

**CITY OF BOULDER
CITY COUNCIL AGENDA ITEM**

MEETING DATE: July 6, 2010

AGENDA TITLE:

Introduction, first reading, and consideration of a motion to order published by title only two ordinances submitting to the electors of the City of Boulder at the special municipal coordinated election to be held on Tuesday, November 2, 2010, the issue of whether the City of Boulder taxes should be increased by up to \$5 million (in the first full fiscal year) annually and by whatever amounts as may be collected annually thereafter:

1. By the imposition of a **utility occupation tax** on public utility companies that deliver energy to customers in the form of electricity and gas, increases in said taxes limited by the cumulative increase in the consumer price index (all items) for the Denver metropolitan area, or equivalent index, beginning January 1, 2011; whether the City Council should be authorized to create exemptions to the tax for renewable energy; or
2. By the imposition of a **utility excise tax** on public utility companies that deliver energy to customers in the form of electricity and gas at the rate of ____ per kilowatt hour (kwh) and the rate of ____ per British Thermal Unit (BTU), beginning January 1, 2011; whether the City Council should be authorized to create exemptions to the tax for renewable energy.

PRESENTERS: Jane Brautigam, City Manager
David Gehr, Acting City Attorney
Paul Fetherston, Deputy City Manager
Bob Eichem, Director of Finance

EXECUTIVE SUMMARY

At the June 3, 2010 City Council study session, council provided general guidance for staff to conduct additional analysis and to prepare draft ballot language for the November 2, 2010 election that would provide a viable alternative to a franchise agreement. If the ballot issue is passed by the voters it will replace the nearly four million dollars per year that is received by the City under the current franchise fee. The alternative tax would also generate nearly one million dollars per year which is currently spent by Public Service Company of Colorado ("Public Service" or "PSCo") on undergrounding electric lines within the City limits and would not occur if the franchise agreement is no longer in place. Staff has prepared two options for council's consideration.

Option 1: An occupation tax that would be charged to every electric and gas utility serving the City. As proposed it would charge the utility for the use of Boulder's public right-of-way, similar in intent to the franchise fee.

Option 2: An excise tax on utility usage for electricity and gas. This option would tax a public utility company at an equivalent rate to what they already pay via the franchise fee. The company would then pass the cost through to their customers. It is proposed that the tax be based on usage.

Public utility companies have the authority to pass extraordinary costs of doing business to their customers. See Section 40-3-106 (4) C.R.S. The existing franchise fee that PSCo pays to the City is passed through to the customer. It is anticipated that any tax paid by PSCo would be passed on the customer as well.

STAFF RECOMMENDATION:

Suggested Motion Language:

Staff requests council consideration of this matter and action in the form of the following motion:

Motion to introduce and order published by title only two ordinances submitting to the electors of the City of Boulder at the special municipal coordinated election to be held on Tuesday, November 2, 2010, the issue of whether the City of Boulder taxes should be increased by up to \$5 million (in the first full fiscal year) annually and by whatever amounts as may be collected annually thereafter:

1. By the imposition of a **utility occupation tax** on public utility companies that deliver energy to customers in the form of electricity and gas, increases in said taxes limited by the cumulative increase in the consumer price index (all items) for the Denver metropolitan area, or equivalent index, beginning January 1, 2011; whether the City Council should be authorized to create exemptions to the tax for renewable energy; or
2. By the imposition of a **utility excise tax** on public utility companies that deliver energy to customers in the form of electricity and gas at the rate of ____ per kilowatt hour (kwh) and the rate of ____ per British Thermal Unit (BTU), beginning January 1, 2011; whether the City Council should be authorized to create exemptions to the tax for renewable energy.

COMMUNITY SUSTAINABILITY ASSESSMENTS AND IMPACTS

- Economic: The implementation of either tax would replace the current charge PSCo customers pay for the franchise agreement and replace the current expenditures made by PSCo for undergrounding electrical lines.
- Environmental: The proposed ballot issues would replace the current franchise fee. It is felt this would provide the City with more opportunities to provide alternative energy sources which will allow the City another primary method to meet the Kyoto protocol goal for emission reductions by 2012.

- Social: The proposed ordinances do not have a major incremental impact on the social sustainability aspects of the community.

OTHER IMPACTS:

- Fiscal: The fiscal impacts to the City of the proposed ordinances are covered in the background and analysis section of this agenda item.
- Staff time: The staff time needed to complete the background work for ballot issues is included within the departmental work plans.

ANALYSIS:

There are two proposed ballot issues attached to this item. Staff is recommending that the council adopt both issues on first reading. A substantive discussion of the two issues can be completed at the time of second reading.

It is not clear whether the City will enter into a franchise with PSCo. Presently, under the existing franchise, PSCo pays a franchise fee to the City for the use of its streets in the amount of three percent of the revenue that it receives from Boulder customers for gas and electricity that it delivers. The revenue is compensation that PSCo pays to the City for the use of its streets and other public property for its distribution infrastructure.

State law allows PSCo to pass this cost through to Boulder customers. *See* Section 40-3-106(4) C.R.S. Since the fee is based upon revenue, if a person or business uses more energy, the person or business also pays a larger portion of the franchise fee.

While legally permissible as a fee, the franchise fee model cannot be used as a model for taxation. A tax on a source of revenue will most likely be considered an income tax by the Colorado courts. Only the state can impose an income tax. It is unconstitutional for any other governmental entity to impose an income tax.

The amount that is currently collected in the franchise fee is approximately \$3.9 million per year. These funds are placed in the City's general fund and used for general fund purposes. An additional \$1.1 million was added to cover the costs associated with the loss of the undergrounding fund, funding necessary for benefits loss, such as pole attachments, and the costs associated with administering a new tax.

Two options are presented for the council's consideration. The first is a simple occupation tax. The other is an excise tax on PSCo on the amount of energy delivered by PSCo to the customer.

Occupation Tax

The first tax is an occupation tax. This is a simple tax on the utility for the privilege of having a utility business in the City. The amount of the tax is \$5 million per year. Future councils will be authorized to increase the tax by the maximum of the consumer price index for the Denver metropolitan area. This type of taxation is very simple to both understand and administer. The

disadvantage to such a system is that there will be uncertainty about how the Public Utilities Commission would pass such a fee through to the customer. Given that it is a lump sum tax, it may not be passed through to the customer based upon energy usage.

Tax on Energy Delivery

The other option for council's consideration is a tax on the amount of energy the PSCo delivers to its customers. The council will have the authority to grant exemptions from this tax for renewable energy sources. This tax should have the same effect as the franchise fee, in that PSCo will probably pass it through on the energy that it sells to customers.

Given that the tax is assessed on energy delivered, there is a good chance that the Public Utilities Commission would pass such a tax directly through to the customer, since it is close to the way the tax would be calculated. This approach would be more difficult to administer than the simple occupation tax addressed above.

NEXT STEPS

The ballot issues included in this item would be enabling legislations. In the event that either issue is passed by the voters, the Boulder Revised Code will need to be revised to exercise the taxation authority granted by the ballot issue. Whether to exercise the authority will be a matter for the City Council to decide after considering the status of any franchise with the local public utility company.

OPTIONS

Staff recommends that council pass both ordinances on first reading. The City Council may discuss and determine which, if any, tax issue is placed on the ballot in November after the second reading and public hearings on the ordinances.

Approved by:


Jane S. Brautigam
City Manager

ATTACHMENTS

- A. Proposed ordinance implementing a Utility Occupation Tax
- B. Proposed ordinance implementing a Utility Excise Tax

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ORDINANCE NO. _____

(Utility Occupation Tax)

AN ORDINANCE SUBMITTING TO THE ELECTORS OF THE CITY OF BOULDER AT THE SPECIAL MUNICIPAL COORDINATED ELECTION TO BE HELD ON TUESDAY, NOVEMBER 2, 2010, THE ISSUE OF WHETHER THE CITY OF BOULDER TAXES SHOULD BE INCREASED BY UP TO \$5 MILLION (IN THE FIRST FULL FISCAL YEAR) ANNUALLY AND BY WHATEVER AMOUNTS AS MAY BE COLLECTED ANNUALLY THEREAFTER BY THE IMPOSITION OF A UTILITY OCCUPATION TAX ON PUBLIC UTILITY COMPANIES THAT DELIVER ENERGY TO CUSTOMERS IN THE FORM OF ELECTRICITY AND GAS, INCREASES IN SAID TAXES LIMITED BY THE CUMULATIVE INCREASE IN THE CONSUMER PRICE INDEX (ALL ITEMS) FOR THE DENVER METROPOLITAN AREA, OR EQUIVALENT INDEX, BEGINNING JANUARY 1, 2011; WHETHER THE CITY COUNCIL SHOULD BE AUTHORIZED TO CREATE EXEMPTIONS TO THE TAX FOR RENEWABLE ENERGY; AND SETTING FORTH RELATED DETAILS.

WHEREAS the City Council finds that:

A. The franchise agreement between the City of Boulder and Public Service Company of Colorado ("PSCo"), adopted pursuant to Ordinance No. 5569 and adopted by the electorate in November 1993 is scheduled to expire on August 4, 2010 (the "Franchise").

B. The City and PSCo intend to extend the terms of the Franchise pursuant to a revocable permit that will be granted pursuant to the authority granted under City Charter Section 115.

C. In the event that the City does not approve a new franchise agreement, the City will need to find an alternative revenue source to replace the benefits of the Franchise agreement, including Franchise fee payments to the City and the benefits that the City receives from an undergrounding fund that is funded and spent on behalf of Boulder customers by PSCo.

D. It is appropriate for voters to approve collection, retention, and expenditure of the full amount collected from the tax proposed by the ballot issue described below.

1 NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY
2 OF BOULDER, COLORADO:

3 Section 1. A special municipal coordinated election will be held in the City of Boulder,
4 county of Boulder and state of Colorado, on Tuesday, November 2, 2010, between the hours of
5 7 a.m. and 7 p.m.

6 Section 2. At that election, there shall be submitted to the electors of the City of Boulder
7 entitled by law to vote the issue of authorizing a utility occupation tax on the delivery of energy
8 created from electricity and gas, and to collect, retain, and spend the revenues generated from
9 such tax notwithstanding any state revenue or expenditure limitations.
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11 Section 3. The official ballot shall contain the following ballot title, which shall also be
12 the designation and submission clause for the issue:
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14 ISSUE NO. ____

15 **UTILITY OCCUPATION TAX**

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17 SHALL CITY OF BOULDER TAXES BE INCREASED BY UP
18 TO \$5 MILLION (IN THE FIRST FULL FISCAL YEAR)
19 ANNUALLY AND BY WHATEVER AMOUNTS AS MAY BE
20 COLLECTED ANNUALLY THEREAFTER BY THE
21 IMPOSITION OF A UTILITY OCCUPATION TAX ON PUBLIC
22 UTILITY COMPANIES AT THE RATE OF 5 MILLION
23 DOLLARS, ANNUALLY, PER UTILITY COMPANY THAT
24 DELIVERS ENERGY TO CUSTOMERS IN THE FORM OF
ELECTRICITY AND GAS, INCREASES IN SAID TAXES
LIMITED BY THE CUMULATIVE INCREASE IN THE
CONSUMER PRICE INDEX (ALL ITEMS) FOR THE DENVER
METROPOLITAN AREA, OR EQUIVALENT INDEX,
BEGINNING JANUARY 1, 2011;

25 SHALL THE CITY COUNCIL BE AUTHORIZED TO CREATE
26 EXEMPTIONS TO THE TAX FOR RENEWABLE ENERGY;

27 AND IN CONNECTION THEREWITH,
28

1 SHALL THE FULL PROCEEDS OF SUCH TAXES AT SUCH
2 RATES AND ANY EARNINGS THEREON BE COLLECTED,
3 RETAINED, AND SPENT, AS A VOTER-APPROVED
4 REVENUE CHANGE WITHOUT LIMITATION OR
5 CONDITION, AND WITHOUT LIMITING THE COLLECTION,
6 RETENTION, OR SPENDING OF ANY OTHER REVENUES
7 OR FUNDS BY THE CITY OF BOULDER UNDER ARTICLE X
8 SECTION 20 OF THE COLORADO CONSTITUTION OR ANY
9 OTHER LAW?

10 FOR THE ISSUE _____ AGAINST THE ISSUE _____

11 Section 4. If this ballot issue is approved by the voters, the City Council may adopt
12 amendments to the Boulder Revised Code to implement this utility occupation tax and such other
13 amendments to the Boulder Revised Code as may be necessary to implement the intent and
14 purpose of this ordinance.

15 Section 5. If a majority of all the votes cast at the election on the issue submitted shall be
16 for the issue, the issue shall be deemed to have passed and shall be effective upon passage, and it
17 shall be lawful for the City Council to provide for the amendment of its tax code in accordance
18 with the issue approved.

19 Section 6. The election shall be conducted under the provisions of the Colorado
20 Constitution, the charter and ordinances of the City, the Boulder Revised Code, 1981, and this
21 ordinance, and all contrary provisions of the statutes of the state of Colorado are hereby
22 superseded.

23 Section 7. The officers of the City are authorized to take all action necessary or
24 appropriate to effectuate the provisions of this ordinance and to contract with the county clerk to
25 conduct the election for the City.
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ORDINANCE NO. _____

(Utility Excise Tax)

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WHEREAS the City Council finds that:

A. The franchise agreement between the City of Boulder and Public Service Company of Colorado ("PSCo"), adopted pursuant to Ordinance No. 5569 and adopted by the electorate in November 1993 is scheduled to expire on August 4, 2010 (the "Franchise").

B. The City and PSCo intend to extend the terms of the Franchise pursuant to a revocable permit that will be granted pursuant to the authority granted under City Charter Section 115.

C. In the event that the City does not approve a new franchise agreement, the City will need to find an alternative revenue source to replace the benefits of the Franchise agreement, including Franchise fee payments to the City and the benefits that the City receives from an undergrounding fund that is funded and spent on behalf of Boulder customers by PSCo.

D. It is appropriate for voters to approve collection, retention, and expenditure of the full amount collected from the tax proposed by the ballot issue described below.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

1 SHALL THE FULL PROCEEDS OF SUCH TAXES AT SUCH
2 RATES AND ANY EARNINGS THEREON BE COLLECTED,
3 RETAINED, AND SPENT, AS A VOTER-APPROVED
4 REVENUE CHANGE WITHOUT LIMITATION OR
5 CONDITION, AND WITHOUT LIMITING THE COLLECTION,
6 RETENTION, OR SPENDING OF ANY OTHER REVENUES
7 OR FUNDS BY THE CITY OF BOULDER UNDER ARTICLE X
8 SECTION 20 OF THE COLORADO CONSTITUTION OR ANY
9 OTHER LAW?

10 FOR THE ISSUE _____ AGAINST THE ISSUE _____

11 Section 4. If this ballot issue is approved by the voters, the City Council may adopt
12 amendments to the Boulder Revised Code to implement this utility excise tax and such other
13 amendments to the Boulder Revised Code as may be necessary to implement the intent and
14 purpose of this ordinance.

15 Section 5. If a majority of all the votes cast at the election on the issue submitted shall be
16 for the issue, the issue shall be deemed to have passed and shall be effective upon passage, and it
17 shall be lawful for the City Council to provide for the amendment of its tax code in accordance
18 with the issue approved.

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20 Constitution, the charter and ordinances of the City, the Boulder Revised Code, 1981, and this
21 ordinance, and all contrary provisions of the statutes of the state of Colorado are hereby
22 superseded.

23 Section 7. The officers of the City are authorized to take all action necessary or
24 appropriate to effectuate the provisions of this ordinance and to contract with the county clerk to
25 conduct the election for the City.
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