Service system following Boulder’s acquisition in a manner that allows Public Service to continue to provide the same safe and reliable service to its remaining customers that it did prior to the taking. The ultimate acquisition costs and calculation of the Financial Viability Metric are therefore highly dependent upon (i) whether Boulder will be able to acquire Public Service’s service territory CPCN to serve the county customers that Boulder assumed it could automatically serve, and (ii) how the systems are required to be separated and reconnected in order to protect the reliability, safety, and service quality of electricity services provided to unincorporated Boulder County and to safeguard the integrity of the system statewide.

26. Similarly, with regard to the Reliability Metric, what will be required for the City to provide safe and reliable service following the formation of its utility is highly dependent upon how the systems are required to be separated.

27. Thus, before it can be demonstrated that the Financial Viability Metric and the Reliability Metric have been met, it is first necessary to know whether Boulder will be allowed to serve any county customer and how the systems are required to be separated and reconnected.

Boulder City Models

28. In an effort to satisfy Charter § 178(a), City Council instructed staff to model and analyze options for creating a local electric utility. The initial modeling is frequently referred to by the City as “Base Material(s)” or “Base Model(s).”

29. Staff presented its preliminary modeling at a February 26, 2013 City Council Study Session. Revised modeling was provided to City Council on April 16, 2013, and another Updated Model was presented by Staff on July 23, 2013 (collectively, the “City Models”).

30. All of the City Models rely upon two essential—and, as described below, fundamentally flawed—assumptions: (1) that Boulder may unilaterally decide to serve and receive revenue from more than 7,000 Public Service electricity customers¹ located outside city limits but inside an “acquisition area” delineated by Boulder, and (2) that, as a result, costs to separate and reconnect the Public Service electric system after formation of Boulder’s municipal utility would be minimal.

31. The proposed Boulder light and power utility envisioned by the City Models has far-reaching impacts beyond the City limits. The City has identified an “acquisition area” covering more than 65 square miles, including approximately 39 square miles outside the city limits – more than 1.5 times the size of the City itself. The City Models also anticipate the acquisition or joint use of all or parts of eight Public Service substations, including five substations located outside city limits; part of Public Service’s Valmont Switchyard; and more than 600 miles of primary distribution lines. These facilities do not simply serve customers in Boulder or even just those located within the City’s proposed acquisition area -- approximately 15,000 customers outside city limits are directly served by them. Thus, even if the City is ultimately given the right by the PUC to serve the roughly 7,000 customers within the acquisition area, there are still an even larger number of customers, including approximately 1,300 within the City of Louisville, who are currently served by the substations and other facilities Boulder wants to acquire. Provisions approved by the PUC will have to be made for Public Service to be able to continue to provide safe, reliable and effective electric service to these additional customers. Finally, the City Models now assume that Boulder will acquire a 115kV transmission line loop at least 30 miles in length, most of which is outside city boundaries (and, in some instances, even the acquisition area). This loop also houses a 230kV line. Both the 115kV and 230kV lines are used by Public Service to serve customers that Boulder’s models do not seek to acquire.

32. Separation and reconnection of an integrated statewide electric system in a manner that is safe, reliable, and protects utility customers on both the Public Service and new municipal utility systems raises complex technical issues requiring a high degree of expertise. The PUC has

¹“Customer,” when used in this context, refers to a “premise,” or customer service location. Depending upon the situation, each premise may have one or more service meters, and each meter may, in turn, serve a single individual, a family, or even an office building or entire business. Thus, many more people may actually receive electric service than the customer count would suggest.

been given the power and obligation, by Colo. Const. Art. XXV and state statutes, to apply this technical expertise and to regulate the facilities and service of Public Service and all other public utilities operating in this state, including municipal utilities seeking to serve customers located outside city limits. The costs associated with any separation are expected to be substantial. Because PUC consideration of what will be required to separate the two systems to protect reliability, safety, and service quality has not yet even been initiated by the City, separation costs are currently unknown.

The City Attempts to Satisfy the Charter Metrics Without Critical Required Data and Authorization from the PUC

33. On April 16, 2013, very early in the process of evaluating the Base Materials, City Council passed Ordinance No. 7898, in which, among other things, “The City Council ma[de] a preliminary determination that based on the [February 26, 2013,] Base Material, the conditions precedent to the creation of a light and power utility in Charter Section 178(a) have been satisfied.”

34. On May 20, 2013, the City engaged PowerServices, Inc. to serve as the “independent expert” required by the Charter. PowerServices set about analyzing the Base Materials comprised of the February 26th and April 16th modeling, even though these materials were not final and staff was “working intensely to refine the options and incorporate new information.” (July 23, 2013 Study Session Memorandum).

35. On July 23, 2013, PowerServices presented findings in a presentation to City Council based only upon its analysis of the February 26, 2013 and April 16, 2013 preliminary Base Materials. Evaluating the City Models described above, which assumed that (1) Boulder may unilaterally decide to serve and receive revenue from Public Service customers located outside city limits, and (2) as a result, costs to separate and reconnect the Public Service electric system after formation of Boulder’s municipal utility would be minimal, PowerServices concluded that the City could meet the preconditions set forth in Section 178(a). At that time, PowerServices had not submitted a formal report to Council.

36. By that same July 23, 2013 date, staff had now created an Updated Model, which, among other things, added the 115kV transmission loop and modified various other quantitative assumptions.

37. On August 15, 2013, PowerServices issued its formal Report of Independent Expert Findings Review & Verification of Modeling of New Electric Utility, concluding that the City could meet the Section 178(a) preconditions. This report, too, was based on the same assumptions that (1) Boulder may unilaterally decide to serve and receive revenue from Public Service customers located outside city limits, and (2) as a result, costs to separate and reconnect the Public Service electric system after formation of Boulder’s municipal utility would be minimal. The August 15 report did *not* evaluate or make any findings regarding the City’s Updated Model.

38. On August 20, 2013, City Council passed Ordinance No. 7917, which accepted PowerServices' findings and determined the Charter Section 178(a) preconditions had been met. Council made these findings although its plans for the proposed utility remained preliminary, and it had not received a truly independent third party verification. For example, Council had not yet determined the assets the City intended to acquire from Public Service or which customers outside of the City that Council intended to take from Public Service. Section 4 of the Ordinance specifically clarified that the ordinance "shall not be construed to create a light and power utility."

39. The same day, City Council passed Ordinance No. 7918, which authorized the city manager to negotiate for or condemn Public Service assets within the City's acquisition area.

40. On October 15, 2013—after the passage of the August ordinance purporting to find that the City had complied with Section 178(a)'s preconditions—PowerServices issued its "supplemental review" of the July 23, 2013, Updated Model that included acquisition of the 115kV loop, but did *not* address what would occur if the City could not serve some or all of the county customers, and contained other deficiencies.

The PUC Rulings

41. After learning of the City's plans to serve certain of its county customers, Public Service formally notified the City in a letter dated February 15, 2013, that Boulder did not have the legal right to serve Public Service's customers outside City limits even assuming it could condemn facilities used to serve those customers. When Boulder rejected that assertion, Public Service filed on May 9, 2013 a Verified Petition for Declaratory Orders ("Petition") with the PUC seeking rulings from the Commission regarding the City's claimed ability to serve such customers.

42. In a Decision Issuing Declaratory Rulings adopted on October 9, 2013 and effective on October 29, 2013, a copy of which is attached as Exhibit C, the PUC ruled that:

- "Transfer of Public Service's CPCN would be required for Boulder to serve customers in unincorporated Boulder County, and the Commission possesses the statutory power to determine under § 40-5-105, C.R.S., and under the doctrine of regulated monopoly, whether Public Service's CPCN is to be transferred to Boulder." Ex. C at p. 12, para. 27. It further held that "the potential that the City of Boulder may file a condemnation action to obtain Public Service's CPCN does not affect the Commission's regulatory authority, the doctrine of regulated monopoly, or the standards governing the transfer of Public Service's CPCN." *Id.* at p. 15, para. 4.
- "The doctrine of regulated monopoly governs Boulder's attempt to serve unincorporated Boulder County where Public Service is certificated. 'After a utility has been assigned a specific territory, no other utility may provide service in that territory unless it is established that the certificated utility is unable or unwilling to provide adequate service.' Evidence that a challenging utility may provide better service or may serve the customers more easily cannot be the basis

of a finding that the existing utility is unwilling or unable to serve the certificated area.” *Id.* at pp. 11-12, para.25 (internal citations omitted).

- “Also under the Commission’s jurisdiction are other types of property, plant, and equipment used to provide service in unincorporated Boulder County. The Commission exercises its authority over Public Service’s transmission and distribution lines, substations, and facilities to protect the reliability, safety, and service quality of electricity services provided to unincorporated Boulder County, and to safeguard the integrity of the system statewide. If Boulder seeks to condemn facilities, wherever located, that Public Service currently uses, at least in part, to serve customers outside of Boulder’s City limits, this Commission must have the ability to investigate and determine how the facilities should be assigned, divided, or jointly used to protect the system’s effectiveness, reliability and safety, as well as any other matter affecting the public interest.” *Id.* at p. 13, para. 28.
- “Commission proceedings addressing the transfer of Public Service’s CPCN or other plant, equipment, and facilities used to provide service to customers located in unincorporated Boulder County are to be completed before Boulder initiates a condemnation action for such property.” *Id.* at p. 14, para. 30.

43. The City filed a motion for Rehearing, Reargument or Reconsideration. The PUC denied that motion by Order dated December 11, 2013, explaining: “[p]erformance of the Commission’s duty to ensure the reliability of the system for unincorporated Boulder County and other regions of the state requires an evaluation and determination of the optimal division, joint use, and potential replacement of assets and facilities providing services both inside and outside Boulder city limits,” and that “any extension of Boulder’s system interfering with Public Service’s provisioning of service to extraterritorial customers” was within the PUC’s jurisdiction, so that “the Commission may prohibit the extension or prescribe just and reasonable terms for the location of the lines, plant, or systems affected.” *See* Order attached as Exhibit D, at p. 9, para. 19; p.12 para. 23.

44. To date, the City has not moved forward with the PUC approval proceedings ordered by the Commission. Instead, it has appealed the PUC orders. The appeal remains pending in this Court. *See City of Boulder v. PUC*, Case No. 2014cv30047 (Div. 3). Unless and until the PUC Orders are reversed, they remain the law. Without prior input from the PUC, the City cannot make an accurate assessment as to whether the Charter requirements governing financial viability and service reliability can be satisfied under the current City Models.

The City Has Not, and Currently Cannot, Demonstrate That the Charter Metrics Can Be Met

45. None of the work by the City or PowerServices adequately satisfies either the Financial Viability Metric or the Reliability Metric that the citizens of Boulder required the City to determine could be met before proceeding with formation of the municipal utility and proceeding with the enormous undertaking involved in attempting to acquire Public Service’s electric system. They fail to do so for the following reasons:

Flaw # 1 –All of the City Models are Based Upon Plans Inconsistent with the PUC Orders and Depend on Unknown Factors

46. As indicated above, all of the City Models assume that the City will acquire the facilities identified in its acquisition area and serve the county customers within that area.

47. The City currently has no legal authority to serve customers outside of the City limits, and there is no indication that it will ever be able to satisfy the legal requirements to do so.

48. The City’s Updated Model acknowledged that there was a “low risk” that the PUC might rule that it could not serve the county customers, but indicated that the City has not analyzed and does not know whether it could create an electric utility that complies with Section 178(a) if it cannot serve customers outside the city limits. As of today’s date, neither City Staff, Power Services, nor City Council have ever reached a conclusion that it is possible to continue with its municipalization efforts if the City cannot serve all of the customers in its proposed acquisition area. And the City’s “low risk” analysis pre-dated – and therefore does not take account of – the PUC Orders described above.

49. Similarly the City’s Models do not take into account the Commission’s Order requiring Boulder to pursue PUC approval proceedings relating to the City’s plans to acquire facilities that are used in part to serve customers outside city limits so that the Commission can examine and determine the manner in which the respective systems should be separated and reconnected. These unanalyzed costs may be substantial, by the City’s own admission.²

50. The City’s public statements, both before and after the PUC Orders, reveal that the City believes it cannot meet the Financial Viability Metric and/or the Reliability Metric if it cannot

²In its Opening Brief in its appeal of the PUC orders, the City admitted that part of the reason it seeks to serve the out-of-city customers in the acquisition area is to “obviate the need to construct, at considerable expense, duplicate facilities to serve the limited number of customers already served by the existing system.” In addition to these damages, Boulder will also be required to pay costs Public Service incurs in order to continue to properly serve the substantial number of other county customers outside Boulder’s acquisition area who are also served by the facilities Boulder has indicated it intends to acquire.

serve the out-of-city customers or if the separation plan that the City has designed based upon such assumed service is not approved by the PUC. For example:

- In July 2013, the City’s staff stated, in the context of analyzing competing ballot measures addressing in part the City’s proposed service to customers outside city limits, that “to recreate the boundary at the current city limits would require construction of numerous new facilities and erection of additional meters and interconnections at hundreds of points around and within the city. That work would decrease the reliability ... and increase the capital costs and O&M costs”
- This same fact was admitted during a June 6, 2013, presentation by Boulder City Attorney Tom Carr. Mr. Carr stated publicly that the City’s electric utility models require the new utility to serve customers outside the city limits: “When ... we hired experts like Warren and other engineers they went out, looked at it and recommended and we were as surprised as anybody that the best way, basically *the only way* to separate was to acquire those [customers outside the city limits].... The City did not before the election, had no way of knowing, we didn’t have the resources to go out and make those technical judgments.” (emphasis supplied).
- In an October 20, 2013, Boulder Daily Camera opinion piece, then-City Council Member Ken Wilson questioned: “can the city still meet its metrics,” given the PUC’s Orders impacting fundamental assumptions in the City’s models. Council has never answered this question. Nor has it ever evaluated or identified a “Plan B” that can meet the Charter’s requirements.

51. Because all of the City Models rely upon assumptions regarding service rights and separation costs that are inconsistent with the PUC Orders, the City Council and its outside consultant evaluator lack the information necessary to determine whether the Financial Viability Metric and the Reliability Metric can be satisfied.

Flaw # 2 – Directly Contrary to the Charter Requirements it Purported to Satisfy, the City Has Admitted That It Does Not Yet Know if Its Light and Power Utility is Feasible

52. Perhaps because of these uncertainties, the City has admitted repeatedly that it has not finally determined what the configuration and service area of its proposed light and power utility will be or whether it will be feasible to municipalize. Indeed, the City has claimed that it will not know these answers until months or years from now, after the City refines its plans and learns new information during a condemnation case. For example:

- A memo from City staff to Council, recommending that the City Council vote on May 6, 2014 to create a utility, states: “Feasibility of the creation of a utility

continues to be evaluated as the city learns more about the system, its value, and operations and maintenance.” Thus, the Council was informed immediately before voting on the Utility Ordinance that the scope of any such utility still was not known and its feasibility remained uncertain.

- In briefing appealing the PUC orders filed shortly after the Utility Ordinance was adopted, the City acknowledged that it does not yet know if the utility project is feasible because it does not yet know which facilities it will finally seek to acquire: “[t]he compensation for the taking will be critical in determining whether the City will seek to amend the Petition in Condemnation ... [to] shrink the taking or will forego the project altogether.”

53. These admissions directly contradict the City’s findings in the Utility Ordinance that a light and power utility can meet the Charter requirements. Until the City determines the configuration and service area of its proposed system, the City Council and its outside consultant evaluator lack the information necessary to determine whether the Financial Viability Metric and the Reliability Metric can be satisfied.

Flaw # 3 – PowerServices Did Not Conduct a Truly Independent Review

54. Boulder’s Charter requires that, prior to the establishment of a light and power utility, the Council receive “verification by a third-party independent expert” that the Charter metrics are satisfied. PowerServices issued reports for this purpose, but its reports failed to satisfy the Charter standards.

55. First, PowerServices’ scope of work did not include a complete review of the Base Materials, and, in particular, did not include a review of the assumed compensation to be paid to acquire Public Service’s electric system or an analysis of any other utility configuration than the acquisition plan assumed by the City: “The Project does not include the Independent Expert providing an independent review or opinion of the results of the Base Materials, or on any of the assumptions of the litigation costs, including determination of fair market value of property to be acquired or stranded costs.”

56. The City, by limiting the scope of PowerServices’ review in this manner, prevented PowerServices from conducting an *independent* review that could determine whether the Financial Viability Metric was satisfied.

57. Second, the City has now hired PowerServices as a contractor to develop a utility transition plan, compromising PowerServices status as an independent third-party evaluator.

58. Finally, because PowerServices has never: (1) verified that Boulder can acquire the customers and facilities it contemplates acquiring and separate the systems in the manner the City envisions; or (2) considered whether the Section 178(a) preconditions can be satisfied if the City cannot proceed in this manner, its report fails to satisfy the Charter precondition for formation of a utility.

Enactment of Utility Ordinance.

59. Notwithstanding the flaws listed above showing lack of compliance with the explicit terms of Article XIII, Section 178(a) of the Charter, on May 6, 2014, City Council voted prematurely to pass the Utility Ordinance.

60. When enacting the Utility Ordinance, Council was informed by City staff that “The adoption of this ordinance does not require the acquisition of a system or equipment. It simply enables the next step. If, in the future, the council decides not to complete the municipalization process, it can repeal this ordinance.”

61. Charter Section 178(a) does not authorize the City to proceed via such a “create first, analyze and repeal later” procedure. Indeed, the Charter nowhere authorizes Council to create a utility based on tentative or incomplete assumptions for its scope, operations, and reliability, with no intention to operate the utility until some unspecified time in the future.

62. The voter-mandated scheme for creation of a City light and power utility requires the City first to determine what the light and power utility would consist of, then to evaluate its feasibility, specifically whether the Charter metrics can be satisfied, and then to vote to create the utility. There was no legally authorized basis for the City to ignore this Charter framework and approve a Utility Ordinance based on incomplete assumptions, unknown facts, and missing data.

63. If allowed to stand, the City’s decision to proceed in this manner without knowing the true cost or scope of its utility creates a real risk that the protections the citizens built into their Charter to prohibit a utility that does not satisfy the Financial Viability Metric or Reliability Metric will be subverted. Additionally, it generates the real risk that Public Service’s assets will be taken by the City without Council *ever* demonstrating that the City can actually satisfy these Charter requirements.

FIRST CLAIM FOR RELIEF (Declaratory Judgment under Colo. R. Civ. P. 57)

64. Public Service incorporates all of the allegations stated above.

65. The City Council passed the Utility Ordinance in violation of the City’s own Charter.

66. Passage of the Utility Ordinance threatens Public Service’s ownership of its facilities and right to provide electrical service to and receive payment from its customers, even though the Council has not yet demonstrated, with independent validation, that the utility it ultimately may form can satisfy the Financial Viability Metric and Reliability Metric required by the City’s Charter. Passage of the Utility Ordinance adversely affects Public Service’s rights, status, and legal relations, including without limitation, Public Service’s rights under its exclusive CPCN. Passage of the Utility Ordinance also constitutes an improper use of tax dollars Public Service pays to the City.

67. Public Service is entitled to a declaration that, as a matter of law, the Utility Ordinance, being in violation of the Charter, is *ultra vires* null, void, and of no effect.

**SECOND CLAIM FOR RELIEF
(Review Under Colo. R. Civ. P. 106(a)(4))**

68. Public Service incorporates all of the allegations stated above.

69. In the alternative, and only if the Court determines that declaratory relief is unavailable, Public Service asserts this claim for review under Colo. R. Civ. P. 106(a)(4).

70. Boulder voters authorized City Council to create a light and power utility, but only if City Council first demonstrated and verified through a third-party independent expert that the utility could meet the preconditions set forth in Article XIII, Section 178(a) of the Boulder Home Rule Charter.

71. In enacting the Utility Ordinance, City Council voted to create a power and light utility even though it has not, as a matter of law, satisfied the preconditions set forth in the Charter.

72. The City Council exceeded its jurisdiction, abused its discretion, and acted contrary to law when it prematurely approved the Utility Ordinance.

73. City Council's decision to pass the Utility Ordinance was also arbitrary, capricious, and not supported by competent evidence in the record.

74. The Utility Ordinance is therefore *ultra vires*, unlawful, null, void, and of no effect.

75. Passage of the Utility Ordinance threatens Public Service's ownership of its facilities and right to provide electrical service to and receive payment from its customers, even though the Council has not yet demonstrated, with independent validation, that the utility it ultimately may form can satisfy the Financial Viability Metric and Reliability Metric required by the City's Charter.

76. Public Service has no other plain, speedy, or adequate remedy otherwise provided by law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

- A. Find and declare that the City acted without jurisdiction, arbitrarily, capriciously, in violation of law, in abuse of discretion, and in a manner unsupported by any competent evidence in the record in passing the Utility Ordinance;
- B. Find and declare that the Utility Ordinance is unlawful, null, void, and of no effect;
- C. Award Plaintiff its costs; and
- D. Award Plaintiff such further relief as this Court deems appropriate.

Dated: June 3, 2014

Respectfully submitted,

FAEGRE BAKER DANIELS LLP

s/ Daniel D. Williams
John R. Sperber, #22073
Daniel D. Williams, #38445
Matthew D. Clark, #44704

ATTORNEYS FOR PLAINTIFF PUBLIC
SERVICE COMPANY OF COLORADO

Plaintiff's Address:

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Denver, CO 80202

DATE FILED: June 3, 2014 11:40 AM
FILING ID: FEFA54295441D
CASE NUMBER: 2014CV30681

EXHIBIT A

1 **Chapter 11-7 Light and Power Utility**

2 **11-7-1 Legislative Intent.**

3 (a) Purpose. The purpose of this chapter is to establish and define the light and power utility
4 of the city, to describe the responsibility of electric users, and to promote the public
5 health, safety and welfare.

6 (b) Legislative Intent. The city council intends to:

7 (1) Establish a light and power utility under the authority in the state constitution, the
8 city charter, and all other laws applicable to the establishment of light plants,
9 power plants, and any other public utilities or works or ways local in use and
10 extent for the provision of local electric and related energy services;

11 (2) Operate the light and power utility in a manner that is consistent with Article XIII
12 of the city charter generally and specifically, the purposes and intent in Article
13 XIII, § 178, including without limitation, delivering safe and reliable energy,
14 operating in a fiscally responsible manner, using cleaner energy, establishing rate
15 payer equity, and operating under principles of responsible environmental
16 stewardship;

17 (3) Serve the duties and functions of the electric utilities board until board members
18 are appointed after the utility has issued bonds and is receiving revenue that will
19 qualify it as an enterprise under the "Taxpayer's Bill of Rights," Article X,
20 Section 20 of the Colorado Constitution. ; and

21 (4) Provide electric services by means of an enterprise, as that term is defined by
22 Colorado law. The city council further declares its intent that the city's light and
23 power utility enterprise be operated and maintained so as to exclude its activities
24 from the application of the "Taxpayer's Bill of Rights," Article X, Section 20 of
25 the Colorado Constitution.

17 **11-7-2 Powers of the Utility.**

18 (a) Powers of the Utility. The light and power utility shall have all of the powers that it may
19 have by virtue of any of the applicable provisions of the Colorado Constitution, state law,
20 the city charter, this code, and any other applicable laws or rules.

21 (b) Utility as an Enterprise. The light and power utility shall conduct its affairs so as to
22 continue to qualify as an "enterprise" within the meaning of Article X, Section 20 of the
23 Colorado Constitution provided however that the governing body may take any action
24 that would cause the utility to not qualify as an enterprise in a given year if it determines
25 such action would benefit its customers or the city.

23 **11-7-3 Governing Body.**

24 (a) City Council as Governing Body. For all purposes under the city charter and this
25 code, the governing body of the light and power utility enterprise shall be the city
council. The governing body shall be subject to all of the applicable laws, rules, and

1 regulations pertaining to the city council. Whenever the city council is in session, the
2 governing body shall also be deemed to be in session. It shall not be necessary for
3 the governing body to meet separately from the regular and special meetings of the
4 city council, nor shall it be necessary for the governing body to specifically
5 announce or acknowledge that actions taken thereby are taken by the governing body
6 of the light and power utility enterprise. The governing body may conduct its affairs
7 in the same manner and subject to the same laws which apply to the city council for
8 the same or similar matters.

- 9 (b) City Council as Advisory Board. Until such time as the city council appoints an
10 electric utility board as anticipated by City Charter § 185(g) the city council shall be
11 responsible for fulfilling the responsibilities of the electric utilities board.

12 Section 2. Chapter 2-3, "Boards and Commissions," B.R.C. 1981, is amended by the
13 addition of a new Section 2-3-23, to read:

14 **2-3-23 Electric Utility Board.**

- 15 (a) Electric Utility Board. The City of Boulder electric utility board consists of nine
16 members not all of the same gender. The members of the board shall not hold any
17 other office in the city and shall serve without pay.
- 18 (b) Chair and Secretary. The board shall choose a chair and a secretary from among its
19 members. The director of electric utilities may be designated as secretary by the
20 board.
- 21 (c) Regular and special meetings. The board shall have regular meetings once a month.
22 Special meetings may be called at any time by the city manager, the chair, or four
23 members of the board upon the giving of at least 24 hours notice of said special
24 meeting to the board members.
- 25 (d) Quorum. Five members of the board shall constitute a quorum. An affirmative vote
of a majority of the members present shall be necessary to authorize any action by
the board, except as otherwise expressly provided herein.
- (e) Record of meetings. The board shall keep minutes and records of its meetings,
recommendations, and decisions.
- (f) Rules of order. Except as otherwise expressly provided herein, the board shall have
power to make rules for the conduct of its business.
- (g) Board member qualifications. Board members shall be qualified to serve on an
advisory commission pursuant to Section 130 of the city charter, customers of the
electric utility, or the owners or employees of a business or governmental entity that
is a customer of the electric utility, provided, however, that a majority of the board
shall be qualified to serve on an advisory commission pursuant to Section 130.

1 Board members shall be well known for their ability, probity, public spirit, and
2 particular fitness to serve on the electric utilities board. At least three board members
3 shall be owners or employees of a business or governmental entity that is a customer
4 of the electric utility.

5 (h) Board member duties and functions. The duty of each member shall be to represent
6 the entire utility customer base without discrimination between customer class or
7 location and without regard to the location or class of customer or the member. The
8 duties and functions of the electric utilities board are those established in the charter,
9 this code and other ordinances of the city, including without limitation:

10 (1) Advice. To advise the city council on policy matters pertaining to the municipal
11 electric and utility systems, including without limitation such policies as the board
12 determines are necessary or prudent to carry out its fiduciary duties and the
13 requirement of the charter;

14 (2) Sounding Board. To act as a sounding board to the city council, city manager, and
15 the electric utility director for the purpose of identifying the ratepayers' service
16 delivery expectations;

17 (3) Rulemaking. To adopt rules and regulations with respect to any matter within its
18 jurisdiction as it may be permitted by the council;

19 (4) Meeting Rules. To adopt bylaws governing its meeting and agenda procedures
20 and other pertinent matters;

21 (5) Budget and Appropriations. To review and make recommendations to the city
22 council on the city manager's proposed budget and appropriation as it relates to
23 the utility;

24 (6) Revenue Bonds. To review and make recommendations to the city council
25 concerning the issuance of revenue bonds or other obligations payable from
revenues of the electric utilities enterprise;

(7) Other Recommendations. To review and make recommendations on any other
matter relating to the electric utilities program, and may request and obtain from
the electric utilities department and the city manager information relating thereto.

(i) Public Hearings. Prior to making any recommendation to the council or the city
manager, the board shall hold a public hearing.

(j) No subpoenas. The board is not authorized to issue subpoenas.

(k) Electric utility board member appointments. The council will appoint the electric
utility board prior to or concurrent with the point in time that the utility has issued
bonds and is receiving revenue that will qualify it as an enterprise under Article X,
Section 20 of the Colorado Constitution. Until such time as the board is appointed,
the city council shall be responsible for fulfilling the responsibilities of the electric
utility board.

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EXHIBIT B

Article XIII: Light and Power Utility

Sec. 178. Creation, purpose and intent.

(a) The city council, at such time as it deems appropriate, subject to the conditions herein, is authorized to establish, by ordinance, a public utility under the authority in the state constitution and the city charter to create light plants, power plants, and any other public utilities or works or ways local in use and extent for the provision of electric power. The city council shall establish a light and power utility only if it can demonstrate, with verification by a third-party independent expert, that the utility can acquire the electrical distribution system in Boulder and charge rates that do not exceed those rates charged by Xcel Energy at the time of acquisition and that such rates will produce revenues sufficient to pay for operating expenses and debt payments, plus an amount equal to twenty-five percent (25%) of the debt payments, and with reliability comparable to Xcel Energy and a plan for reduced greenhouse gas emissions and other pollutants and increased renewable energy; and

(b) The governing body of the electric utility enterprise shall be the city council. The council may, by ordinance, delegate responsibility to the electric utilities board or the city manager as appropriate.

(c) The people of Boulder seek electric power supplied in a reliable, fiscally sound, and environmentally responsible manner. Therefore, the utility will be operated according to the following guiding principles.

(1) **Reliable Energy:** Community safety, convenience, and prosperity all depend on the reliable delivery of electric power. The utility will deliver reliable electric power. The utility's foremost responsibilities will be to provide electric power that is high quality and dependable, support economic vitality, prevent service outages, and respond promptly to any service outage.

(2) **Fiscal Responsibility:** The cost of electric power is a significant portion of business and household budgets. The utility will operate in a fiscally responsible manner, always being mindful that every expenditure will be reflected in customers' rates and will affect household budgets and business profitability. The utility will, while always honoring its obligations to bondholders, strive to maintain rate parity with any investor-owned utility whose service area would include the City of Boulder.

(3) **Clean Energy:** Climate change and diminishing fossil fuel supplies, combined with the high cost of those fuels, are significant factors leading to the creation of the utility. The utility will strive to reduce reliance on fossil fuels, focus on sustainable alternatives, and seek new opportunities for producing clean energy.

(4) **Ratepayer Equity:** The utility will direct its efforts to promote ratepayer equity in all aspects of its operations. Rates charged by the utility will be designed to create a fair and equitable distribution among all users of the costs, replacement, maintenance, expansion, operations of facilities, energy, and energy conservation programs for the safe and efficient delivery of electric power to city residents and other customers. The utility will consider the effects of its programs, policies, and rates in the development of programs for low-income customers.

(5) **Environmental Stewardship:** Preserving and protecting our natural environment goes well beyond producing clean energy. The utility will be a good environmental steward by working to reduce the environmental impact of its operations, including working to reduce the demand for

electricity. Energy and power that is produced in an environmentally responsible manner requires that the city balance environmental factors as an integral component of planning, design, construction, and operational decisions.

(6) Enterprise: The city will deliver electric power services by means of an enterprise, as that term is defined by Colorado law. The city further declares its intent that the city's electric utility enterprise be operated and maintained so as to exclude its activities from the application of Article X, Section 20 of the Colorado Constitution. (Added by Ord. No. 7804 (2011), § 2, adopted by electorate on November 1, 2011.)

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EXHIBIT C

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13D-0498E

IN THE MATTER OF THE VERIFIED PETITION OF PUBLIC SERVICE COMPANY OF COLORADO FOR CERTAIN DECLARATORY ORDERS CONCERNING THE RIGHTS OF PUBLIC SERVICE COMPANY OF COLORADO UNDER ITS SERVICE TERRITORY CERTIFICATE COVERING BOULDER COUNTY, COLORADO.

DECISION ISSUING DECLARATORY RULINGS

Mailed Date: October 29, 2013
Adopted Date: October 9, 2013

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I. BY THE COMMISSION**A. Statement**

1. On May 9, 2013, Public Service Company of Colorado (Public Service) filed a Verified Petition for Declaratory Orders (Petition) pursuant to Rules 1001 and 1304(i) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, and Colorado Rule of Civil Procedure 57. The Petition requests that the Commission enter declaratory rulings relating to actions of the City of Boulder (Boulder) to municipalize and provide electricity services to customers located in unincorporated Boulder County, Colorado.

2. On June 12, 2013, the Commission issued a decision accepting the Petition and providing notice of the Petition to interested persons.¹

3. The Commission granted Boulder's motion to intervene and noted the intervention by right of the Colorado Office of Consumer Counsel (OCC). The Commission denied the motion to intervene filed by Black Hills/Colorado Electric Utility Company, L.P., and Black Hills/Colorado Gas Utility Company, L.P. (collectively Black Hills); however, the Commission permitted Black Hills to participate as *amicus curiae*. The Commission granted the joint motion to participate as *amicus curiae* filed by the Colorado Rural Electric Association; Delta-Montrose Electric Association, Inc.; Holy Cross Electric Association, Inc.; Poudre Valley Rural Electric Association, Inc.; and United Power, Inc.² Through this Decision, the Commission

¹ Order Accepting Petition for Declaratory Order and Issuing Notice; Decision No. C13-0705, issued June 12, 2013.

² Interim Decision: (1) Addressing Interventions and Motion to Participate as *Amici Curiae*; (2) Granting Motion for Leave to Reply; and (3) Establishing a Procedural Schedule, Decision No. C13-0875-I, issued July 16, 2013.

denies the motion to intervene filed by the Gunbarrel Energy Future Citizens' Group,³ but accepts its filing as public comment.

4. The Commission heard this case *en banc*.

5. Pursuant to Commission scheduling orders, the parties and *amici* filed briefs addressing the issues raised by the Petition. In addition, this Decision grants Boulder's request for acceptance of its supplemental authority, filed September 6, 2013, and also grants Public Service's request for leave to reply to the supplemental authority, filed September 13, 2013.

B. Public Service's Requests for Declaratory Orders

6. Public Service's Petition describes Boulder's actions and plans to form a municipal electric utility, condemn Public Service's facilities, and serve customers located not only inside Boulder's city limits, but also outside in unincorporated Boulder County. Public Service asserts that Boulder expects to obtain these extraterritorial customers through condemnation of Public Service's certificate of public convenience and necessity (CPCN) and facilities that serve unincorporated Boulder County.

7. Paragraph 25 of the Petition requests the Commission enter the following five declaratory orders:

- 1) If a municipal utility seeks to serve customers located outside the city's boundaries, it is subject to the certificate jurisdiction of the Commission;
- 2) The Commission has already granted to Public Service a certificate of public convenience and necessity covering the territory in Boulder

³ Because The Gunbarrel Energy Future Citizens' Group as an association must be represented by a licensed attorney to participate formally as a party, and because its filing is not signed by and does not identify a licensed attorney representing the group, the Commission denies its request to intervene as a party. See Rules 1201(a) and (b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1; *Denver Bar Association v. Public Utilities Commission*, 391 P.2d 467 (1964).

- County, outside the Boulder city boundaries, in which the 5,800 customers⁴ are located;
- 3) Under Colorado law, there can only be one certificated utility per geographic area;
 - 4) The certificate of an existing utility cannot be taken away without due process of law which requires a hearing before this Commission and proof by substantial evidence that the existing certificated public utility is unwilling or unable to serve the certificated area; and
 - 5) The need to construct replacement facilities as a result of actions taken by a challenging utility does not constitute an inability to serve.⁵

Public Service further explains that it “is simply seeking a clarification that it will not lose its right to serve out-of-city customers because Boulder creates a municipal utility and condemns some facilities which currently serve customers both inside and outside the Boulder city limits.”⁶

8. Public Service is not requesting declaratory rulings addressing Boulder’s authority to form a municipal utility and serve customers located within Boulder city limits, or its ability to acquire through condemnation facilities located outside city limits but used to provide service within the city.⁷ Public Service’s request for declaratory rulings refers only to its rights to serve the customers located service outside Boulder’s territorial boundaries.⁸

C. Positions of the Parties and *Amici*.

9. Public Service argues that the Commission has the authority to regulate a municipal utility operating extraterritorially and to resolve service disputes between a municipality and an existing utility. Public Service also contends that the doctrine of regulated monopoly, which permits only one certificated utility to serve in an area and requires a new

⁴ Subsequent filings indicate that the number of customers located in unincorporated Boulder County at approximately 7,000. *See* Public Service Response, dated August 15, 2013, at 2.

⁵ Verified Petition, at ¶ 25.

⁶ Public Service Reply, at 8.

⁷ Public Service Response, dated August 15, 2013, at ¶¶ 11-15.

⁸ Verified Petition, at ¶ 26.

carrier to show that the existing carrier is unable or unwilling to provide adequate service, governs Boulder's plans to serve in unincorporated Boulder County. Public Service asserts that a municipality's decision to seek condemnation of an existing utility's CPCN does not override the Commission's exclusive jurisdiction over certification of a municipal utility operating its territorial boundaries. Public Service also argues that the Commission's determination—of whether the CPCN and other extraterritorial assets will be transferred to Boulder—should precede a condemnation action.

10. The OCC and *amici curiae* support Public Service's position. They argue that becoming a municipal utility does not automatically allow Boulder to serve customers located outside of its municipal boundaries, and that the doctrine of regulated monopoly requires a showing that Public Service is unwilling or unable to serve the customers at issue, regardless of whether Boulder's provisioning of service would be more efficient or technically optimal.

11. Boulder states that as a home rule municipality, it has the authority under Article XX of the Colorado Constitution to operate an electric utility and to condemn all necessary facilities and property, whether located inside or outside of its city limits. Boulder asserts that a CPCN to serve a particular area is a property interest subject to condemnation, and the district court hearing a condemnation action has the authority to determine Boulder's need for the CPCN. Boulder argues that its plans to condemn Public Service's CPCN as a property interest distinguish this case from those cited by Public Service recognizing the Commission's authority to regulate municipal utilities extraterritorially and apply the doctrine of regulated monopoly to a new carrier's encroachment into an existing provider's territory. Condemnation of a CPCN would relieve Boulder from the burden of showing that Public Service is unable or unwilling to serve in unincorporated Boulder County. Boulder admits that it must obtain a

certificate from the Commission to serve extraterritorial customers, but argues that the condemnation action would precede the Commission's proceedings for transfer of Public Service's certificate, and that the Commission must act consistently with the orders of the district court condemning the CPCN.

12. Boulder also contends that the public interest standard should apply to the transfer of Public Service's certificate, and that its provision of service in unincorporated Boulder County would be the most efficient, effective, and reliable option. Further, Boulder argues that Public Service's request may not be ripe, because Boulder has not decided finally whether to serve unincorporated Boulder County.

D. Discussion

1. Commission Jurisdiction to Hear this Matter

13. Boulder contends that Articles II and XX of the Colorado constitution authorize home rule cities to condemn property for the creation and operation of a municipal utility, and that the district court has jurisdiction over condemnation matters. Thus, Boulder argues, the district court sitting in condemnation, not the Commission, has the jurisdiction to determine Boulder's ability to obtain Public Service's CPCN to serve unincorporated Boulder County.⁹

14. We disagree. The Commission has the authority to determine the facts upon which its jurisdiction may depend and rule on the scope of its jurisdiction.¹⁰ The Commission's jurisdiction to decide matters has been analogized to that of judicial tribunals: "except in the case of plain usurpation, a court has the jurisdiction to determine its own jurisdiction."¹¹

⁹ Boulder Response, dated August 15, 2013, Part I.C., at 7-9.

¹⁰ *Keystone v. Flynn*, 769 P.2d 484, 488 (Colo. 1989).

¹¹ *Id.*, quoting *United States v. United Mine Workers*, 330 U.S. 258, 292 n. 57 (1947) (in turn quoting *Carter v. United States*, 135 F.2d 858, 861 (5th Cir. 1943)).

The Commission therefore has the authority to hear Public Service's request for declaratory rulings regarding Boulder's attempts to serve unincorporated Boulder County. As shown below, our rulings do not interpret Boulder's constitutional or statutory rights to condemn property; rather, we apply the Commission's authority under Article XXV of the Colorado constitution and the public utilities law as interpreted by the Colorado Supreme Court to rule upon Boulder's municipal utility service in unincorporated Boulder County.

2. Ripeness

15. Boulder argues that Public Service's request for declaratory rulings is not ripe, contending that no final decision has been made on whether its municipal utility will serve customers in unincorporated Boulder County.¹²

16. "Ripeness requires that there be an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication."¹³ "A court may find 'a conflict is ripe for judicial review even in the context of uncertain future facts so long as there is no uncertainty regarding the facts relevant to the dispute and no pending actions that might resolve the issue prior to the court's determination.'"¹⁴ To be ripe, the court's or an agency's decision must have a "practical effect upon an actual and existing **controversy**."¹⁵

17. Undisputed facts show that a controversy is sufficiently immediate and that there is no uncertainty regarding the facts relevant to the dispute. The Boulder City Council passed an ordinance authorizing the city to acquire the property of Public Service through negotiation or

¹² Boulder Reply, dated August 30, 2013, at 3.

¹³ *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002); *See also Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo. 2008).

¹⁴ *Metal Management West, Inc. v. State*, 251 P.3d 1164, 1175 (Colo. App. 2010) (quoting *Stell v. Boulder County Dep't of Social Servs.*, 92 P.3d 910, 915, n.6 (Colo. 2004)).

¹⁵ *Board of Directors v. Nat'l Union Fire Ins. Co.*, 105 P.3d 653, 656 (Colo. 2005).

the power of eminent domain. The ordinance authorizes a condemnation action on or after January 1, 2014.¹⁶ Boulder's engineers have advised the city that it should provide service to extraterritorial customers.¹⁷ Boulder sent letters dated February 15, 2013, to customers located in unincorporated Boulder County stating that, if it creates a city utility, then it plans on providing service to residential and business customers located outside the city.¹⁸ This letter states that Boulder has no plans to annex the area outside of Boulder where it seeks to provide service.¹⁹

18. A Commission ruling will have a practical effect on an actual and existing controversy between Public Service and Boulder. Public Service asserts that the Commission has the authority to apply the breadth of public utilities law to Boulder's attempt to obtain a CPCN to serve customers outside its city boundaries; whereas, Boulder contends that the Commission's rulings upon a transfer of Public Service's CPCN to Boulder must await and be consistent with a court's condemnation orders. We find that a Commission ruling will instruct the parties on the legal standards governing their conduct and disputes regarding Boulder's actions to obtain Public Service' CPCN for unincorporated Boulder County. A Commission ruling also will guide the parties on whether a Commission proceeding should precede a condemnation action and which property interests and facilities could be used to provide service and thus may be part of a condemnation action. Therefore, Public Service's Petition is ripe for Commission determination.

19. Boulder admits that the first three statements listed in paragraph 25 of the Petition for which Public Service seeks declaratory rulings—that a municipal utility serving outside its

¹⁶ See Response of Public Service, dated August 15, 2013, at 2-3.

¹⁷ Boulder Response, at 3-4.

¹⁸ Letter from City of Boulder to unincorporated Boulder County customers, dated February 15, 2013, attached as Exhibit A to Public Service's Verified Petition.

¹⁹ *Id.*

territorial boundaries is subject to the certificate jurisdiction of the Commission, that Public Service had been granted a certificate to serve unincorporated Boulder County, and that there can be only one certificated utility per geographic area—are correct.²⁰ We therefore proceed with addressing the issues underlying the fourth and fifth statements.

a. The Commission’s Regulatory Authority Over a Municipal Utility Serving Outside its Territorial Boundaries.

20. Dating back to the 1920s and extending through interpretations of Commission powers granted by Article XXV, the Colorado Supreme Court repeatedly and consistently has acknowledged the Commission’s authority to regulate a municipal utility serving customers located outside its territorial boundaries.²¹ This rule is premised upon the customers’ ability to vote on municipal matters. If the services offered by a municipality to its citizens within its territory are not satisfactory to a majority of the citizens, they can effect a change, either at a regular election, or by the exercise of the right of recall.²² In contrast,

When a municipally owned utility provides utility service outside the municipality, those receiving the service do not have a similar recourse on election day. They have no effective way of avoiding the possible whims and excesses of the municipality in the absence of state regulation by the PUC.²³

21. The court has elaborated on the Commission’s authority over service area disputes between a municipal utility and a certificated public utility. “[T]he Utilities Act unmistakably

²⁰ Boulder’s Response, filed August 15, 2013, at 4.

²¹ *Town of Holyoke v. Smith*, 226 P. 158 (Colo. 1924); *City of Lamar v. Town of Wiley*, 248 P. 1009 (Colo. 1926); *Public Utilities Commission v. City of Loveland*, 289 P. 1090 (Colo. 1930); *City and County of Denver v. Public Utilities Commission*, 507 P.2d 871 (Colo. 1973); *Board of County Commissioners v. Denver Board of Water Commissioners*, 718 P.2d 235 (Colo. 1886); *Poudre Valley Rural Electric Association, Inc. v. City of Loveland*, 807 P.2d 547 (Colo. 1991).

²² *Town of Holyoke v. Smith*, 226 P. 158, 161 (Colo. 1924); *City of Lamar v. Town of Wiley*, 248 P. 1009, 1010 (Colo. 1926).

²³ *K.C. Electric Association, Inc. v. Public Utilities Commission*, 550 P.2d at 871, 874 (Colo. 1976). See also *City and County of Denver v. Public Utilities Commission*, 507 P.2d at 874; and *City of Loveland v. Public Utilities Commission*, 580 P.2d 381, 385 (Colo. 1978) (“the PUC [is] the only protection for the non-resident customers.”)

and clearly invests the Public Utilities Commission with the sole jurisdiction to hear and determine, in the first instance, a controversy of this nature.”²⁴ Further,

We believe it is essential that the PUC be allowed to regulate the public utility services provided by municipalities outside their boundaries. Not only is the PUC the only protection for the non-resident customers,...but the PUC must also be allowed the power to resolve jurisdictional disputes between municipalities and private utilities companies over who is to serve areas outside municipal boundaries.²⁵

22. The court also has defined a municipality’s status relative to other utilities when it serves outside its boundaries: “Both upon authority and reason a municipally owned public utility, as to service furnished consumers beyond its territorial jurisdiction, should be as already stated, subject to the same regulation to which a privately owned public utility must conform in similar circumstances.”²⁶

23. Boulder’s plans to condemn Public Service’ CPCN to serve unincorporated Boulder County do not affect the Commission’s authority over the transfer of the CPCN or the applicable standards. The statute upon which Boulder relies as granting a property interest to a CPCN, § 40-5-105, C.R.S., conditions any sale or assignment of a CPCN upon Commission approval and upon such terms and conditions as the Commission may prescribe.²⁷ The court rulings quoted above in this Decision—recognizing Commission authority to resolve disputes between municipalities serving outside its boundaries and existing public utilities—also refute

²⁴ *Public Utilities Commission v. City of Loveland*, 289 P. 1090, 1093 (Colo. 1930).

²⁵ *City of Loveland v. Public Utilities Commission*, 580 P.2d 381, 385 (Colo. 1978).

²⁶ *City and County of Denver v. Public Utilities Commission*, 507 P.2d at 874.

²⁷ Section 40-5-105, C.R.S., says:

Certificate or assets may be sold, assigned, or leased. (1) The assets of any public utility, including a certificate of public convenience and necessity or rights obtained under any such certificate held, owned, or obtained by any public utility, may be sold, assigned, or leased as any other property, but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe....”

Boulder's argument that the potential of an action in condemnation over utility property diminishes Commission authority.

24. Two Supreme Court cases specifically confirm Commission authority even when a municipality is planning or has completed condemnation actions. In *City and County of Denver v. Public Utilities Commission*,²⁸ the Supreme Court upheld the Commission's regulatory authority over *Denver's* tramway service outside its boundaries, even after a district court had completed a condemnation action transferring ownership rights to *Denver*. In *Colorado and Southern Railway Co., Inc. v. District Court*,²⁹ the court ruled that the Commission may exercise its statutory authority to determine where a railroad may cross the tracks of another, even though the utility already had filed an action to condemn an easement for the crossing. These cases demonstrate that, if the public utilities law has granted the Commission regulatory authority over property or service used by a utility to serve outside its territory boundaries, the Commission retains its regulatory authority even though the property or service is the subject of a condemnation action.

25. The doctrine of regulated monopoly governs Boulder's attempt to serve unincorporated Boulder County where Public Service is certificated.³⁰ "After a utility has been assigned a specific territory, no other utility may provide service in that territory unless it is established that the certificated utility is unable or unwilling to provide adequate service."³¹ Evidence that the challenging utility may provide better service or may serve the customers more

²⁸ *City and County of Denver v. Public Utilities Commission*, 507 P.2d 871 (Colo. 1973).

²⁹ *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972).

³⁰ *Public Service Company v. Public Utilities Commission*, 765 P.2d 1015, 1021 (Colo. 1988).

³¹ *Id.*

easily cannot be the basis of a finding that the existing utility is unwilling or unable to serve its certificated area.³²

b. Commission Proceedings Addressing Transfer of Public Service's CPCN and Other Property

26. Boulder's briefing argues that a condemnation action for Public Service's extraterritorial CPCN should precede any Commission proceedings under § 40-5-105, C.R.S., addressing Boulder's request for the CPCN, and that any resulting Commission orders must be consistent with a condemnation court's order awarding ownership to Boulder.³³ Public Service disagrees, asserting that "it is essential that a determination be made, before the condemnation action, regarding who has the right to serve the out-of-city customers. That information affects the separation of the two utilities, reconnection costs, the compensation owed in any condemnation proceeding, and pre-filing good faith negotiations."³⁴

27. Transfer of Public Service's CPCN would be required for Boulder to serve customers in unincorporated Boulder County, and the Commission possesses the statutory power to determine under § 40-5-105, C.R.S., and under the doctrine of regulated monopoly, whether Public Service's CPCN is to be transferred to Boulder. Thus, Commission proceedings addressing the transfer of Public Service's CPCN are to precede any actions seeking to condemn Public Service's CPCN.

³² *Id.*, at 1022; See also *Public Service Company v. Public Utilities Commission*, 485 P.2d 123, 127; *Public Utilities Commission v. Poudre Valley Rural Electric Association*, 480 P.2d 106, 107 (Colo. 1970).

³³ Boulder Response, dated August 15, 2013, at 12-14.

³⁴ Public Service Reply, dated August 30, 2013, at ¶ 7.

28. Also under the Commission's jurisdiction are other types of property, plant, and equipment used to provide service in unincorporated Boulder County. The Commission exercises its regulatory authority over Public Service's transmission and distribution lines, substations, and other facilities to protect the reliability, safety, and service quality of electricity services provided to unincorporated Boulder County, and to safeguard the integrity of the system statewide. If Boulder seeks to condemn facilities, wherever located, that Public Service currently uses, at least in part, to serve customers located outside of Boulder's city limits, this Commission must have the ability to investigate and determine how the facilities should be assigned, divided, or jointly used to protect the system's effectiveness, reliability, and safety, as well as any other matter affecting the public interest. Thus, a Commission proceeding addressing these facilities should precede a condemnation action to allow the district court to rule on the public need and value of facilities that the Commission determines may be the subject of transfer to Boulder.

29. Case law also supports Public Service's position. In *Colorado & Southern*,³⁵ a railroad company known as C&W commenced a proceeding in district court to condemn an easement over tracks owned by two other railroads. C&W selected the easement as suitable for the crossing. The two other railroads filed a motion to dismiss the district court action, asserting that C&W first had to secure an order from the Commission as required under the public utilities law that would determine the point at which C&W may cross the tracks or facilities of other railroads. The Supreme Court ruled that the district court did not have jurisdiction over the property easement identified by C&W absent a predetermination by the Commission. Because

³⁵ *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972).

the Commission has the power to determine the point of crossing, “[i]t follows logically then that the commission -- not the railroad -- determines what property the railroad requires.”^{36 37}

E. Conclusion

30. For the reasons stated above, we rule on the fourth and fifth statements listed in paragraph 25 of Public Service’s Petition by clarifying that the Commission has regulatory authority over electricity services provisioned by a municipal utility formed by Boulder to customers located in unincorporated Boulder County, and that the doctrine of regulated monopoly as delineated by rulings of the Colorado Supreme Court governs any application filed by Boulder seeking transfer of Public Service’s CPCN. The potential that Boulder may file a condemnation action to obtain Public Service’s CPCN for unincorporated Boulder County does not affect the Commission’s regulatory authority, the doctrine of regulated monopoly, or the standards governing transfer of Public Service’s CPCN. Further, Commission proceedings addressing the transfer of Public Service’s CPCN or other plant, equipment, and facilities used to provide service to customers located in unincorporated Boulder County are to be completed before Boulder initiates a condemnation action for such property.

³⁶ *Id.*, 493 P.2d at 659.

³⁷ The case cited by Boulder, *Miller v. Public Service Company of Colorado*, 272 P.2d 283 (1954), for the proposition that its condemnation action for Public Service’s CPCN should precede a Commission proceeding, is inapposite and has been distinguished by the court in *Colorado & Southern*. The court in *Miller* ruled that a utility was not required to obtain a CPCN from the Commission to construct a facility before the utility filed a condemnation action to acquire the land upon which the facility was to be built. The court reasoned that the construction permitted by the CPCN is an act that occurs after the utility obtains ownership of the land. Further, the court in *Miller* found that: “[t]he so-called certificate is only a permit or license to use and enjoy land that has been condemned; it is not a condition precedent to the right to condemn; **and has no relationship whatever with the matter of condemnation.**” *Miller*, 272 P.2d at 285 (emphasis added). The court in *Colorado and Southern* ruled that the *Miller* result—that a condemnation action may precede the Commission’s—did not apply to C&W’s condemnation of the easement, because the location of crossing point was essential to determining the property to be condemned and was subject to the Commission’s approval authority. *Colorado and Southern*, 493 P.2d at 659. The issue presented in this proceeding mirrors that of *Colorado & Southern*, in which the property at issue in the potential condemnation proceeding, Public Service’s extraterritorial CPCN, is the same property over which the Commission has jurisdiction and approval authority.

II. ORDER

A. The Commission Orders That:

1. The request to intervene filed by the Gunbarrel Energy Future Citizens' Group is denied. The filing submitted by the Gunbarrel Energy Future Citizens' Group on August 8, 2013, will be accepted as public comment.

2. The request of the City of Boulder to accept its Supplemental Authority, filed September 6, 2013, is granted. The request of Public Service Company of Colorado (Public Service) for leave to reply to the City of Boulder's Supplemental Authority, filed September 13, 2013, is granted.

3. The Commission grants the request of Public Service to enter as declaratory orders the first, second, and third statements listed in paragraph 25 of Public Service's Verified Petition for Declaratory Orders (Petition).

4. The Commission enters declaratory rulings addressing the fourth and fifth statements listed in paragraph 25 of the Petition by clarifying that the Commission has regulatory authority over electricity services provisioned by a municipal utility formed by the City of Boulder to customers located in unincorporated Boulder County, and that the doctrine of regulated monopoly as delineated by rulings of the Colorado Supreme Court governs any application filed by the City of Boulder seeking transfer of Public Service's certificate of public convenience and necessity (CPCN). The potential that the City of Boulder may file a condemnation action to obtain Public Service's CPCN does not affect the Commission's regulatory authority, the doctrine of regulated monopoly, or the standards governing transfer of Public Service's CPCN. Further, Commission proceedings addressing the transfer of Public Service's CPCN or other plant, equipment, and facilities used to provide service to customers

located in unincorporated Boulder County are to be completed before the City of Boulder initiates a condemnation action for such property.

5. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

6. This Decision is effective on its mailed date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 9, 2013.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners

DATE FILED: June 3, 2014 11:40 AM
FILING ID: FEFA54295441D
CASE NUMBER: 2014CV30681

EXHIBIT D

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13D-0498E

IN THE MATTER OF THE VERIFIED PETITION OF PUBLIC SERVICE COMPANY OF COLORADO FOR CERTAIN DECLARATORY ORDERS CONCERNING THE RIGHTS OF PUBLIC SERVICE COMPANY OF COLORADO UNDER ITS SERVICE TERRITORY CERTIFICATE COVERING BOULDER COUNTY, COLORADO.

**DECISION DENYING CITY OF BOULDER’S
APPLICATION FOR REHEARING,
REARGUMENT, OR RECONSIDERATION**

Mailed Date: December 18, 2013
Adopted Date: December 11, 2013

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I. STATEMENT

A. Introduction

1. On November 18, 2013, the City of Boulder (Boulder) filed its Application for Rehearing, Reargument, or Reconsideration (RRR) of Commission Decision issued on

October 29, 2013 (Decision). Boulder's RRR challenges the Decision's rulings clarifying the Commission's jurisdiction to conduct approval proceedings of the proposed transfer from Public Service Company of Colorado (Public Service) to Boulder of certifications, assets, and facilities used to provide electricity services to customers located outside Boulder's territorial limits in unincorporated Boulder County. Boulder's RRR also opposes the requirement to obtain Commission approval before Boulder commences a condemnation action over regulated property rights. Because Colorado Supreme Court precedent interpreting Article XXV of the state constitution and the public utilities law validates Commission jurisdiction to approve the transfer of regulated property before a condemnation court acquires subject matter jurisdiction over the property, the Commission denies Boulder's RRR.

B. Procedural Background and Positions of the Parties

2. We incorporate the Decision's description of the procedural history of this case, including Public Service's petition for declaratory ruling, intervention by Boulder and the Office of Consumer Counsel, grants of *amicus* status, and the positions of parties and *amici*.¹

3. The Decision issued declaratory rulings clarifying the Commission's jurisdiction under the state constitution and the public utilities law to regulate Boulder's certification as a municipal utility to provide electricity services to customers located in unincorporated Boulder County. The Decision also declares the Commission has the authority to conduct approval proceedings over Boulder's proposed acquisition of assets and facilities owned and used by Public Service to provide service outside the city. Citing *Colorado and Southern*,² the Decision requires Boulder to obtain Commission approval before a condemnation action could commence.

¹ Decision, issued October 29, 2013, at ¶¶ 1-12.

² *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972).

4. Boulder's RRR challenges the following ruling from paragraph 28 of the Decision:

If Boulder seeks to condemn facilities, wherever located, that Public Service currently uses, at least in part, to serve customers located outside of Boulder's city limits, this Commission must have the ability to investigate and determine how the facilities should be assigned, divided, or jointly used Thus, a Commission proceeding addressing these facilities should precede a condemnation action to allow the district court to rule on the public need and value of *facilities that the Commission determines may be the subject of transfer to Boulder*.

(emphasis added by Boulder).

Boulder requests the deletion of paragraph 28 from the Decision. According to the RRR, selection of facilities for condemnation is a "municipal function," and the Decision impairs Boulder's ability as a home rule city to form a municipal utility and condemn plant and facilities it deems necessary. Boulder also objects to the Decision's application of the *Colorado and Southern* case requiring Commission approval of any acquisition of regulated property rights from Public Service before Boulder files a condemnation action.

5. Boulder's RRR "recognizes the authority of the Commission over service provided by a municipal electric utility to customers located outside the jurisdictional boundaries of the municipality,"³ and indicates it "will file all applicable applications for transfer."⁴ Boulder argues, however, "Commission's approval of an application for transfer is not the same as the Commission's deciding what property rights may be transferred and when the transfer may occur."⁵

6. By leave of the Commission, Public Service filed a response to Boulder's RRR on December 3, 2013. Public Service requests denial of Boulder's RRR and provides argument and

³ Boulder RRR, at 3.

⁴ *Id.*, at 5-6.

⁵ *Id.*, at 6.

citations to the state constitution, the public utilities law, and Colorado case law in support of Commission regulatory authority over extraterritorial electricity services.

II. DISCUSSION

A. Scope of Commission Jurisdiction

7. The Decision defines the Commission's jurisdiction over Boulder's municipal utility to encompass certifications, assets, and facilities used to provide electricity to customers located outside Boulder's territorial boundaries. The Decision does not suggest or imply Commission jurisdiction over services Boulder's utility may provide within the city. Paragraph 28 of the Decision, the object of Boulder's RRR, also is limited to facilities and assets used to provide extraterritorial services.

8. Despite these definitions of the scope of Commission authority, Boulder's RRR causes us to question whether it is addressing Commission jurisdiction over municipal services provided inside, or outside, the city. Boulder's RRR on occasion references extraterritorial matters; however, the vast majority of the RRR discusses municipal powers in general terms, and cases cited by the RRR address municipal functions to provide services within the municipality, not outside.

9. The Commission reiterates its assertion of regulatory authority over the certifications, assets, and facilities, wherever located, used by Public Service at least in part to provide electricity service to customers outside Boulder city limits. The Commission does not assert regulatory authority over Boulder's efforts to form a utility or over facilities and plant, wherever located, used only to provide service to customers within Boulder's municipal territory.

B. Commission Jurisdiction and Municipal Functions

10. Boulder argues in its RRR that selection of certifications, facilities, and other property rights for condemnation is a municipal function beyond the Commission's jurisdiction. Boulder's primary citation for this proposition is the 1926 case of *Public Service v. City of Loveland*,⁶ in which the city sought to condemn Public Service's distribution system used to provide service to Loveland's residents.⁷ Public Service challenged Loveland's ability to acquire ownership through eminent domain proceedings and also protested the city's unwillingness to condemn a substation and real estate located within the town. The Court in *Public Service v. City of Loveland* ruled that the town has the authority to condemn facilities, and the selection of which facilities to condemn is a municipal function Public Service could not override. Boulder's RRR also relies upon *City of Thornton v. Farmers Reservoir & Irrigation Co.*,⁸ arguing a home rule city has constitutionally-granted powers to condemn "*within or without its territorial limits,*" to acquire utilities "*and everything required therefore.*"⁹

11. Neither *Public Service v. City of Loveland* nor *City of Thornton* addresses the Commission's jurisdiction over regulated services provided by a municipal utility to customers located outside territorial boundaries. These cases do not diminish the multitude of Supreme Court cases and their citations to article XXV of the Colorado constitution and the public utilities law granting the Commission regulatory authority over services provided to customers located

⁶ *Public Service Company v. City Of Loveland*, 245 P. 493 (Colo. 1926).

⁷ The distribution system in *Loveland* also served "a few customers located adjacent to or in close proximity with the city." Public Service raised no objections before the Supreme Court to Loveland serving customers located outside the city, and the Court did not address any issues defining either the municipality's or the Commission's authority over facilities used to provide service outside city limits.

⁸ *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382 (1978).

⁹ *Id.*, 575 P.2d at 388-899 (emphasis that of the Court).

outside city limits. Our Decision lists these cases and their holdings,¹⁰ examples of which include the following:

- “When the city became a public utility under the statute, it had no superior right as to territory outside of its municipal boundaries over the rights of any other public utility, private corporation or otherwise, authorized to furnish service.”¹¹
- In the 1930 case in which the City of Loveland extended its facilities to serve customers outside the city’s boundaries, the Court stated: “the Utilities Act unmistakably and clearly invests the Public Utilities Commission with ***the sole jurisdiction*** to hear and determine, in the first instance, a controversy of this nature.”¹²
- In the 1978 *City of Loveland* case, the court stated: “We believe it is essential that the PUC be allowed to regulate the public utility services provided by municipalities outside their boundaries. Not only is the PUC the only protection for the non-resident customers, . . . ***but the PUC must also be allowed the power to resolve jurisdictional disputes between municipalities and private utilities companies over who is to serve areas outside municipal boundaries.***”¹³.

12. None of the other cases cited in Boulder’s RRR impair Commission authority to regulate services provided by a municipal utility outside city boundaries.¹⁴

13. Boulder’s citations also do not reconcile the Court’s ruling in *City and County of Denver v. Public Utilities Commission*,¹⁵ in which the Court upheld the Commission’s regulatory authority over Denver’s provision of tramway services outside its boundaries, even after a

¹⁰ Decision, issued October 29, 2013, at ¶¶ 20-22.

¹¹ *Public Utilities Commission v. City of Loveland*, 289 P. 1090, 1094 (Colo. 1930).

¹² *Id.*, 289 P. at 1093 (emphasis added).

¹³ *City of Loveland v. Public Utilities Commission*, 580 P.2d 381, 385 (Colo. 1978) (emphasis added).

¹⁴ In *Colorado Cent. Power Co. v. City of Englewood*, 89 F.2d 233 (10th Cir. 1937), cited in Boulder’s RRR, a private utility challenged the city’s condemnation of facilities located outside the city and part of the system supplying electricity inside and outside of the city. The federal appeals court held that the city may condemn extraterritorial facilities to serve customers within the city. The utility also argued condemnation of such facilities amounted to an effort to generate, distribute, and sell electricity outside the city without first having obtained a certificate of convenience and necessity from the PUC. The court ruled: “Whether the city is required to obtain such a certificate cannot be determined on the complaint of a private suitor. It may be inquired into only on the complaint of the state or the commission.” Thus, the federal appeals court did not address Commission jurisdiction to regulate any efforts by the City of Englewood to provide extraterritorial service.

¹⁵ *City and County of Denver v. Public Utilities Commission*, 507 P.2d 871 (Colo. 1973).

district court had completed a condemnation action transferring ownership rights of the system to Denver.

14. Characterizing the selection of facilities for condemnation as a “municipal function” does not undermine the scope of Commission jurisdiction over certifications and facilities used to serve extraterritorial customers. In the 1978 *City of Loveland v. PUC* case,¹⁶ the Court characterized the setting of rates by a city utility for its inhabitants as a “municipal function”;¹⁷ however, when the city performed the same function for extraterritorial customers, it was subject to the Commission’s jurisdiction.¹⁸ Also, in *Colorado and Southern Railway Co., Inc. v. District Court*,¹⁹ in which a railway company attempted to condemn property for a railroad crossing, the Court referenced the Commission’s authority to approve the location of railway crossings and stated “*the commission – not the railroad -- determines what property the railroad requires.*”²⁰

15. Boulder’s RRR reflects an intention to initiate condemnation proceedings over Public Service’s certificate of public convenience and necessity (CPCN) before obtaining the Commission’s formal approval: “Because a CPCN is a property right, whether a CPCN will be included in a city’s petition in condemnation is likewise a matter within the purview of the city to determine.”²¹ A major issue addressed in the briefing of parties and *amici* prior to issuance of the Decision was Boulder’s ability to condemn Public Service’s CPCN for service in unincorporated Boulder County. The Decision, citing the Commission’s authority to approve

¹⁶ *City of Loveland v. Public Utilities Commission*, 580 P.2d 381 (Colo. 1978).

¹⁷ *Id.*, 580 P.2d at 384.

¹⁸ *Id.*, 580 P.2d at 384-85.

¹⁹ *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972).

²⁰ *Id.*, 493 P.2d at 659 (emphasis added).

²¹ Boulder RRR at 7.

and regulate CPCN transfers, held that Boulder must obtain Commission approval of any proposed acquisition of Public Service's CPCN to serve extraterritorial customers.²² Boulder's RRR does not cite any cases or other legal authorities placing this holding into question.

16. Boulder's RRR at times acknowledges Commission authority over CPCNs and services provided to extraterritorial customers; however, its RRR minimizes this authority by suggesting it will satisfy this requirement by simply working and coordinating with the Commission and Public Service to identify which facilities should be acquired and condemned.²³ Boulder also attempts to reduce the extent of Commission approval authority: "[T]he Commission's approval of an application for transfer is not the same as the Commission's deciding what property rights may be transferred and when the transfer may occur."²⁴

17. Negotiation and coordination among Boulder, Public Service, and other interested entities and agency staffs are encouraged to reduce the scope of disputed issues and conserve administrative and judicial resources. Informal negotiations, however, do not supplant formal Commission approvals required by statute. Further, an inability to determine which property rights may be acquired conflicts with the Commission's constitutional and statutory duties to regulate the transfer of certification, assets, and facilities used to provide service to extraterritorial customers.

18. Boulder contends that pre-approval proceedings before the Commission will deny Boulder of its right to conduct discovery pursuant to the rules of civil procedure applicable to

²² Decision, issued October 29, 2013, at ¶¶ 23-24 (citing *City and County of Denver v. Public Utilities Commission*, 507 P.2d 871 (Colo. 1973), and *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972)).

²³ Boulder RRR at 3, 10.

²⁴ *Id.*, at 6.

eminent domain actions.²⁵ The Commission’s procedural rules provide Boulder with the same mechanisms to conduct discovery through written interrogatories, requests for production of documents, and depositions.²⁶ Boulder also objects to delays resulting from Commission approval proceedings.²⁷ Commission rules allow parties to request expedited proceedings, which accelerate discovery responses and hearing schedules.²⁸ The Commission will process and decide the matter as efficiently as the issues and the public interest allow.

19. Regulatory oversight of the assets, plant, and facilities used to provide electricity outside Boulder’s territorial boundaries advances important public interests. Public Service constructs, engineers, and operates its network as an integrated system, and its service capabilities cross the political boundaries defining the City of Boulder and Boulder County. Performance of the Commission’s duty to ensure the reliability of the system for unincorporated Boulder County and other regions of the state requires an evaluation and determination of the optimal division, joint use, and potential replacement of assets and facilities providing services both inside and outside Boulder city limits.

C. Sequencing of Commission and Condemnation Proceedings

20. The Supreme Court’s *Colorado and Southern* case²⁹ governs the sequencing of Commission and condemnation proceedings of property subject to Commission regulation. In *Colorado and Southern*, a railway company commenced a condemnation action for an easement over railroad tracks. The public utilities law granted the Commission “the power to determine

²⁵ *Id.*, at 13.

²⁶ 4 *Code of Colorado Regulations* (CCR) 723-1-1405 of the Commission’s Rules of Practice and Procedure.

²⁷ Boulder RRR, at 9-10.

²⁸ 4 CCR 723-1-1302(c), 1405(i).

²⁹ *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972).

what property the condemning railroad can use as the ‘particular point of crossing.’”³⁰ The Court issued two holdings applicable to Boulder’s RRR: first, because the Commission has the statutory power to determine the point of crossing, “[i]t follows logically then that the commission -- not the railroad -- determines what property the railroad requires”;³¹ and second, absent Commission approval, the district court sitting in condemnation did not have jurisdiction over the subject matter of the case.³² Under *Colorado and Southern*, Commission approval proceedings over regulated property is a condition precedent to a condemnation action over the subject property.³³

21. Boulder’s RRR attempts to distinguish *Colorado and Southern*. Boulder first argues that the statute cited in *Colorado and Southern* authorized the Commission to approve the property at issue, whereas, according to Boulder, “Here, there is no such statute. No statute grants this Commission the power to determine, order, and prescribe which property a municipality may seek to condemn in order to create a municipal utility.”³⁴

22. Two public utilities law provisions prove otherwise and authorize Commission approval of the transfer of property and facilities providing regulated services. As cited in the Decision, § 40-5-105(1), C.R.S., requires Commission approval of the sale, assignment, or lease of assets of a public utility, including any CPCN. This statute also permits the Commission to

³⁰ *Id.*, 493 P.2d at 659.

³¹ *Id.*

³² *Id.*, 493 P.2d at 659-60.

³³ *Id.*, 493 P.2d at 658-60.

³⁴ Boulder RRR, at 11.

prescribe the terms and conditions of approval.³⁵ The transfer of ownership through condemnation means to “purchase” or to “acquire,”³⁶ which is a “sale,” and thus a transfer of facilities used to provide electricity service outside territorial limits is within Commission purview under § 40-5-105(1), C.R.S. Despite arguing no statute grants the ability of the Commission to conduct approval proceedings, Boulder in other portions of its RRR concedes regulatory approval authority over property it may wish to condemn.³⁷

³⁵ § 40-5-105, C.R.S., says:

Certificate or assets may be sold, assigned, or leased. (1) The assets of any public utility, including any certificate of public convenience and necessity or rights obtained under any such certificate held, own, or obtained by any public utility, may be sold, assigned, or leased as any other property, but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe; except that this section does not apply to assets that are sold, assigned or leased:

- (a) In the normal course of business: or
- (b) [Describing circumstances applying only to telecommunications service providers]

³⁶ See Article XX, Section 1 (extended to home rule cities by Article XX, Section 1), which says:

[The City and County of Denver] ... shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefore, for the use of said city and county and the inhabitants thereof, and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain....

³⁷ See, for example, Boulder RRR at 3 (“The transfer of a CPCN, which is a property right subject to condemnation, cannot take place without the Commission’s approval....While Boulder recognizes the authority of the Commission over service provided by a municipal electric utility to customers located outside the jurisdictional boundaries of the municipality, Boulder respectfully submits that the Decision misapprehended certain points of law, as discussed below, and requests that the Commission reconsider its Decision.”), and 5-6 (“Once Boulder determines that it may form a retail electric utility in compliance with its Charter requirements and it, in fact, does so, Boulder will file all applicable applications for transfer.”).

23. The emphasis in Boulder's RRR upon facilities, and the potential for interference with Public Service's system, invokes a second provision of the public utilities law, § 40-5-101(1)(b), C.R.S. It says:

If a public utility, in constructing or extending its line, plant, or system, interferes, or is about to interfere, with the operation of the line, plant, or system of any other public utility already constructed, the commission, upon complaint of the public utility claiming to be injuriously affected, after hearing, may prohibit the construction or extension or prescribe just and reasonable terms and conditions for the location of the lines, plants, or systems affected.

Boulder acts as a "public utility" under Commission regulation when it operates outside territorial limits.³⁸ Any extension of Boulder's system interfering with Public Service's provisioning of service to extraterritorial customers is within this statute, and the Commission may prohibit the extension or prescribe just and reasonable terms for the location of the lines, plant, or systems affected.

24. Independent of these two statutory authorizations is the Commission's constitutional mandate over regulated property and services, as recognized by the Court:

Article XXV of the Colorado Constitution vests in such agency as the General Assembly may designate all power to regulate the facilities, service, rates, and charges of every public utility operating within Colorado. See Colo. Const. art. XXV. Through the Public Utilities Law, 40-1-101 to 40-7-117, 11 C.R.S. (1998), the General Assembly has assigned to PUC the authority "to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power." 40-3-102, 11 C.R.S. (1998). Accordingly, PUC has power to accomplish functions delegated to it by the Public Utilities Law and article XXV.³⁹

25. Boulder's attempt to minimize the precedential value of *Colorado and Southern*—by arguing the public utilities law does not contain a specific statute authorizing the

³⁸ *Public Utilities Commission v. City of Loveland*, 289 P.2d 1090, 1094 (Colo. 1930).

³⁹ *Public Service Company of Colorado, v. Trigen-Nations Energy Company, L.L.P.*, 982 P.2d 316, 322 (Colo. 1999).

Commission to select property for condemnation of a municipal utility—is of no consequence. In *Colorado and Southern*, the approval statute at issue also did not reference or grant Commission authority to select facilities for condemnation; rather, as here, the statute granted the Commission general approval powers over the subject property.⁴⁰ The approval statutes governing the acquisition of Public Service’s assets by Boulder are comparable to the crossing approval statute in *Colorado and Southern*.

26. Boulder’s second attempt to distinguish *Colorado and Southern* is to attach significance to the demands of the condemning railway in that case to take immediate possession, in contrast to Boulder’s commitment not to take possession of Public Service’s assets until after the condemnation action (but by implication before obtaining Commission approval). The language and reasoning of *Colorado and Southern* do not support Boulder’s contention. The condemnation action was prohibited from proceeding not because of the demand for immediate possession, but because the district court lacked subject matter jurisdiction over the property absent Commission approval of the crossing pursuant to the public utilities law.⁴¹

⁴⁰ As quoted by the Court in *Colorado and Southern*, the approval statute at issue stated:

The [public utilities] commission shall have power to determine, order, and prescribe, in accordance with the plans and specifications to be approved by it, the just and reasonable manner including the particular point of crossing at which the tracks or other facilities of any railroad corporation may be constructed across the tracks or other facilities of any other railroad corporation at grade, or above or below grade; and to determine, order, and prescribe the terms and conditions of installation and operation, maintenance, and protection of all such crossings which may now or hereafter be constructed to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted. 493 P.2d at 658-59.

⁴¹ *Colorado and Southern*, 493 P.2d at 658-60.

III. ORDER

A. The Commission Orders That:

1. The City of Boulder's Application for Rehearing, Reargument, or Reconsideration of Decision No. C13-1350, filed November 18, 2013, is denied.
2. This Decision is effective on its mailed date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 11, 2013.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners