

# CITY OF BOULDER

## CITY COUNCIL AGENDA ITEM

MEETING DATE: August 3, 2010

**AGENDA TITLE:** Consideration of a motion to adopt four ordinances submitting to the electors of the City of Boulder, Colorado, at the special municipal coordinated election to be held on Tuesday, November 2, 2010, the issues of:

1. (Ord. 7728) Second reading and consideration of the question of a franchise by the City of Boulder, Colorado, being granted to the Public Service Company of Colorado, its successors and assigns, to furnish, sell, and distribute gas and electricity to the City and to all persons, businesses, and industries within the City and the right to acquire, construct, install, locate, maintain, operate, and extend into, within, and through said City all facilities reasonably necessary to furnish, sell, and distribute gas and electricity within the City and the right to make reasonable use of all streets, public easements and other City property as herein defined as may be necessary; and fixing the terms and conditions thereof; and setting forth related details;
2. (Ord. 7747) ) Second reading and consideration of the question of whether the City of Boulder taxes should be increased by up to \$3.9 million (in the first full fiscal year) annually and by such amounts as may be collected annually thereafter by the imposition of a utility excise tax on public utility companies that deliver energy to customers in the form of electricity and gas beginning January 1, 2011 and expiring on December 31, 2015; and setting forth related details; and
3. (Ord. 7748) Second reading and consideration of the question of whether the City of Boulder taxes should be increased by up to \$4.35 million (in the first full fiscal year) annually and by such amounts as may be collected annually thereafter by the imposition of a utility excise tax on public utility companies that deliver energy to customers in the form of electricity and gas beginning January 1, 2011 and expiring on December 31, 2015; and setting forth related details; and
4. Introduce, read, and order published by title only an ordinance on the issue of whether the City of Boulder taxes should be increased by up to \$4.35 million (in the first full fiscal year) annually and by such 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 beginning January 1, 2011 and expiring on December 31, 2015; [**dedicating up to \$450,000 per year for the planning of clean energy programs;**] and setting forth related details.

**PRESENTERS:**

Jane S. Brautigam, City Manager  
Paul Fetherston, Deputy City Manager  
Tom A. Carr, City Attorney  
David J. Gehr, Deputy City Attorney  
Bob Eichen, Director of Finance  
David Driskell, Executive Director of Community Planning and Sustainability  
Jonathan Koehn, Regional Sustainability Coordinator  
Kara Mertz, Local Environmental Action Manager

**EXECUTIVE SUMMARY:**

The City of Boulder is committed to achieving a clean energy future. Spurred by citizen initiatives such as the carbon tax and numerous community efforts focused on reducing greenhouse gas emissions, council has consistently acted to commit City resources toward community climate action goals within a framework of comprehensive sustainability, seeking to advance Boulder's environmental quality, economic vitality, and social equity.

Energy consumption in buildings represents the most significant component of Boulder's "carbon footprint," accounting for 74 percent of the City's 2009 greenhouse gas inventory. This is largely due to the continued reliance on coal-fired power plants to generate the City's electricity. While the City has been and continues to be a national leader in advancing energy efficiency in buildings, there is no doubt that achieving Boulder's carbon reduction goals requires a significant shift toward clean fuel sources in its power generation.

Within this context, staff has been working for two years with the Public Service Company of Colorado, an Xcel Energy company (Xcel)—the City's electrical and gas supply company—to develop new agreements that would not only define the rights and responsibilities of Xcel for operating within the public rights-of-way (the traditional realm of franchise agreements) but also to define a path toward cleaner energy options and steps Xcel would take to move in that direction. These steps are embodied in a set of "side agreements" that would represent a contractual agreement between Xcel and the City.

Xcel representatives have worked diligently with City staff to develop a mutually agreeable franchise agreement. These negotiations concluded on July 23, resulting in the franchise document attached with this memo for council's consideration. Staff believes this agreement will serve the City well as it contains a number of important provisions to protect and advance important City interests related to Xcel's operations in the City. As a stand-alone document, it represents a reasonable document that could guide Xcel's use of the public rights-of-way. Further, City staff proposed, and Xcel accepted, language crafted to avoid foreclosing options the City may have if state law changes with regard to the generation and transport of electricity. Staff wishes to express sincere appreciation of the Xcel negotiating team for their considerable time and effort in achieving a successful outcome on the core franchise agreement.

While franchise negotiations are traditionally time consuming and often contentious, the addition of a “side agreement” related to clean energy has added an even greater level of complexity to Boulder’s discussions with Xcel. The side agreement speaks to a range of collaboration and coordination opportunities between the City and Xcel related to energy efficiency programs (e.g., data access, “free ridership,” SmartGridCity implementation, etc.) as well as investments by Xcel related to clean energy (e.g., Valmont repowering or decommissioning). Some elements that were originally part of the side agreement discussions have been pursued during the past year outside the realm of the franchise discussions: most notably the “solar gardens” legislation that was supported by both the City and Xcel, sponsored by State Representative Claire Levy and others, and signed into law by Governor Ritter on June 5, 2010.

The side agreements have been a particularly challenging part of the franchise discussions, in large part because they are uncharted territory. While traditional franchise agreements have been executed in various forms by cities throughout the state over the past several decades (including twice before in Boulder), a “clean energy partnership” side agreement has never before been developed. The discussions between the City and Xcel on the side agreement issues have made progress but have been the focus of considerable differences regarding what is appropriate, achievable, and enforceable.

In April 2010, in light of mounting community and staff concern regarding the franchise and side agreements that did not contain enough specifics, the City proposed a two-year extension to the existing franchise agreement to allow time for a joint study and development of a shared strategy for “rapid decarbonization.” The purpose of the extension proposal was to:

- 1) Engage “the best minds in the business” to answer the question of “how far can you get, how fast, and at what cost?” in achieving a clean energy future based on currently available or anticipated technology, with or without changes to state law; and
- 2) Based on that input, define an achievable, cost-effective implementation strategy that would serve as the basis for a more specific and data-grounded side agreement, defining both Xcel’s and the City’s roles, including potential capital investment by the City that would be subject to voter approval in combination with a clean energy franchise agreement in November 2012.

Xcel agreed to the basic concept of the clean energy study but only in combination with approval of the franchise agreement in 2010. Xcel has requested that the version of the side agreement text presented to council on July 13 be considered the final text for council’s consideration in relation to the November 2010 ballot. Xcel did not wish to consider additional revisions proposed by staff subsequent to council’s July 13 study session discussion (see summary in this memo on page 17).

Staff continues to believe that an extension of the current franchise agreement and collaboration on a clean energy strategy is the most productive path forward for Boulder’s energy future. This belief is based on the following facts:

- 1) **Poll results show limited support for approval of a new franchise (43%).** Most notably, nearly 60% of those polled feel that a 20-year agreement is too long, and nearly

70% voiced support for increasing renewable energy now, even if costs go up. At this point, the only agreement that voters would have to consider is a 20-year agreement that does not speak with any specificity to how that agreement will result in higher levels of renewable energy. *Staff believes that a fall campaign regarding a new franchise would be contentious, would result in a significant community effort to defeat the franchise, and that the likelihood of passage of the franchise, with the side agreement, in their current form is highly unlikely.*

- 2) **Better information is needed regarding Boulder's clean energy options.** Many claims and counter-claims have been made during the past year regarding how far Boulder can go in decarbonizing its energy supply, how fast, and at what cost. These are important decisions that require better information and considerable analysis. Whether in conjunction with a franchise extension or outside of any franchise agreement or discussion, *staff believes that a clean energy study and strategy development similar to that proposed in April is necessary to inform decision-making regarding Boulder's energy future.*
- 3) **Loss of the franchise fee is the most compelling reason to place the new franchise on the ballot.** The franchise fee provides approximately \$4 million in annual revenue to the City's General Fund. Loss of this revenue would be significant. However, in light of the importance this issue has for Boulder's future (environmentally and economically), the level of investment being made by the community to achieve its climate action goals (including not only the current carbon tax but also private investment in energy efficiency and a wide range of community efforts), staff does not believe the franchise fee should be the overriding consideration for this decision. Given current circumstances, *staff believes it is in the City's best interest to work toward successful passage of an alternative tax that would replace the franchise fee revenues for a five-year period to provide time for analysis of clean energy options and development of an agreed upon strategy for Boulder's energy future.*

These findings are not intended as a slight to the City's partners at Xcel or a statement regarding any preferred option regarding Boulder's energy supply. City staff has the utmost respect for Xcel's representatives and believes they have represented the company's interests well, that they have worked diligently to resolve differences, that they have exhibited a high level of professionalism and integrity, and that the current impasse is the result of many factors beyond any individual's or entity's control. The City respects the efforts that Xcel has made within the City and state-wide in increasing its renewable energy portfolio. Staff anticipates that Xcel will continue to work on these matters into the future.

The city manager remains open to discussing a two-year revocable permit agreement pursuant to Charter Section 115 with Xcel so that the City and Xcel can jointly engage in a study and strategy development process that defines a clear and achievable path to a clean energy future, including an appropriate community process to discuss the trade-offs between alternative paths and levels of investment, with the aim of placing a new franchise and/or alternative options on the ballot for voter consideration in November 2012.

In considering the best interests of the City and its residents, and in light of the facts presented above, staff recommends the following course of action at this time:

- 1) Adopt the occupation tax ballot measure ordinance.
- 2) Do not approve the ballot measure ordinance placing the current version of a new franchise with Xcel Energy on the ballot.

#### Summary of Utility Excise Tax and Occupation Tax Items.

At its June 3, 2010 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 the revenue currently received from the franchise fee. If the ballot measure 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.

Three ballot measure ordinance options were introduced on the consent calendar at the July 6, 2010 meeting. Those options proposed an alternative tax that would generate funds to substitute revenue from the franchise fee and benefits that are derived from the franchise such as undergrounding and pole attachments. Those ordinances were Nos. 7734, 7735, and 7737.

The council discussed the matter further at its July 13, 2010 study session. The consensus of the council appeared to be against placing a permanent revenue replacement option on the ballot. Those ordinances will not be considered further unless the council so requests. The general guidance provided by the council was that the proposed measures should be simple and focus on the minimum necessary to get the City through a five-year period in the event that there are no franchise fee payments to the City.

The proposed ballot measures attached to this memorandum are variations of the five-year tax that was introduced at the July 6, 2010 meeting. Staff has refined the tax rates and the ballot language. Also proposed for first reading is an occupation tax ballot measure. The options do the following:

- 1) The first utility excise tax option only recovers the revenue lost from the franchise fee.
- 2) The other utility excise tax option recovers the revenue lost from the franchise fee and an additional \$450,000 per year for the purpose of studying options for Boulder's cleaner energy future.
- 3) The third option, a utility occupation tax which is a flat tax rate, will replace lost revenue and further the purpose of studying options of Boulder's cleaner energy future.

Public utility companies have the authority to pass on extraordinary costs of doing business to their customers. *See* Section 40-3-106 (4) C.R.S. The state statute only makes reference to "occupation taxes." The existing franchise fee that Xcel pays to the City is passed through to the customer. It is anticipated that any tax passed by the voters under either of the proposed ballot measures would be passed on to the customer by Xcel as well.

Council members made a number of comments on the ballot measures presented at the July 20, 2010 meeting. Included in the attachments to this memo are clean copies of the ordinances introduced at first reading on July 20, 2010 (Ord. Nos. 7747 and 7748) (Attachments A and C) as well as proposed amendments based upon the council's discussion. (Attachments B and D)

There was also discussion about an occupation tax measure. Staff has further researched the topic of occupation taxes. As permitted by law, Xcel passes occupation taxes through to the taxing municipality's ratepayers via a surcharge applied to a customer's energy usage. This tax and pass-through methodology has already been approved by the PUC and is included in the tariff that governs Xcel's relationship with its customers. Therefore, a new ordinance is attached (Attachment E), proposing an occupation tax alternative that could be read on first reading at the August 3, 2010 meeting. Given the legal certainty of this approach to taxation, together with the fact that the occupation tax is passed through to the customer based on energy usage, staff is recommending that this approach be pursued.

### **STAFF RECOMMENDATION:**

#### **Suggested Motion Language:**

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

- 1) Introduce, read, and order published by title only 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 [\$4.35 million] (in the first full fiscal year) annually and by such 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 at the rate of [\$4.35 million], beginning January 1, 2011 and expiring on December 31, 2015; **[dedicating up to \$450,000 per year for the planning of clean energy programs;]** and setting forth related details.
- 2) Not adopt the ordinance that will place the franchise agreement, attached to this memo as Attachment F, on the November 2, 2010 ballot.

### **PROCESS NOTE:**

Throughout this process, members of the City Council have requested, it at all possible, that any franchise or tax measures not be passed as emergency ordinances. If the council wishes to keep any of these options in play until August 17, it should pass the council on August 3, with final reading to occur, if at all, at the August 17 meeting.

## COMMUNITY SUSTAINABILITY ASSESSMENTS AND IMPACTS:

### A. Regarding Utility Tax Items:

- **Economic:** The implementation of any of the three proposed tax measures will be needed to replace the current charge Xcel customers pay for the franchise agreement. An attempt has been made to make the first tax measure revenue neutral, to the extent practical. The second option adds \$450,000 per year in the rate calculation to cover the anticipated costs of staff and consultant resources, including legal resources related to the exploration and pursuit of clean energy options for Boulder's future energy supply. The final option is an occupation tax on the public utility at a flat rate that can accommodate either option.
- **Environmental:** The revenue raised by the proposed ballot measures would replace the current franchise fee if the franchise fee is no longer remitted to the City. Reviewing plans for a cleaner energy future may provide the City with more opportunities to consider 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. Costs to individual ratepayers are expected to be minimal if any under the first ballot option as pass-through of the proposed tax would replace the existing franchise fee. Under the second option, the average residential ratepayer might see a monthly cost increase in the range of 15 to 20 cents per month compared to the existing franchise fee.

### B. Regarding Franchise Item:

- **Economic:** The franchise fee of three percent of all revenues from Boulder customers from electric and natural gas sales currently results in approximately \$3.9 million dollars to the General Fund annually. Xcel also sets aside one percent of the revenue that it receives from electricity sales to a fund that it uses to underground overhead utilities. The City also shares facilities with Xcel in the public rights-of-way that would require the City to incur additional costs. If the ballot measure is not placed on the ballot and a revenue replacement tax is not passed, the City will need to cut its General Fund budget in 2011 to accommodate the lost revenue source. Staff will consider budget cutting options as part of the budget process.
- **Environmental:** The franchise agreement provides that Xcel will assist the City in meeting its Climate Action Plan. Through the franchise and associated side agreements, the City will partner with Xcel in an effort to foster and support the City's clean energy goals. In the absence of an agreement, the City will continue to work toward implementing its Climate Action Plan.
- **Social:** A clean energy future will help mitigate the impacts of carbon-based energy on future generations. It is also anticipated that developing a plan for a cleaner energy future will identify an energy supply with more stable rates, helping energy costs be more affordable to city residents over time.

## **OTHER IMPACTS:**

### **A. Regarding Utility Tax Items:**

- Fiscal: The fiscal impacts to the City of the proposed ordinances are covered in the background and analysis section of this agenda item. Staff estimates that the incremental cost to put a tax measure on the ballot is approximately \$42,000.
- Staff time: The staff time needed to complete the background work for ballot measures is included within the departmental work plans.

### **B. Regarding Franchise Item:**

- Fiscal: No fiscal impact from election related to a franchise due to Xcel paying the cost of the election. Franchise will result in approximately \$3,900,000 revenue to the City and a one percent undergrounding fund as well as the right to connect City equipment to Xcel poles.
- Staff time: Approval of the franchise agreement will reduce the staff time required to regulate Xcel's use of City streets. In the absence of a franchise, the staff will review the City's right-of-way regulatory requirements to ensure that it has the appropriate tools to manage the public rights-of-way in the absence of a franchise.

## **UTILITY EXCISE AND OCCUPATION TAX ITEMS**

### **Analysis Regarding Utility Tax Items:**

#### *Three Options for Ballot Measures for a Five-Year Utility Tax.*

There are three proposed utility tax ballot measures attached to this memo. Staff is recommending that the council introduce a third ordinance, which is an occupation tax, on first reading. A substantive discussion of the three options, with amendments, will occur at the August 3, 2010 meeting. At that meeting the City Council is asked to consider these tax measures together with the franchise that has been negotiated between Xcel and the City.

As noted earlier in this memo, under the existing franchise Xcel 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 council has asked staff to prepare revenue replacement options in the event that it decides not to place it on the ballot.

State law allows Xcel 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. The statute allows the PUC to approve surcharges on customers for costs associated with franchises, licenses, or occupation taxes levied by cities.

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, although that amount fluctuates each year as consumption increases or decreases and Xcel's rates change. These funds are placed in the City's General Fund and used for General Fund purposes. General Fund revenue sources are important to the budget as they fund many of the general services of government.

## EXCISE TAXES

Two of the options presented for the council's consideration are utility excise taxes that tax energy that is delivered by Xcel to its customers. Either option could replace the revenue that is presently collected under the existing franchise. The ballot questions provide that if the City is no longer collecting a franchise fee from a public utility, the City Council may authorize the collection of a utility tax for a five-year period. It sets the expectation that the City will use the five-year period to develop alternative plans for providing a cleaner future energy supply with more stable rates. The proposal sets the expectation that such choices will be placed on the ballot for consideration by the voters before the end of 2015.

The two excise tax options address the revenue lost in the event that the City is no longer in a franchise agreement. The ballot measures do not address the benefits from the franchise which includes items such as the overhead utility undergrounding fund, pole attachment rights, etc.

- 1) The first excise tax option only attempts to recover the revenue lost from the franchise fee. (Attachment A)
- 2) The second excise tax option attempts to recover the revenue lost from the franchise fee as well as \$450,000 per year of additional tax revenue for the purpose of studying options related to Boulder's clean energy future. (Attachment C)

At their first readings, council made a number of suggestions related to specific language of the two measures. That language can be found in Attachments B and D.

These tax options should have a similar effect as the franchise fee in that Xcel will probably pass it through on the energy that it sells to its Boulder customers. There are some variations that will affect large natural gas users. Given that the tax is assessed on energy delivered, there is a good chance that the PUC would approve passing such a tax directly through to the customer, since it is close to the way the tax would be calculated. As described below, there is some concern about the statutory language related to the pass-through.

## OCCUPATION TAXES

There was also a discussion at the July 20, 2010 meeting about an occupation tax measure. Staff did further research on the topic of occupation taxes. By way of its rate tariff, Xcel passes occupation taxes through by way of a surcharge that is based on energy usage. This idea is worthy of further discussion. In that vein, a new ordinance is attached (Attachment E) proposing

an occupation tax alternative that could be read on first reading at the August 3, 2010 meeting. Staff is recommending this approach to a replacement revenue source.

The advantages of the occupation tax option are that the law is clear regarding both imposition and pass-through to customers. There is a PUC-approved rate tariff in place to pass occupation taxes through to customers. Also, if an objective of the council is to make sure any customer charge is consistent with energy usage, the existing rate tariff will achieve that objective. The rate tariff applies statewide and, in the event that it is proposed for change, the City will be able to participate in that docket. Another positive for an occupation tax is that it is simple for the City to administer.

*Assumptions for Tax Rates and Revenues.*

At the July 13 study session, council indicated staff should prepare two tax options with a time limit of five years. The intent of the five-year limit is to serve as a “bridge” between the loss of the franchise fee and a to-be-defined energy future in which energy services (and the franchise fee or similar mechanism) would be provided through a municipal utility or a renewed “clean energy” franchise agreement.

The two options presented for council consideration include: 1) a straight replacement tax rate structured to stay equal to or below Xcel’s franchise fee rate; and 2) the replacement tax rate and \$450,000 per year to cover costs associated with the study and pursuit of Boulder’s clean energy options, including potential municipalization. This projected cost includes but is not limited to consultant and legal fees, staffing resources, and ancillary costs.

Because the franchise fee is collected and remitted to the City based on three percent of gross revenues from the sale of electricity (kWh) and natural gas (therms), there is considerable variability in the amount of the franchise fee collected. The amount remitted to the City is impacted by both the level of consumption and rate increases by Xcel, which are regulated by the PUC. As an example, the amount received in the City for the past five years is as follows:

2005	\$3,675,683
2006	\$3,909,519
2007	\$3,702,053
2008	\$4,347,015
2009	\$3,912,071
Avg	\$3,909,268

The amount projected by the finance department for 2010 is \$3,940,000. This is the amount that has been used in previous discussions, which is the projection rounded to \$3,900,000.

There has also been recent discussion around variations, such as setting an upper limit on the kWh and therm rates, and adding an annual escalator that predicts future rate increases in order to most closely mimic the existing franchise fee.

Actual franchise fee revenue collected to-date in 2010 captures the PUC approved Xcel rate increase that took effect January 1, 2010.<sup>1</sup> Data collected through May 2010 indicate that revenues are 3.2% above the current projection, which did not include the rate increases since they were unknown at the time the projections were made. Based on the new data, the revised projection for collected franchise revenue in 2010 is \$4,054,815 versus the original \$3,940,000 (difference of \$114,815).

Based on the complexity of the associated ballot language to accurately reflect changes in consumption and future rate increases, staff recommends establishing a consistent tax rate that would simply replace the current amount of the franchise fee (\$3.9 million) by structuring the new tax rates at \$0.00223 per kWh and \$0.01626 per therm. The lower rate per therm is the result of additional analysis of the revenue assumptions since first reading.

Importantly, the \$450,000 additional amount proposed for consideration for clean energy planning would be tied to an increase in the electric rate only. These planning efforts would focus specifically on electricity options and not gas.

## **FRANCHISE ITEM**

### **A. Staff Recommendation.**

The city manager is not recommending that the City place the franchise on the ballot for the reasons stated in the Executive Summary. As a document that simply regulates and sets the conditions for the use of the public right-of-way, the franchise agreement itself is a document the city manager can support.

However, as part of a larger framework, the idea of entering into a 20-year agreement without strong commitments to a decarbonization strategy is not something that can be supported. The community simply needs more time to map out how to work towards decarbonizing its energy supply.

This path is not without its risks. The City will potentially forego \$3.9 million in franchise fees and approximately another \$1 million that flow from the franchise agreement for overhead utility undergrounding and attachment privileges. If one of the tax measures is placed on the ballot and the voters approve it, there is a potential to replace the franchise fee revenues.

### **B. Description of the Franchise Agreement.**

*Franchise.* A franchise is a special right or privilege granted by a government to an individual or corporation – such a right as does not ordinarily belong to citizens in general. In the case of the Xcel franchise, it is a grant from the City to Xcel of the right to use City streets, alleys, rights-of-way, and other public property for the purpose of providing utility service to the residents and businesses within the City.

---

<sup>1</sup> An additional rate increase became effective on June 1, 2010.

*Franchise Agreement.* A franchise agreement is the document by which a city makes a grant to use City streets, alleys, rights-of-way, and other public property for the purpose of providing utility service. It also includes any terms and conditions agreed to by the city and Xcel regarding the use of the streets. The franchise agreement recently negotiated by City staff and Xcel is included with this memo as an attachment to the Ordinance placing the franchise question on the ballot. (Attachment F)

*Process.* For nearly two years the City and Xcel have been negotiating the terms of the franchise agreement that is attached to this memo. The City was represented by members of the Public Works Department, who have had experience working with the current franchise agreement in the field, and members of the City Attorney's Office. Of paramount importance to City staff in these negotiations were two goals: first, decreasing the number of inconsistencies or ambiguities in the agreement; and second, ensuring that nothing in the agreement would hinder the City's move toward a Clean Energy Future.

While Xcel prefers to enter into standard agreements with the cities in its service territory, that is not this agreement. Many of the provisions are similar to those in other franchise agreements approved by other communities within the past four years, but Xcel agrees that this is far from a boilerplate agreement. Since March, Xcel has met with the City at least twice a week: Monday afternoons were dedicated to the franchise agreement, while Thursday afternoons found the parties working through the details of the Street Lighting and Traffic Signal Lighting Agreement (the "Street Lighting Agreement"). The agreements were only recently finalized. City staff appreciates Xcel's dedication to this process and its willingness to stay engaged while creative solutions to difficult problems were found.

*Key Terms and Conditions of the Negotiated Franchise Agreement.* The franchise agreement is, above all else, the rules that govern Xcel's use of the City's streets, public easements, and other property owned by the City. This portion of the memo outlines some of the key terms and conditions of the franchise agreement and discusses in greater detail those terms that have been the focus of recent negotiations. Please see the revised franchise agreement attached to this memo as Attachment F. If council decides that it wishes to enter into a franchise agreement with Xcel, whether that decision is made now or at a future date, staff recommends that this agreement be used and not reopened.

Grant of Franchise. The franchise agreement grants Xcel a right to place its facilities in City streets, alleys, public easements and other City property in order to provide gas and electric service to the City, its residents, and businesses. The franchise permits the City to avoid granting Xcel an easement to place its service lines in City property, as Xcel could otherwise require from the City, pursuant to the regulations of the Colorado Public Utilities Commission (the "PUC"). The article also grants Xcel the non-exclusive right to provide street lighting and traffic lighting service to the City. Staff was careful to be sure this service is non-exclusive, so there can be no question regarding the City's ability to provide its own street lighting and traffic signal lighting service and pay Xcel for only the energy used. Section 2.1 also gives the City the right to review the location of Xcel facilities on parks and open space land and requires Xcel to obtain a permit from the City before those facilities can be installed. The "Conveyance of City Streets, Public Easements or Other City Property" is

addressed in the next section of this memo, “Changes to the Franchise Agreement Since the June 3<sup>rd</sup> First Reading.”

City Police Powers. In this article, Xcel expressly recognizes the City’s right to adopt ordinances and regulations and Xcel’s obligation to comply, not only with City laws, regulations, permit requirements, and orders, but also with federal, state, and other local government laws and regulations that relate to the terms and conditions of the franchise agreement.

Franchise Fee. In consideration of the right to use City streets, alleys, rights-of-way, public easements, and other City property, Xcel will pay to the City an amount equal to three percent of the Gross Revenues it collects from City residents and businesses. This amount, roughly \$3.9 million, is paid to the City’s General Fund where it is used for vital City services. Xcel will, as permitted by Colorado law, pass this amount through to Boulder residents and businesses as a surcharge on their energy use. The City will not be surcharged for the energy it uses. If another municipality charges a higher franchise fee, Xcel is obligated to advise the City of this higher franchise fee and the City is free to amend the franchise agreement to charge the higher franchise fee. (This is a relatively new provision in Xcel franchises and takes the place of the former “most favoured nation” provision.)

Administration of Franchise. Part of the “nuts and bolts” of the franchise agreement, this article concerns the coordination of work by the parties. Xcel agrees to meet with the City on a semi-annual basis to discuss long-term and short-term work plans to avoid unnecessary interference with City streets, easements, and other City property. This is a very efficient approach for the City and Xcel to use to coordinate construction projects and avoids unnecessary duplication of effort and destruction of new infrastructure.

Supply, Construction and Design. Article 6 is the regulatory portion of the franchise agreement. In this article, Xcel agrees to provide reliable gas and electric service to City residents and businesses.

Section 6.3.A. is a provision that is in all Xcel franchise agreements and, in fact, is in Boulder’s current franchise agreement. If the City elects to become a gas transport customer, Xcel will transport natural gas purchased by the City for use in City facilities.

Subsection B., however, is new. In this subsection, which parallels subsection A, Xcel agrees to transport electricity purchased by the City for use in City facilities - if and when the City is legally permitted to engage in these activities. This provision is intended to ensure that the City will not be foreclosed from engaging in this activity even while it is “in franchise” with Xcel.

Xcel expressly agrees to perform work within the City in a timely, expeditious, high-quality, cost-effective manner, and to comply with all City laws including the Code, the Design and Construction Standards, licenses, permits, and written agreements. It was important to Public Works staff to include a reference to the Design and Construction Standards in the franchise agreement in order to eliminate arguments City staff has had from time to time with Xcel

contractors regarding the applicability of those standards. Xcel agreed to insert that specific reference.

Section 6.8, Relocation of Company Facilities, was a major sticking point in the franchise agreement negotiations. Xcel and the City have a difference of opinion with regard to public easements that appear on plats. In negotiations, the City's position has been that, except for those easements specifically identified as a private easement, all easements on plats with public dedication language are easements that have been dedicated to the City. These public easements are owned in fee by the City and held in trust for the public. Xcel's position is that if an easement is identified on a plat as being for "utilities" or "public utilities," then the purpose of the easement is not for "public use," but is instead for utility facilities, including Xcel's facilities, and Xcel should not have to pay to relocate its facilities from that easement. The example often cited in our negotiations was the backyard easement, in which Xcel, Comcast and Qwest lines are located, while the City's water and sewer lines were out in the street.

While City staff does not agree with Xcel's legal position, there are certain situations in which the City was able to agree that it should not require Xcel to pay to relocate its facilities, as in the backyard easement example. Accordingly, two new provisions in Subsection 6.8.B were negotiated.

Subparagraph (1) addresses the situation in which Xcel's facilities are located in property Xcel owns or in which it has a private easement, license, or other property interest that has been granted specifically to Xcel. In that instance, Xcel will not be required to relocate its facilities.

Subparagraph (2) addresses the backyard easement situation. If an easement on a plat is marked as "utilities" or "public utilities" and the City has no facilities located in the easement, then Xcel will not have to pay to relocate its facilities for a public project. If, however, the City thinks that the original intended purpose of the easement included use by the City, then the parties will meet to discuss the issue and to determine who should pay for the relocation.

The City and Xcel also agreed to use an undefined term, "public easement" throughout the document. However, neither side has conceded its legal position. From the perspective of City negotiators, leaving the term "public easement" undefined will give the City the right to argue before a judge, if necessary, that the term should have the same meaning it has in the Boulder Revised Code.

Any future disagreement will be resolved through discussion, mediation or court action. However, the Public Works Department is of the opinion that this situation will rarely arise.

Section 6.10 provides that the City, unlike Xcel's other, private customers, does not have to advance the cost of construction when the City requests that Xcel construct new facilities for the City. This is an advantage of the franchise agreement that has not previously been mentioned.

Reliability. Xcel is obligated to provide adequate, safe, and reliable utility service to the City. Its failure to do so would likely be a material breach of the franchise agreement.

Company Performance Obligations. This article includes requirements for the completion of projects requested by the City. The terms in this article are tighter than past franchise agreements and should provide greater certainty in determining when projects must be completed.

Billing and Payment. Billing for utility service is a subject matter reserved to the PUC. Consequently, this section largely references the requirements of the PUC regulations. However, during the course of negotiations, City staff has talked with Xcel regarding billing issues and the company has been responsive to staff's concerns.

Use of Company Electric Distribution Poles. The franchise agreement gives the City the right to use Xcel distribution poles for police, fire, emergency, public safety, traffic control, or any other purpose consistent with the City's police power. Without this right, the City would be obligated to enter into pole attachment agreements for the use of these poles at the rate of \$11 per pole for the nearly 3,600 poles the City currently uses.

Undergrounding of Overhead Facilities. Xcel reserves one percent of the Electric Gross Revenues received from City residents and businesses for the undergrounding of its facilities within the City. This amounts to nearly \$1 million set aside each year for this purpose. While City staff has been diligent in trying to prudently manage this fund in order to get the "biggest bang for the undergrounding buck," the actual costs of undergrounding projects have in recent years sometimes exceeded the Xcel estimate by as much as 300%. This has been frustrating for both sides.

One year ago, City staff began meeting with Xcel staff to try to develop processes to curtail these cost overruns. Xcel has developed new, internal processes to tighten up undergrounding projects and has agreed to include this process in the Boulder franchise agreement. Section 11.3 addresses how estimates are prepared, requires meetings throughout an undergrounding project and explains the time period allotted for each project. Significantly, Xcel has agreed to assign a project manager who will oversee the undergrounding project from the beginning – through design, construction and restoration. This is an important step that should greatly enhance the reliability of estimated project costs.

Purchase or Condemnation. By entering into the franchise agreement, the City does not lose any of its rights to purchase or condemn Xcel facilities in the future.

Municipally-Produced Utility Service. The City has expressly reserved the right to engage in the production of utility service to the extent permitted by law and the Company has agreed to enter into negotiations to purchase City-generated power. Importantly, the Company has also agreed to offer transmission and delivery service to the City, comparable to the service it provides to other electric generators, when such services are permitted (not required) by law.

City staff argued that it wanted to be able to take advantage of changes in the law that simply permitted utilities to do this, not required them to do so.

What this means for the City is that if, for example, the law is changed in the future to permit a municipality to generate enough megawatts to power all of the city buildings, for example, by building a concentrated solar array (which is not currently the case because of the on-site requirement), this provision provides that Xcel will negotiate with the City in good faith to enter into a contract to purchase that electricity and that it will transport and deliver that energy. After many meetings and much discussion, the company agreed. This was a major concession on Xcel's part, given its current business model.

Section 13.2 further provides that nothing in the franchise agreement prohibits the City from becoming an aggregator of utility service or from selling utility service once that becomes permissible under Colorado law. In other words, should Colorado law change, the City will not be foreclosed from aggregating electricity on behalf of its residents and businesses.

Environment and Conservation. This section primarily represents a description of Xcel's commitment to sustainable development and energy conservation. In Section 14.2, however, Xcel does commit to assisting the City in reaching its Climate Action Plan goals. Xcel also commits to seeking authority from the PUC to develop and offer Energy Efficiency programs to its customers. Section 14.2.B. requires Xcel to obtain electricity from renewable sources equivalent to at least 30% of retail sales by 2020. While this does reflect current law, Xcel is now bound by this percentage, even if the law changes, except as required by law. So, if the legal requirement goes up, the requirement of the franchise agreement will also rise. However, if the requirement goes down, unless the law is couched as saying the utility may provide no more than a lesser percentage, the 30% requirement will stand. In effect, this creates a contractual right to a benefit that is a current regulatory requirement.

Transfer of Franchise. Xcel cannot transfer its rights under this agreement to a non-Xcel affiliated company without the approval of the City. However, if Xcel were to transfer its rights under the franchise agreement to another unaffiliated entity, Xcel would be required to pay the City a portion of the \$1 million transfer fee it has agreed to pay the City and County of Denver under similar circumstances. The amount would be the proportion of the then-number of City residents to the then-number of Denver residents.

Continuation of Utility Service. This is a new provision that Xcel has included in its franchise agreement with municipalities for several years now. Essentially, it says that if the franchise agreement terminates, Xcel will continue to *provide service, collect the equivalent of the franchise fee from residents and businesses, and pay that amount to the City.* This means that if this franchise agreement is approved, the next franchise negotiations will not be held under the spectre of the loss of significant revenue for the General Fund, the situation that the City now confronts.

Indemnification and Immunity. Importantly, Xcel will indemnify and defend the City from claims brought against the City as a result of Xcel operations within the City under the terms of the franchise agreement.

### C. Changes to the Franchise Agreement Since First Reading.

*Definitions.* As discussed above, the defined term "Public Easement" was deleted and replaced that term throughout the document with a lower case, undefined "public easement." Also, a new defined term, "Relocate" (along with its variations), has been added simply to streamline the document.

*Subsection 2.1.C.* This subsection has been amended to clarify that Xcel must have approval from the City before it places its facilities on Other City Property, whether that is an approval that the City has previously granted to Xcel or approval granted in the future. The final two sentences, which provided additional protections for Xcel related to previously granted licenses, were deleted. This protection had been inserted in the franchise agreement of another jurisdiction in which Xcel had a problem with the enforcement of license agreements. It felt comfortable deleting the provision for Boulder.

*Subsection 2.1.D.* Section 2.1.D. was added to address an issue that Xcel has encountered recently, that being finding itself a potential trespasser when a community vacates streets or easements or sells municipal-owned property. These provisions are consistent with current City practices and seemed fair. Essentially, they provide that if the City is considering selling a parcel, for example, and the City has City utilities located within the parcel, along with Xcel facilities, the City will reserve a public easement for those facilities. If, on the other hand, the street contains only Xcel facilities, not City facilities, the City will use its best efforts to ensure before closing that the purchaser has granted an easement for the Xcel facilities. Also, once the property is sold, the relocation obligation will no longer apply (which is fairly self-evident since the property would no longer be "Other City Property."). This is consistent with long-standing City practices regarding disposition of land.

*Subsection 4.1.C (2).* This subsection was added to address continued and rapid changes in the gas and electric industry. In this subsection, the City and Xcel agree that such changes may make it necessary to amend this agreement in the future or to enter into a separate agreement in order to properly accommodate these changes. This subsection is in the City's current franchise agreement, but is not in Xcel's current, standard franchise agreement. Staff believes that Xcel's willingness to include it in this agreement, despite its preference for uniform agreements with the municipalities it serves, is an indication of the partnership both sides hope to have with the other in addressing industry changes over the course of this agreement.

*Subsection 6.8.A.* This subsection has been amended to incorporate the new defined term, "Relocate." Also, a measuring point for the completion of a relocation project has been added to help both sides calculate the two-year limit on relocations at Xcel's expense. The final sentence, which was inserted in the attachment to the ordinance on first reading as the City's recognition of the issue (and never agreed to by Xcel), has been deleted. This issue is now addressed in Subparagraph 6.8.B.2.

*Subsection 6.8. B.* Please see the discussion in the section above.

*Section 11.4.* The final change is in Section 11.4, which clarified that the audit requested by the City would be performed by Xcel at its sole cost.

D. Side Agreements.

At the July 13 Study Session, staff provided to council what was considered at the time to be the final version of the side agreements negotiated with Xcel. Staff requested council feedback on whether the side agreements as presented are sufficient, in whole or part, to move the franchise renewal forward to second reading on August 3.

Council recommended several changes to the side agreements, which were then presented to Xcel on July 20 for their consideration. These included:

- 1) Specification of a longer partnership on the Advisory Board by changing the two-year commitment to four years,
- 2) Create an open and transparent process for the Advisory Board's discussions and decisions, and
- 3) Clarification around the cost sharing of the Data Pilot Project.

On July 26 the City was informed that Xcel would not agree to the proposed changes. Therefore, the side agreements discussed with council on July 13 are considered the final version.  
(Attachment G)

E. Street Lighting and Traffic Signal Lighting Agreement.

The Street Lighting Agreement is an agreement separate from the franchise agreement that addresses issues related to Xcel's provision of electric service to the City. Staff has been able to successfully negotiate a new and improved Street Lighting Agreement with Xcel representatives (Attachment H). Some of the major changes discussed during negotiations included:

- 1) Adding new references to the City's Design and Construction Standards to clarify that Xcel must comply with those regulations.
- 2) Clarifying that the Street Lighting Agreement is subject to only the applicable tariffs filed with the PUC. This permits the City to maintain its position that certain tariffs (for example, the portion of the tariff that requires customers to give Xcel an easement in order to obtain service) do not apply to the City.
- 3) Modifying the Street Lighting Agreement in contemplation of the City's potential future purchase of the street lights. This would enable the City to use new, energy-efficient technologies as they become available and before they would meet Xcel's "utility grade" standard. (You may recall that in the PUC's order in Phase II of the rate case, the Commission ordered the involved municipalities and Xcel to work together to develop a customer owned and maintained energy only rate.)

- 4) Including in the Street Lighting Agreement certain provisions from the Quality of Service settlement to ensure that these provisions remain in place for the City, even if that portion of the tariff is amended by the PUC at some future point.<sup>2</sup>
- 5) Including new required processes in the Undergrounding section that both sides believe will help to keep actual costs in line with estimates. This had been a major issue for City staff. Please see a fuller discussion on this topic in the discussion of key franchise agreement terms and conditions.

Finally, in the course of negotiations, City staff raised the problem of unforeseen non-routine maintenance bills that have to be paid within 15 days of the date of the bill. Subsection 4.2.D. distinguishes billing for this non-routine maintenance from billing for utility service and routine maintenance that must be paid in 15 days. Because City staff agrees that modifying the due date for non-routine maintenance will likely require a tariff change approved by the PUC, this section provides that billing for non-routine maintenance will be paid as required by the tariff. However, Xcel has agreed to submit a proposed change to the applicable tariff and City staff will work to remind Xcel of this commitment.

#### F. Next Steps Regarding Franchise Item.

If the franchise is approved for the ballot, the staff recommends the following schedule:

August 3:	Second reading/public hearing
August 17:	Final passage (if passed on first or second reading)
September 2:	Submit measure to County Clerk to be placed on ballot
November 2:	Election Day

#### G. Matrix of Options Regarding Franchise Item.

Complete reading of ordinance 7728; or

Decide not to place the matter on the ballot for the year 2010.

### **PUBLIC HEARINGS AND COUNCIL FEEDBACK:**

#### A. Utility Tax Question and Issues Raised at the July 2010 Meeting.

Clean copies of the ordinances read on first reading are Attachments A and C. Proposals for amendment are included as Attachments B and D. Questions were asked about the occupation tax approach as well. Staff has included an occupation tax measure as this is the recommended approach. A discussion of the occupation tax is included below.

---

<sup>2</sup> In 2006, several municipalities, including Boulder, entered into a settlement agreement with Xcel regarding street light burn out rates and restoration of service, traffic signal outages, installation of company facilities, and billing issues. That settlement saw the introduction of new language in the Xcel tariff for which the company is not permitted to request amendment before December 31, 2010. Including these basic provisions in the franchise agreement means these settlement terms will now be enforceable by the City as contract terms.

The next part of this memo is a discussion of the two utility excise tax measures that were introduced at that July 20, 2010 meeting. Also, based upon the council discussion and further research by the staff, a third ballot measure is recommended for first reading as well. It is a five-year utility occupation tax measure. Those items are discussed in more detail below.

A number of questions were raised at first reading regarding the proposed taxation measures. For the most part, the council member questions centered on the details of the language in the proposed ballot measures. Those items have been integrated into the language of each of the ordinances.

The attachments that include the utility tax ordinances are organized in the following way:

- a. Limited Term Energy Utility Excise Tax: Revenue Replacement. Ordinance No. 7747, as introduced on first reading at the July 20, 2010 meeting.
- b. Limited Term Energy Utility Excise Tax: Revenue Replacement – **With Amendments**. Based on proposed Ordinance No. 7747, as introduced on first reading at the July 20, 2010 meeting.
- c. Limited Term Energy Utility Excise Tax: Revenue Replacement + Earmark for Clean Energy Planning and Programs. Ordinance No. 7748, as introduced on first reading at the July 20, 2010 meeting.
- d. Limited Term Energy Utility Excise Tax: Revenue Replacement + Earmark for Clean Energy Planning and Programs – **With Amendments**. Based on Ordinance No. 7748, as introduced on first reading at the July 20, 2010 meeting.
- e. Limited Term Energy Utility Occupation Tax: Revenue. This option is new and **was not presented** at the July 20, 2010 meeting.

B. Questions from Council.

- 1) *Provide an analysis of the anticipated revenue that should be received in lieu of the franchise fee payments for the tax looking five years into the future, rather than five years in the past.*
  - a. Five-year look back. When projecting revenue to be derived from the franchise fee, the Finance department uses a rolling five-year average with an analysis of the median. This is a common method when there are significant fluctuations in the amount of the annual revenues. As shown earlier the annual revenues have fluctuated from a high of \$4.3 million to a low of \$3.6 million. Both the median and the average has been \$3.9 million. The amount received by the city is based on gross revenue so it is dependent on usage and rates. For 2010 the projection is for the city to receive \$3.9 million. This projection was made in April 2009 when revenues were being projected for the General Fund. With the most current information, it appears that the city will receive around \$4.0 million.

b. Five-year look forward. If the collection of the franchise fee continues, it is expected that the amount collected will continue to fluctuate. It is reasonable to expect that long term energy costs will increase. Another variable to look at is consumption. Based on the effort to meet carbon reduction goals for the City, it is projected that energy usage will decrease. However, it does not necessarily follow that utility company revenue would also decrease. Whether the two variables will offset each other is impossible to project. Therefore, the most conservative projection would be to have a method to increase the tax rate if there is a large increase in Xcel rates. So that council would have the most flexibility, a tax rate increase escalation clause could be stated as, on an annual basis, the maximum the City Council may increase the tax rate is the lesser of the rate increases approved by the PUC for Xcel in the past calendar year or a certain flat percentage amount up to a certain amount, such as three percent. If no rate increases were approved, the tax collected would not increase and could drop if consumption decreases. If rates approved by the PUC were above the flat percent, then the maximum increase would be from zero to the maximum of the flat percentage. This would seem to closely follow a replacement of the franchise fee but put a cap on the maximum.

c. A second option would be to set the amount at the \$4.0 million that is now projected to be collected for 2010 and not include any changes during the five-year time period.

- 2) *In the titles to the ballot measures, consider adding the notion that the tax is to "replace" revenue potentially lost if the City does not collect franchise fee payments.*

The title to the ballot measures in Attachments B and D have been revised, with language added that the intent of the measure is to "TO REPLACE LOST FRANCHISE FEE REVENUE."

- 3) *Provide information based upon how the rates for gas and electricity were weighted in developing the proposed utility rates.*

Since the rates are intended to replace existing revenues generated by the current franchise fees, actual consumption information and actual franchise fees received for 2009 were used as the basis of the rate calculations. The City records the electric and gas fees separately within its accounting records so no weighting factors are necessary. The rates for each were calculated independent of the other.

After further detailed analysis using the above methodology, the excise tax rate for gas was refined from \$0.01634 per therm to \$0.01626 per therm, as reflected in Attachments B & D.

- 4) *Consider dropping the notion of allowing the dedicated funds referenced in proposed Ordinance No. 7748 to be used for clean energy programs.*

The ordinance titles and the titles to the ballot measures in Attachments B and D have been revised, with language changed in the intent of the measure to remove references to "programs." As drafted, the dedicated funds are intended to go towards planning efforts.

- 5) *Consider adding the notion in the ballot titles that one of the objectives of studying clean energy future options should focus on securing energy at stable prices.*

The title to the ballot measures in Attachments B and D have been revised, with language added that intent of the measure is to provide for a cleaner future energy supply with “MORE STABLE ENERGY RATES AND TO IMPLEMENT SUCH PLANS WITH THE ...”

- 6) *Consider substituting the term “dedicating” for the term “earmarking” when making reference to limitations on the spending of revenue collected.*

The title to the ordinance and the ballot measure Attachment D has been revised, substituting the word “dedicating” for the word “earmarking.”

- 7) *Provide a discussion of the differences between an excise tax and an occupation tax with pros and cons. What are the obstacles of trying to collect the excise tax? What are the cost implications of litigation and how will we pay for it? Will the PUC allow a pass-through?*

- a. **Authority to Tax.** The City is granted its power to tax from the Colorado Constitution. *See* Colo. Const., art. 20, Sec. 6. Taxation and municipal financial issues are matters of local concern. *Id.* Furthermore, the Colorado Revised Statutes grant the City the power to impose occupation taxes on local businesses. The Statutes grant municipalities the authority to tax, subject to any law of this state, any lawful occupation, business place, amusement, or place of amusements and to fix the amount. Section 31-15-501(1)(c), C.R.S. Thus the City has the authority to impose an excise tax or occupation tax on public utilities.

- b. **Types of Taxes.** In the conversations that staff has had with the council regarding taxation, there has been discussion of two forms of excise tax and an occupation tax. First, an explanation of each tax.

1. Excise Tax. An excise tax is “a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege.” It has come to mean and include practically any tax which is not an *ad valorem* tax.” *Bloom v. City of Fort Collins*, 784 P.2d 304, 307 (Colo. 1989). An *ad valorem* tax is based on the value of the article taxed. An occupation tax is considered to be a “subset of an excise tax.” *Town of Eagle v. Scheibe*, 10 P.3d 648, 653 n.4 (Colo. 2000); *Black's Law Dictionary* 585, 1471 (7th ed.1999).

2. Occupation Tax. As mentioned above, an occupation tax is one form of excise tax. It is “a tax on the exercise of the right or privilege [of carrying on a business] in the nature of a license or excise tax.” J.P. Massie, Annotation, *What is a property tax as distinguished from excise, license, and other taxes*, 103 A.L.R. 18 (1936). The Colorado Supreme Court has defined an occupation tax as a tax on the privilege of doing business with a municipality or a tax to reimburse a municipality for the use of its facilities or services. *Town of Eagle v. Scheibe*, 10 P.3d 648, 651 (Colo. 2000). Occupation taxes are typically flat rate taxes on occupations or businesses. The City imposes a

variety of occupation taxes. For examples, see Chapter 3-7, "Occupation Tax," B.R.C. 1981.

- c. **Pass-through Taxes on Public Utilities.** A public utility has the authority to pass on the costs of an occupation tax to customers; however, it is unclear whether a public utility has the authority to pass on the costs of an excise tax to customers. Public utilities pass on the costs of occupation taxes via a percentage rate surcharge based on the revenue collected, flat tax, or in the same form as which the tax was imposed on the company—if a flat tax is imposed on the company, it imposes a flat tax on the customers. Occupation taxes are normally charged to a public utility in the form of a flat rate; thus, most occupation taxes guarantee revenue regardless of electricity use by customers.

An occupation tax may be passed on by public utilities to its customers via a surcharge. Thus the burden of an occupation tax is placed on the customer instead of the public utility. The Colorado Revised Statutes state that

*the commission shall order a fixed public utility, except a municipally owned utility, to increase its rates only to its customers in a municipality by adding a surcharge to recover the amount such fixed public utility pays to that municipality as a cost of doing business with that municipality under a franchise or pursuant to a license or occupation tax levied by the municipality....*

Section 40-3-106, C.R.S. (emphasis added).

In the event that this provision would not apply to an excise tax, a similar result would probably be reached using the general rate-making statute that allows public utilities to make reasonable charges for the product or services rendered that are just and reasonable. *See* § 40-3-101(1), C.R.S.

Xcel uses an occupation tax percentage surcharge, similar to the franchise fee currently contemplated in the 1990 franchise. The surcharge made to a customer in Xcel's rate tariff is based on usage. It creates an incentive for customers to change their electricity consumption, much like the objective for the excise tax proposal on energy usage. An excise tax based on the kilowatt hours used may provide a less secure revenue stream to the City but will also encourage customers to conserve energy in order to save money.

It should also be noted that in some of the tariffs of other investor owned utilities, excise taxes are addressed in their pass-through provisions. The rate tariff for Black Hills Electric Utility notes that excise taxes are passed through in the form that it is levied upon the company. Holy Cross Electric Utility passes through rates for occupation taxes based upon the revenue generated by the customer. This pass-through is also based upon usage of energy.

- d. **In conclusion**, staff is recommending council consider the occupation tax approach because, unlike an excise tax, it guarantees that the City will receive one flat fee regardless of electricity use. Furthermore, since Xcel uses an occupation tax percentage surcharge, there will be an incentive for customers to change their electricity consumption because a decrease in energy used will result in a decrease in taxes paid.

Although an excise tax also creates an incentive for customers to save electricity, using an excise tax based on kilowatt hours will not guarantee steady revenue if customers change their electricity usage. Furthermore, while an excise tax would probably be passed directly through to customers, it is unclear whether the costs of excise taxes will be passed on to local consumers.

A draft occupation tax measure is attached to this memorandum as Attachment E.

8) *What are the costs of the Clean Energy Study? Municipalization?*

Over the past several months, staff has been discussing the development of a Clean Energy Plan for Boulder. The two tax options presented for council consideration include: 1) a straight replacement tax rate structured to stay equal to or below Xcel's franchise fee rate; and 2) the replacement tax rate plus \$450,000 per year to cover costs associated with the study and pursuit of the Energy Plan options. The projected cost includes but is not limited to consultant and legal fees, staffing resources, and ancillary costs.

Staff anticipates embarking on a parallel path this fall to begin a comprehensive analysis of options related to a Clean Energy Plan, while simultaneously investigating the benefits, risks, and costs of municipalization (see below). It is anticipated that the plan will have a focus on how to rapidly decarbonize Boulder's energy supply. This could occur through a variety of means.

Over the next several months, staff will develop a process to map out, in broad strokes, various alternative scenarios that will outline Boulder's energy future. The goal of this process, and of the more detailed analysis and planning process, is to identify the City's priorities about the decisions that will determine our path forward. Ultimately, the results of the Clean Energy studies are not just a more accurate picture of tomorrow, but better thinking and an ongoing strategic conversation about Boulder's energy future.

Specific to municipalization, if directed by council, staff can continue with the next steps which would include at least the following:

- a. Cost estimate to complete the municipalization efforts including estimated legal proceedings,
- b. Independent engineering and financial analyses of the 2005 and draft 2007 Municipalization Feasibility studies,
- c. A complete field inventory,

- d. Legal investigation of FERC stranded cost rulings,
- e. In-depth investigation into Boulder's load profile and rates, and
- f. Completion of a detailed design and physical severance plan to refine the costs to physically separate the Boulder distribution system from the rest of Xcel's system.

Staff will continue to determine the costs associated with the steps outlined above. That said, cursory research on recent successful municipalization efforts<sup>3</sup> indicate that feasibility studies, engineering, and legal expenses could cost in the range of \$1 to \$2 million. In some cases, there are consulting firms who will absorb the municipalization process costs up front with eventual payback through municipalization bonds (costs plus interest at the prime rate), assuming the process is successful. If municipalization is ultimately rejected, the City would need to find another way to pay the costs. At council direction, staff will conduct additional research on this option as well as related cost issues and other options.

- 9) *The franchise measure ballot title is short and to the point. However, one of the ideas that is not reflected in the title is the fact that the franchise does have an economic impact on Boulder customers. Is it possible to reflect the economic impact that the franchise has on Boulder customers in the ballot measure title?*

Yes, it is possible to be more descriptive of the franchise measure. Charter § 48, "Title of ballots," states in part that, "Proposed measures . . . shall be submitted by ballot title. There shall appear upon the official ballot a ballot title which . . . shall be a clear, concise statement, without argument or prejudice, descriptive of the substance of such measure . . ."

In terms of background, the ballot measure presented to the council is similar to the measure that was presented to the voters in 1993. Given the legal uncertainty at the time, there was also language in the 1993 ballot measure that would have allowed the franchise fee to be converted to a tax in the event that there was found to be any violations of the Taxpayers Bill of Rights. Since that time, the Colorado Court of Appeals ruled that franchise fees are considered compensation for the use of the public rights of way, not taxes subject to the Taxpayers Bill of Rights, Colo. Constitution, Art. 10, § 20; Also, see *Bruce v. City of Colorado Springs*, 131 P.3d 1187, (Colo. App. 2005). Therefore, the TABOR language of the 1993 ballot measure was not proposed for this version.

The language of the ballot measure title that was read on first reading has a focus on the grant that the city is making of the franchise. Staff recommends a brief statement related to the benefits that it will receive as a result of the franchise be included in the ballot title.

---

<sup>3</sup> Data was collected from Winter Park, FI; Massena, NY ; Clyde, OH; and Las Cruces, NM

If the council wants to amend this provision, the language could read as follows:

BALLOT QUESTION NO. \_\_\_\_\_

PUBLIC SERVICE COMPANY FRANCHISE

SHALL THE CITY OF BOULDER GRANT A FRANCHISE TO PUBLIC SERVICE COMPANY OF COLORADO TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY TO THE CITY AND TO ALL PERSONS, BUSINESSES, AND INDUSTRIES WITHIN THE CITY AND THE RIGHT TO MAKE REASONABLE USE OF ALL STREETS AND OTHER PUBLIC PLACES AND PUBLIC EASEMENTS AS MAY BE NECESSARY IN EXCHANGE FOR THE BENEFITS DESCRIBED IN THE FRANCHISE AGREEMENT ATTACHED TO ORDINANCE NO. 7728 THAT INCLUDES WITHOUT LIMITATION SHARED EQUIPMENT PRIVILEGES, THE BENEFITS OF AN OVERHEAD UTILITY FUND, AND A FRANCHISE FEE OF THREE PERCENT OF LOCAL GROSS REVENUES FROM THE COMPANY THAT IS PASSED THROUGH TO LOCAL CUSTOMERS?

FOR THE MEASURE \_\_\_\_\_ AGAINST THE MEASURE \_\_\_\_\_

10) *With regard to the franchise, council requested staff identify the questions and concerns of Xcel's largest customers in Boulder.*

A meeting was held on July 22 with representatives from several large Boulder based Xcel customers. Attachment I captures the comments and questions resulting from the meeting. Staff will continue to work closely with this group to identify partnership opportunities and to communicate additional concerns to council.

**NEXT STEPS:**

The outcome of this issue is based upon two outcomes. The franchise and revocable permit expiring and a tax measure passing. If these two matters occur, then staff will draft an ordinance implementing the tax measure before the end of the year.

If the tax measure fails, or the City otherwise loses franchise fee revenue, the city will look at options to cut its General Fund budget by \$4 million dollars. Options for program and services cuts will be considered as part of the 2011 budget process.

Approved by:

Jane S. Brautigam  
Jane S. Brautigam  
City Manager  
*Joy Mary Wallace*

Attachments:

- A. Limited Term Energy Utility Excise Tax – Revenue Replacement. Proposed Ordinance No. 7747, as introduced on first reading at the July 20, 2010 meeting.
- B. Limited Term Energy Utility Excise Tax – Revenue Replacement – **With Amendments**. Based on proposed Ordinance No. 7747, as introduced on first reading at the July 20, 2010 meeting.
- C. Limited Term Energy Utility Excise Tax – Revenue Replacement + Earmark for Clean Energy Planning and Programs. Proposed Ordinance No. 7748, as introduced on first reading at the July 20, 2010 meeting.
- D. Limited Term Energy Utility Excise Tax – Revenue Replacement + Earmark for Clean Energy Planning and Programs – **With Amendments**. Based on proposed Ordinance No. 7748, as introduced on first reading at the July 20, 2010 meeting.
- E. Limited Term Energy Utility Occupation Tax Revenue Proposed Ordinance. This option is new and **was not presented** at the July 20, 2010 meeting.
- F. Proposed Franchise Agreement Ordinance 7728
- G. Proposed Side Agreement (as provided to council on July 13).
- H. Proposed Street Lighting Agreement
- I. Notes from July 22 Large Energy Customer Meeting

**Limited Term Energy Utility Excise Tax:  
Revenue Replacement**

Ordinance No. 7747, as introduced on  
first reading at the July 20, 2010 meeting.

ORDINANCE NO. 7747

1  
2 AN ORDINANCE SUBMITTING TO THE ELECTORS OF THE  
3 CITY OF BOULDER AT THE SPECIAL MUNICIPAL  
4 COORDINATED ELECTION TO BE HELD ON TUESDAY,  
5 NOVEMBER 2, 2010, THE ISSUE OF WHETHER THE CITY  
6 OF BOULDER TAXES SHOULD BE INCREASED BY UP TO  
7 \$3.9 MILLION (IN THE FIRST FULL FISCAL YEAR)  
8 ANNUALLY AND BY SUCH AMOUNTS AS MAY BE  
9 COLLECTED ANNUALLY THEREAFTER BY THE  
10 IMPOSITION OF A UTILITY EXCISE TAX ON PUBLIC  
11 UTILITY COMPANIES THAT DELIVER ENERGY TO  
12 CUSTOMERS IN THE FORM OF ELECTRICITY AND GAS  
13 AT THE RATE OF \$0.00223 PER KILOWATT HOUR (kWh)  
14 AND THE RATE OF \$0.0164 PER THERM, BEGINNING  
15 JANUARY 1, 2011 AND EXPIRING ON DECEMBER 31, 2015;  
16 AND SETTING FORTH RELATED DETAILS.

17 WHEREAS the City Council finds that:

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

21 B. The City and PSCo have extended the terms of the Franchise pursuant to a  
22 revocable permit granted pursuant to the authority granted under Ordinance #7729 and under  
23 City Charter Section 115.

24 C. In the event that the City does not approve a new franchise agreement, the City  
25 will need to find an alternative revenue source to replace the benefits of the Franchise, including  
26 franchise fee payments to the City.

27 D. It is appropriate for voters to approve collection, retention, and expenditure of the  
28 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:



**Limited Term Energy Utility Excise Tax:  
Revenue Replacement**

Ordinance No. 7747, as introduced on  
first reading at the July 20, 2010 meeting.

- AND DEVELOP PLANS FOR PROVIDING A CLEANER FUTURE ENERGY SUPPLY WITH THE INTENT OF PLACING CHOICES FOR BOULDER'S ENERGY SUPPLY ON THE BALLOT BEFORE THE END OF 2015;

AND SHALL THE FULL PROCEEDS OF THIS TAX AT SUCH RATES AND ANY EARNINGS THEREON BE COLLECTED, RETAINED, AND SPENT, AS A VOTER-APPROVED REVENUE CHANGE WITHOUT LIMITATION OR CONDITION, AND WITHOUT LIMITING THE COLLECTION, RETENTION, OR SPENDING OF ANY OTHER REVENUES OR FUNDS BY THE CITY OF BOULDER UNDER ARTICLE X SECTION 20 OF THE COLORADO CONSTITUTION OR ANY OTHER LAW?

FOR THE MEASURE \_\_\_\_\_ AGAINST THE MEASURE \_\_\_\_\_

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

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

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

**Limited Term Energy Utility Excise Tax:  
Revenue Replacement**

Ordinance No. 7747, as introduced on  
first reading at the July 20, 2010 meeting.

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

4        Section 8. If any section, paragraph, clause, or provision of this ordinance shall for any  
5 reason be held to be invalid or unenforceable, such decision shall not affect any of the remaining  
6 provisions of this ordinance.

7        Section 9. This ordinance is necessary to protect the public health, safety and welfare of  
8 the residents of the City, and covers matters of local concern.

9        Section 10. The council deems it appropriate that this ordinance be published by title  
10 only and orders that copies of this ordinance be made available in the office of the city clerk for  
11 public inspection and acquisition.

12        INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY  
13 TITLE ONLY this 20th day of July 2010.

14  
15  
16  
17 \_\_\_\_\_  
Mayor

18 Attest:

19 \_\_\_\_\_  
20 City Clerk on behalf of the  
21 Director of Finance and Record

**Limited Term Energy Utility Excise Tax:  
Revenue Replacement**

Ordinance No. 7747, as introduced on  
first reading at the July 20, 2010 meeting.

1           READ ON SECOND READING, PASSED, ADOPTED, AND ORDERED  
2 PUBLISHED BY TITLE ONLY this 3rd day of August 2010.  
3

4 \_\_\_\_\_  
5 Mayor

6 Attest:

7 \_\_\_\_\_  
8 City Clerk on behalf of the  
9 Director of Finance and Record  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Limited Term Energy Utility Excise Tax:  
Revenue Replacement  
– With Amendments**

Based on proposed Ordinance No. 7747,  
as introduced on first reading at the July 20, 2010 meeting.

ORDINANCE NO. 7747

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 \$3.9 MILLION (IN THE FIRST FULL FISCAL YEAR) ANNUALLY AND BY SUCH AMOUNTS AS MAY BE COLLECTED ANNUALLY THEREAFTER 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 \$0.00223 PER KILOWATT HOUR (kWh) AND THE RATE OF \$0.01626 PER THERM, BEGINNING JANUARY 1, 2011 AND EXPIRING ON DECEMBER 31, 2015; 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 have extended the terms of the Franchise pursuant to a revocable permit granted pursuant to the authority granted under Ordinance #7729 and 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, including franchise fee payments to the City.

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.

E. The proposed measure title is a clear and concise statement, without argument or prejudice that is descriptive of the substance of the amendment and complies with the requirements of the City of Boulder Charter and the Boulder Revised Code, 1981.

**Limited Term Energy Utility Excise Tax:  
Revenue Replacement  
– With Amendments**

Based on proposed Ordinance No. 7747,  
as introduced on first reading at the July 20, 2010 meeting.

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

4 Section 1. A special municipal coordinated election will be held in the City of Boulder,  
5 county of Boulder and state of Colorado, on Tuesday, November 2, 2010, between the hours of  
6 7 a.m. and 7 p.m.

7 Section 2. At that election, there shall be submitted to the electors of the City of Boulder  
8 entitled by law to vote the issue of authorizing a utility excise tax on the delivery of energy  
9 created from electricity and gas, and to collect, retain, and spend the revenues generated from  
10 such tax notwithstanding any state revenue or expenditure limitations.  
11

12 Section 3. The official ballot shall contain the following ballot title, which shall also be  
13 the designation and submission clause for the issue:

14  
15 ISSUE NO. \_\_\_\_

16 **FIVE YEAR UTILITY EXCISE TAX TO REPLACE**  
17 **LOST FRANCHISE FEE REVENUE**

18 SHALL CITY OF BOULDER TAXES BE INCREASED (UP TO \$3.9  
19 MILLION IN THE FIRST YEAR) ANNUALLY AND BY SUCH  
20 AMOUNTS AS MAY BE COLLECTED THEREAFTER, BY  
21 IMPOSING A TAX ON PUBLIC UTILITY COMPANIES TO  
22 REPLACE THE 3 PERCENT FRANCHISE FEE IF IT IS NO LONGER  
23 COLLECTED BY PUBLIC SERVICE COMPANY OF COLORADO  
24 (“XCEL ENERGY”) FROM ITS BOULDER CUSTOMERS AND  
25 REMITTED TO THE CITY;

26  
27 AND IN CONNECTION THEREWITH SHALL THE CITY COUNCIL  
28 BE AUTHORIZED TO:

**Limited Term Energy Utility Excise Tax:  
Revenue Replacement  
- With Amendments**

Based on proposed Ordinance No. 7747,  
as introduced on first reading at the July 20, 2010 meeting.

- 1       • LEVY AND COLLECT THIS TAX TO TAKE EFFECT ON
- 2       JANUARY 1, 2011 AND EXPIRE ON DECEMBER 31, 2015,
- 3       • LEVY AND COLLECT THIS TAX UPON PUBLIC UTILITY
- 4       COMPANIES THAT DELIVER ELECTRICITY AND
- 5       NATURAL GAS TO CUSTOMERS WITHIN THE CITY OF
- 6       BOULDER AT THE RATES OF \$0.00223 PER KILOWATT
- 7       HOUR (kWh) AND \$0.01626 PER THERM,
- 8       • AND DEVELOP PLANS FOR PROVIDING A CLEANER
- 9       FUTURE ENERGY SUPPLY WITH STABLE ENERGY RATES
- 10      AND THE INTENT OF PLACING CHOICES FOR BOULDER'S
- 11      ENERGY SUPPLY ON THE BALLOT BEFORE THE END OF
- 12      2015;

AND SHALL THE FULL PROCEEDS OF THIS TAX AT SUCH RATES AND ANY EARNINGS THEREON BE COLLECTED, RETAINED, AND SPENT, AS A VOTER-APPROVED REVENUE CHANGE WITHOUT LIMITATION OR CONDITION, AND WITHOUT LIMITING THE COLLECTION, RETENTION, OR SPENDING OF ANY OTHER REVENUES OR FUNDS BY THE CITY OF BOULDER UNDER ARTICLE X SECTION 20 OF THE COLORADO CONSTITUTION OR ANY OTHER LAW?

FOR THE MEASURE \_\_\_\_ AGAINST THE MEASURE \_\_\_\_

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

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

**Limited Term Energy Utility Excise Tax:  
Revenue Replacement  
– With Amendments**

Based on proposed Ordinance No. 7747,  
as introduced on first reading at the July 20, 2010 meeting.

1        Section 6. The election shall be conducted under the provisions of the Colorado  
2 Constitution, the charter and ordinances of the City, the Boulder Revised Code, 1981, and this  
3 ordinance, and all contrary provisions of the statutes of the state of Colorado are hereby  
4 superseded.  
5

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

9        Section 8. If any section, paragraph, clause, or provision of this ordinance shall for any  
10 reason be held to be invalid or unenforceable, such decision shall not affect any of the remaining  
11 provisions of this ordinance.  
12

13        Section 9. This ordinance is necessary to protect the public health, safety and welfare of  
14 the residents of the City, and covers matters of local concern.

15        Section 10. The council deems it appropriate that this ordinance be published by title  
16 only and orders that copies of this ordinance be made available in the office of the city clerk for  
17 public inspection and acquisition.  
18

19        INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY  
20 TITLE ONLY this 20th day of July 2010.  
21

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk on behalf of the  
Director of Finance and Record

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Limited Term Energy Utility Excise Tax:  
Revenue Replacement  
– With Amendments**

Based on proposed Ordinance No. 7747,  
as introduced on first reading at the July 20, 2010 meeting.

1 READ ON SECOND READING, PASSED, AMENDED, AND ORDERED  
2 PUBLISHED BY TITLE ONLY this 3rd day of August 2010.

3

4

5

\_\_\_\_\_  
Mayor

6

Attest:

7

8

\_\_\_\_\_  
City Clerk on behalf of the  
Director of Finance and Record

9

10

11

READ ON THIRD READING, PASSED, ADOPTED, AND ORDERED PUBLISHED

12

BY TITLE ONLY this 17th day of August 2010.

13

14

15

\_\_\_\_\_  
Mayor

16

Attest:

17

18

\_\_\_\_\_  
City Clerk on behalf of the  
Director of Finance and Record

19

20

21

22

23

24

25

26

27

28

**Limited Term Energy Utility Excise Tax: Revenue Replacement  
+ Dedication for Clean Energy Planning and Programs**

Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

## ORDINANCE NO. 7748

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 \$4.35 MILLION (IN THE FIRST FULL FISCAL YEAR) ANNUALLY AND BY SUCH AMOUNTS AS MAY BE COLLECTED ANNUALLY THEREAFTER 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 \$0.00257 PER KILOWATT HOUR (kWh) AND THE RATE OF \$0.0164 PER THERM, BEGINNING JANUARY 1, 2011 AND EXPIRING ON DECEMBER 31, 2015; EARMARKING \$450,000 FOR PROGRAMMING AND PLANNING OF CLEAN ENERGY PROGRAMS; 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 have extended the terms of the Franchise pursuant to a revocable permit granted pursuant to the authority granted under Ordinance #7729 and 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, including franchise fee payments to the City.

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:

**Limited Term Energy Utility Excise Tax: Revenue Replacement  
+ Dedication for Clean Energy Planning and Programs**

Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

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

4           Section 2. At that election, there shall be submitted to the electors of the City of Boulder  
5 entitled by law to vote the issue of authorizing a utility excise tax on the delivery of energy  
6 created from electricity and gas, and to collect, retain, and spend the revenues generated from  
7 such tax notwithstanding any state revenue or expenditure limitations.  
8

9           Section 3. The official ballot shall contain the following ballot title, which shall also be  
10 the designation and submission clause for the issue:  
11

ISSUE NO \_\_\_\_\_

**FIVE YEAR UTILITY EXCISE TAX**

12  
13  
14 SHALL CITY OF BOULDER TAXES BE INCREASED (UP TO \$4.35  
15 MILLION IN THE FIRST YEAR) ANNUALLY AND BY SUCH  
16 AMOUNTS AS MAY BE COLLECTED THEREAFTER, BY  
17 IMPOSING A TAX ON PUBLIC UTILITY COMPANIES TO  
18 REPLACE THE 3 PERCENT FRANCHISE FEE IF IT IS NO LONGER  
COLLECTED BY PUBLIC SERVICE COMPANY OF COLORADO  
("XCEL ENERGY") FROM ITS BOULDER CUSTOMERS AND  
REMITTED TO THE CITY;

19 AND IN CONNECTION THEREWITH SHALL THE CITY COUNCIL  
20 BE AUTHORIZED TO:

- 21 • LEVY AND COLLECT THIS TAX TO TAKE EFFECT ON  
22 JANUARY 1, 2011 AND EXPIRE ON DECEMBER 31, 2015,
- 23 • LEVY AND COLLECT THIS TAX UPON PUBLIC UTILITY  
24 COMPANIES THAT DELIVER ELECTRICITY AND  
25 NATURAL GAS TO CUSTOMERS WITHIN THE CITY OF  
26 BOULDER AT THE RATES OF \$0.00257 PER KILOWATT  
27 HOUR (kWh) AND \$0.0164 PER THERM,  
28

**Limited Term Energy Utility Excise Tax: Revenue Replacement  
+ Dedication for Clean Energy Planning and Programs**

Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

- EARMARK UP TO \$450,000 PER YEAR OF THE REVENUE COLLECTED FROM THIS TAX TO FUND PROGRAMS AND DEVELOP PLANS FOR PROVIDING A CLEANER FUTURE ENERGY SUPPLY WITH THE INTENT OF PLACING CHOICES FOR BOULDER'S ENERGY SUPPLY ON THE BALLOT BEFORE THE END OF 2015;

AND SHALL THE FULL PROCEEDS OF THIS TAX AT SUCH RATES AND ANY EARNINGS THEREON BE COLLECTED, RETAINED, AND SPENT, AS A VOTER-APPROVED REVENUE CHANGE WITHOUT LIMITATION OR CONDITION, AND WITHOUT LIMITING THE COLLECTION, RETENTION, OR SPENDING OF ANY OTHER REVENUES OR FUNDS BY THE CITY OF BOULDER UNDER ARTICLE X SECTION 20 OF THE COLORADO CONSTITUTION OR ANY OTHER LAW?

FOR THE MEASURE \_\_\_\_\_ AGAINST THE MEASURE \_\_\_\_\_

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

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

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

**Limited Term Energy Utility Excise Tax: Revenue Replacement  
+ Dedication for Clean Energy Planning and Programs**

Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

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

4           Section 8. If any section, paragraph, clause, or provision of this ordinance shall for any  
5 reason be held to be invalid or unenforceable, such decision shall not affect any of the remaining  
6 provisions of this ordinance.

7           Section 9. This ordinance is necessary to protect the public health, safety and welfare of  
8 the residents of the City, and covers matters of local concern.

9           Section 10. The council deems it appropriate that this ordinance be published by title  
10 only and orders that copies of this ordinance be made available in the office of the city clerk for  
11 public inspection and acquisition.

12           INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY  
13 TITLE ONLY this 20th day of July 2010.

14  
15  
16  
17  
18 \_\_\_\_\_  
Mayor

19 Attest:

20  
21 \_\_\_\_\_  
22 City Clerk on behalf of the  
23 Director of Finance and Record

**Limited Term Energy Utility Excise Tax: Revenue Replacement  
+ Dedication for Clean Energy Planning and Programs**  
Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

1        READ ON SECOND READING, PASSED, ADOPTED, AND ORDERED  
2 PUBLISHED BY TITLE ONLY this 3rd day of August 2010.  
3  
4

5 \_\_\_\_\_  
Mayor

6 Attest:

7  
8 \_\_\_\_\_  
9 City Clerk on behalf of the  
Director of Finance and Record  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**Limited Term Energy Utility Excise Tax – Revenue Replacement +  
Dedication for Clean Energy Planning and Programs  
– With Amendments**

Based on proposed Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

ORDINANCE NO. 7748

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 \$4.35 MILLION (IN THE FIRST FULL FISCAL YEAR) ANNUALLY AND BY SUCH AMOUNTS AS MAY BE COLLECTED ANNUALLY THEREAFTER 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 \$0.00257 PER KILOWATT HOUR (kWh) AND THE RATE OF \$0.01626 PER THERM, BEGINNING JANUARY 1, 2011 AND EXPIRING ON DECEMBER 31, 2015; ~~EARMARKING DEDICATING UP TO \$450,000 PER YEAR FOR PROGRAMMING AND THE PLANNING OF CLEAN ENERGY PROGRAMS;~~ 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 have extended the terms of the Franchise pursuant to a revocable permit granted pursuant to the authority granted under Ordinance #7729 and 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, including franchise fee payments to the City.

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.

**Limited Term Energy Utility Excise Tax – Revenue Replacement +  
Dedication for Clean Energy Planning and Programs  
– With Amendments**

Based on proposed Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

1 E. The proposed measure title is a clear and concise statement, without argument or  
2 prejudice that is descriptive of the substance of the amendment and complies with the  
3 requirements of the City of Boulder Charter and the Boulder Revised Code, 1981.

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

6 Section 1. A special municipal coordinated election will be held in the City of Boulder,  
7 county of Boulder and state of Colorado, on Tuesday, November 2, 2010, between the hours of  
8 7 a.m. and 7 p.m.

9 Section 2. At that election, there shall be submitted to the electors of the City of Boulder  
10 entitled by law to vote the issue of authorizing a utility excise tax on the delivery of energy  
11 created from electricity and gas, and to collect, retain, and spend the revenues generated from  
12 such tax notwithstanding any state revenue or expenditure limitations.

13 Section 3. The official ballot shall contain the following ballot title, which shall also be  
14 the designation and submission clause for the issue:

15 ISSUE NO \_\_\_\_\_

16 **FIVE YEAR UTILITY EXCISE TAX TO REPLACE**  
17 **LOST FRANCHISE FEE REVENUE**

18 SHALL CITY OF BOULDER TAXES BE INCREASED (UP TO \$4.35  
19 MILLION IN THE FIRST YEAR) ANNUALLY AND BY SUCH  
20 AMOUNTS AS MAY BE COLLECTED THEREAFTER, BY  
21 IMPOSING A TAX ON PUBLIC UTILITY COMPANIES TO  
22 REPLACE THE 3 PERCENT FRANCHISE FEE IF IT IS NO LONGER  
23 COLLECTED BY PUBLIC SERVICE COMPANY OF COLORADO  
24 (“XCEL ENERGY”) FROM ITS BOULDER CUSTOMERS AND  
25 REMITTED TO THE CITY;

**Limited Term Energy Utility Excise Tax – Revenue Replacement +  
Dedication for Clean Energy Planning and Programs  
– With Amendments**

Based on proposed Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

1 AND IN CONNECTION THEREWITH SHALL THE CITY COUNCIL  
2 BE AUTHORIZED TO:

- 3 • LEVY AND COLLECT THIS TAX TO TAKE EFFECT ON  
4 JANUARY 1, 2011 AND EXPIRE ON DECEMBER 31, 2015,
- 5 • LEVY AND COLLECT THIS TAX UPON PUBLIC UTILITY  
6 COMPANIES THAT DELIVER ELECTRICITY AND  
7 NATURAL GAS TO CUSTOMERS WITHIN THE CITY OF  
8 BOULDER AT THE RATES OF \$0.00257 PER KILOWATT  
9 HOUR (kWh) AND \$0.01626 PER THERM,
- 10 • ~~EARMARK DEDICATE~~ UP TO \$450,000 PER YEAR OF THE  
11 REVENUE COLLECTED FROM THIS TAX TO ~~FUND~~  
12 ~~PROGRAMS AND DEVELOP~~ PLANS FOR PROVIDING A  
13 CLEANER FUTURE ENERGY SUPPLY WITH MORE  
14 STABLE ENERGY RATES AND TO IMPLEMENT SUCH  
15 PLANS WITH THE INTENT OF PLACING CHOICES FOR  
16 BOULDER’S ENERGY SUPPLY ON THE BALLOT BEFORE  
17 THE END OF 2015;

18 AND SHALL THE FULL PROCEEDS OF THIS TAX AT SUCH  
19 RATES AND ANY EARNINGS THEREON BE COLLECTED,  
20 RETAINED, AND SPENT, AS A VOTER-APPROVED REVENUE  
21 CHANGE WITHOUT LIMITATION OR CONDITION, AND  
22 WITHOUT LIMITING THE COLLECTION, RETENTION, OR  
23 SPENDING OF ANY OTHER REVENUES OR FUNDS BY THE CITY  
24 OF BOULDER UNDER ARTICLE X SECTION 20 OF THE  
25 COLORADO CONSTITUTION OR ANY OTHER LAW?

26 FOR THE MEASURE \_\_\_\_ AGAINST THE MEASURE \_\_\_\_

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

**Limited Term Energy Utility Excise Tax – Revenue Replacement +  
Dedication for Clean Energy Planning and Programs  
– With Amendments**

Based on proposed Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

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

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

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

12        Section 8. If any section, paragraph, clause, or provision of this ordinance shall for any  
13 reason be held to be invalid or unenforceable, such decision shall not affect any of the remaining  
14 provisions of this ordinance.

15        Section 9. This ordinance is necessary to protect the public health, safety and welfare of  
16 the residents of the City, and covers matters of local concern.

17        Section 10. The council deems it appropriate that this ordinance be published by title  
18 only and orders that copies of this ordinance be made available in the office of the city clerk for  
19 public inspection and acquisition.

**Limited Term Energy Utility Excise Tax – Revenue Replacement +  
Dedication for Clean Energy Planning and Programs  
– With Amendments**

Based on proposed Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

1 INTRODUCTION, READ ON FIRST READING, AND ORDERED PUBLISHED BY

2 TITLE ONLY this 20th day of July 2010.

3  
4  
5 \_\_\_\_\_  
Mayor

6 Attest:

7  
8 \_\_\_\_\_  
City Clerk on behalf of the  
9 Director of Finance and Record

10 READ ON SECOND READING, PASSED, AMENDED, AND ORDERED  
11 PUBLISHED BY TITLE ONLY this 3rd day of August 2010.

12  
13  
14 \_\_\_\_\_  
Mayor

15 Attest:

16  
17 \_\_\_\_\_  
City Clerk on behalf of the  
18 Director of Finance and Record

**Limited Term Energy Utility Excise Tax – Revenue Replacement +  
Dedication for Clean Energy Planning and Programs  
– With Amendments**

Based on proposed Ordinance No. 7748, as introduced on  
first reading at the July 20, 2010 meeting.

1 READ ON THIRD READING, PASSED, ADOPTED, AND ORDERED PUBLISHED

2 BY TITLE ONLY this 17th day of August 2010.

3  
4  
5 \_\_\_\_\_  
Mayor

6 Attest:

7  
8 \_\_\_\_\_  
City Clerk on behalf of the  
9 Director of Finance and Record

**Limited Term Energy Utility Occupation Tax: Revenue  
+ Dedication for Clean Energy Planning and Programs**

This option is new and was not  
presented at the July 20, 2010 meeting.

ORDINANCE NO. \_\_\_\_\_

1  
2 AN ORDINANCE SUBMITTING TO THE ELECTORS OF THE  
3 CITY OF BOULDER AT THE SPECIAL MUNICIPAL  
4 COORDINATED ELECTION TO BE HELD ON TUESDAY,  
5 NOVEMBER 2, 2010, THE ISSUE OF WHETHER THE CITY  
6 OF BOULDER TAXES SHOULD BE INCREASED BY UP TO  
7 \$4.35 MILLION (IN THE FIRST FULL FISCAL YEAR)  
8 ANNUALLY AND BY SUCH AMOUNTS AS MAY BE  
9 COLLECTED ANNUALLY THEREAFTER BY THE  
10 IMPOSITION OF A UTILITY OCCUPATION TAX ON PUBLIC  
11 UTILITY COMPANIES THAT DELIVER ENERGY TO  
12 CUSTOMERS IN THE FORM OF ELECTRICITY AND GAS  
13 AT THE RATE \$4.35 MILLION DOLLARS, BEGINNING  
14 JANUARY 1, 2011 AND EXPIRING ON DECEMBER 31, 2015;  
15 **[DEDICATING UP TO \$450,000 PER YEAR FOR THE  
16 PLANNING OF CLEAN ENERGY PROGRAMS;]** AND  
17 SETTING FORTH RELATED DETAILS.

18 WHEREAS the City Council finds that:

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

22 B. The City and PSCo have extended the terms of the Franchise pursuant to a  
23 revocable permit granted pursuant to the authority granted under Ordinance #7729 and under  
24 City Charter Section 115.

25 C. In the event that the City does not approve a new franchise agreement, the City  
26 will need to find an alternative revenue source to replace the benefits of the Franchise, including  
27 franchise fee payments to the City.

28 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.

E. The proposed measure title is a clear and concise statement, without argument or  
prejudice that is descriptive of the substance of the amendment and complies with the  
requirements of the City of Boulder Charter and the Boulder Revised Code, 1981.

**Limited Term Energy Utility Occupation Tax: Revenue  
+ Dedication for Clean Energy Planning and Programs**

This option is new and was not  
presented at the July 20, 2010 meeting.

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.  
10

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:

13 ISSUE NO \_\_\_\_\_

14 **FIVE YEAR UTILITY OCCUPATION TAX TO REPLACE**  
15 **LOST FRANCHISE FEE REVENUE**

16  
17 SHALL CITY OF BOULDER TAXES BE INCREASED (UP TO \$4.35  
18 MILLION IN THE FIRST YEAR) ANNUALLY AND BY SUCH  
19 AMOUNTS AS MAY BE COLLECTED THEREAFTER, BY  
20 IMPOSING A TAX ON PUBLIC UTILITY COMPANIES TO  
21 REPLACE THE THREE PERCENT FRANCHISE FEE IF IT IS NO  
LONGER COLLECTED BY PUBLIC SERVICE COMPANY OF  
COLORADO ("XCEL ENERGY") FROM ITS BOULDER  
CUSTOMERS AND REMITTED TO THE CITY;

22 AND IN CONNECTION THEREWITH SHALL THE CITY COUNCIL  
23 BE AUTHORIZED TO:

- 24 • LEVY AND COLLECT THIS TAX TO TAKE EFFECT ON  
25 JANUARY 1, 2011 AND EXPIRE ON DECEMBER 31, 2015,

**Limited Term Energy Utility Occupation Tax: Revenue  
+ Dedication for Clean Energy Planning and Programs**

This option is new and was not  
presented at the July 20, 2010 meeting.

- 1       • LEVY AND COLLECT THIS TAX UPON PUBLIC UTILITY  
2       COMPANIES THAT DELIVER ELECTRICITY AND  
3       NATURAL GAS TO CUSTOMERS WITHIN THE CITY OF  
4       BOULDER AT THE RATE OF [\$4.35 MILLION] PER PUBLIC  
5       UTILITY COMPANY,
- 6       • INCREASE THE OCCUPATION TAX LIMITED BY THE  
7       LESSER OF UP TO THREE PERCENT PER YEAR OR THE  
8       AVERAGE OF RATE INCREASES MADE BY COLORADO  
9       PUBLIC UTILITY COMPANIES IN THE PREVIOUS YEAR,  
10      AND
- 11     • **[DEDICATE UP TO \$450,000 PER YEAR OF THE**  
12     **REVENUE COLLECTED FROM THIS TAX TO]** DEVELOP  
13     PLANS FOR PROVIDING A CLEANER FUTURE ENERGY  
14     SUPPLY WITH MORE STABLE ENERGY RATES AND TO  
15     IMPLEMENT SUCH PLANS WITH THE INTENT OF  
16     PLACING CHOICES FOR BOULDER'S ENERGY SUPPLY ON  
17     THE BALLOT BEFORE THE END OF 2015;

18     AND SHALL THE FULL PROCEEDS OF THIS TAX AT SUCH  
19     RATES AND ANY EARNINGS THEREON BE COLLECTED,  
20     RETAINED, AND SPENT, AS A VOTER-APPROVED REVENUE  
21     CHANGE WITHOUT LIMITATION OR CONDITION, AND  
22     WITHOUT LIMITING THE COLLECTION, RETENTION, OR  
23     SPENDING OF ANY OTHER REVENUES OR FUNDS BY THE CITY  
24     OF BOULDER UNDER ARTICLE X SECTION 20 OF THE  
25     COLORADO CONSTITUTION OR ANY OTHER LAW?

26                   FOR THE MEASURE \_\_\_\_ AGAINST THE MEASURE \_\_\_\_

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

31             Section 5. If a majority of all the votes cast at the election on the issue submitted shall be  
32     for the issue, the issue shall be deemed to have passed and shall be effective upon passage, and it

**Limited Term Energy Utility Occupation Tax: Revenue  
+ Dedication for Clean Energy Planning and Programs**

This option is new and was not  
presented at the July 20, 2010 meeting.

1 shall be lawful for the City Council to provide for the amendment of its tax code in accordance  
2 with the issue approved.

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

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

11  
12       Section 8. If any section, paragraph, clause, or provision of this ordinance shall for any  
13 reason be held to be invalid or unenforceable, such decision shall not affect any of the remaining  
14 provisions of this ordinance.

15       Section 9. This ordinance is necessary to protect the public health, safety and welfare of  
16 the residents of the City, and covers matters of local concern.

17  
18       Section 10. The council deems it appropriate that this ordinance be published by title  
19 only and orders that copies of this ordinance be made available in the office of the city clerk for  
20 public inspection and acquisition.

**Limited Term Energy Utility Occupation Tax: Revenue  
+ Dedication for Clean Energy Planning and Programs**

This option is new and was not  
presented at the July 20, 2010 meeting.

1 INTRODUCTION, READ ON FIRST READING, AND ORDERED PUBLISHED BY

2 TITLE ONLY this 3rd day of August 2010.

3  
4  
5 \_\_\_\_\_  
Mayor

6 Attest:

7  
8 \_\_\_\_\_  
City Clerk on behalf of the  
9 Director of Finance and Record

10 READ ON SECOND READING, PASSED, ADOPTED, AND ORDERED

11 PUBLISHED BY TITLE ONLY this 17th day of August 2010.

12  
13  
14 \_\_\_\_\_  
Mayor

15 Attest:

16  
17 \_\_\_\_\_  
City Clerk on behalf of the  
18 Director of Finance and Record

## ORDINANCE NO. 7728

AN ORDINANCE CALLING A SPECIAL COORDINATED MUNICIPAL ELECTION TO BE HELD ON TUESDAY, THE 2ND DAY OF NOVEMBER, 2010, IN THE CITY OF BOULDER, COLORADO, AND PROVIDING FOR THE SUBMISSION TO THE ELECTORS ENTITLED TO VOTE THEREON OF THE QUESTION OF A FRANCHISE BY THE CITY OF BOULDER, COLORADO, BEING GRANTED TO PUBLIC SERVICE COMPANY OF COLORADO, ITS SUCCESSORS AND ASSIGNS, TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY TO THE CITY AND TO ALL PERSONS, BUSINESSES, AND INDUSTRIES WITHIN THE CITY AND THE RIGHT TO ACQUIRE, CONSTRUCT, INSTALL, LOCATE, MAINTAIN, OPERATE, AND EXTEND INTO, WITHIN, AND THROUGH SAID CITY ALL FACILITIES REASONABLY NECESSARY TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY WITHIN THE CITY AND THE RIGHT TO MAKE REASONABLE USE OF ALL STREETS, PUBLIC EASEMENTS AND OTHER CITY PROPERTY AS HEREIN DEFINED AS MAY BE NECESSARY; AND FIXING THE TERMS AND CONDITIONS THEREOF; AND SETTING FORTH RELATED DETAILS.

The City Council finds that:

A. Public Service Company of Colorado has applied to the city for the grant of a franchise to furnish, sell, and distribute gas and electricity to the city, its residents, businesses, and industries and to make reasonable use of the city streets, public easements, and other city property to do so.

B. Section 108 of the Boulder home rule charter provides that no franchise may be granted by the city except upon the vote of the qualified taxpaying electors.

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

Section 1. That a special coordinated municipal election be held in the various precincts and at the polling places in the city of Boulder, county of Boulder and state of Colorado, on Tuesday, the 2nd day of November, 2010, between the hours of 7:00 am and 7:00 pm.

Section 2. At that election there shall be submitted to the electors of the city of Boulder entitled by law to vote thereon the question of whether or not a franchise shall be granted by the city of Boulder to Public Service Company of Colorado, its successors and assigns, for the use of city streets, public easements, and other city property to furnish, sell, and distribute gas and electricity within the city under the terms and conditions of the franchise agreement attached hereto as Exhibit A.

Section 3. The official ballot shall contain the following ballot title, which shall also be the designation and submission clause for the question:

BALLOT QUESTION NO. \_\_\_\_\_

PUBLIC SERVICE COMPANY FRANCHISE

SHALL THE CITY OF BOULDER GRANT A FRANCHISE TO PUBLIC SERVICE COMPANY OF COLORADO TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY TO THE CITY AND TO ALL PERSONS, BUSINESSES, AND INDUSTRIES WITHIN THE CITY AND THE RIGHT TO MAKE REASONABLE USE OF ALL STREETS AND OTHER PUBLIC PLACES AND PUBLIC EASEMENTS AS MAY BE NECESSARY?

FOR THE MEASURE \_\_\_\_\_ AGAINST THE MEASURE \_\_\_\_\_

Section 4. If a majority of all the votes cast at the election on the question submitted shall be for the question, the question shall be deemed to have passed and the franchise granted.

Section 5. The city clerk of the city of Boulder shall give public notice of the election on such question as required by law.

Section 6. The officers of the city are authorized to take all action necessary or appropriate to effectuate the provisions of this ordinance.

Section 7. If the electorate passes the ballot question, the city council deems this ordinance to be the ordinance granting a franchise as required by the city Charter, including Charter Section 20, "Ordinances Granting Franchise," Charter Section 108, "Franchises Granted Upon Vote," and Charter Section 109, "No Exclusive Grants-Ordinance in Plain Terms."

Section 8. If any section, paragraph, clause, or provisions of this ordinance shall for any reason be held to be invalid or unenforceable, such decision shall not affect any of the remaining provisions of this ordinance.

Section 9. This ordinance is deemed necessary for the protection of the public health, safety, and welfare of the residents of the city, and covers matters of local concern.

Section 10. The city council deems it appropriate that this ordinance be published by title only and orders that copies of the text hereof be available in the office of the city clerk for public inspection and acquisition.

INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY  
TITLE ONLY this 1st day of June 2010.

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk on behalf of the  
Director of Finance and Record

READ ON SECOND READING, PASSED, ADOPTED, AND ORDERED

PUBLISHED BY TITLE ONLY this 3rd day of August 2010.

\_\_\_\_\_  
Mayor

Attest:

\_\_\_\_\_  
City Clerk on behalf of the  
Director of Finance and Record

## EXHIBIT A

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE GRANTING A FRANCHISE BY THE CITY OF BOULDER TO PUBLIC SERVICE COMPANY OF COLORADO, ITS SUCCESSORS AND ASSIGNS, TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY TO THE CITY AND TO ALL PERSONS, BUSINESSES, AND INDUSTRIES WITHIN THE CITY AND THE RIGHT TO ACQUIRE, CONSTRUCT, INSTALL, LOCATE, MAINTAIN, OPERATE, AND EXTEND INTO, WITHIN, AND THROUGH SAID CITY ALL FACILITIES REASONABLY NECESSARY TO FURNISH, SELL, AND DISTRIBUTE GAS AND ELECTRICITY WITHIN THE CITY AND THE RIGHT TO MAKE REASONABLE USE OF ALL STREETS, PUBLIC EASEMENTS AND OTHER CITY PROPERTY AS HEREIN DEFINED AS MAY BE NECESSARY; AND FIXING THE TERMS AND CONDITIONS THEREOF; AND SETTING FORTH RELATED DETAILS.

**FRANCHISE AGREEMENT BETWEEN THE CITY OF BOULDER, COLORADO  
AND PUBLIC SERVICE COMPANY OF COLORADO**

ARTICLE 1	DEFINITIONS
ARTICLE 2	GRANT OF FRANCHISE
ARTICLE 3	CITY POLICE POWERS
ARTICLE 4	FRANCHISE FEE
ARTICLE 5	ADMINISTRATION OF FRANCHISE
ARTICLE 6	SUPPLY, CONSTRUCTION, AND DESIGN
ARTICLE 7	RELIABILITY
ARTICLE 8	COMPANY PERFORMANCE OBLIGATIONS
ARTICLE 9	BILLING AND PAYMENT
ARTICLE 10	USE OF COMPANY ELECTRIC DISTRIBUTION POLES
ARTICLE 11	UNDERGROUNDING OF OVERHEAD FACILITIES
ARTICLE 12	PURCHASE OR CONDEMNATION
ARTICLE 13	MUNICIPALLY-PRODUCED UTILITY SERVICE
ARTICLE 14	ENVIRONMENT AND CONSERVATION
ARTICLE 15	TRANSFER OF FRANCHISE
ARTICLE 16	CONTINUATION OF UTILITY SERVICE
ARTICLE 17	INDEMNIFICATION AND IMMUNITY
ARTICLE 18	BREACH
ARTICLE 19	AMENDMENTS
ARTICLE 20	EQUAL OPPORTUNITY
ARTICLE 21	MISCELLANEOUS

TABLE OF CONTENTS

Page

ARTICLE 1 DEFINITIONS.....[PAGE #'S WILL BE IN FINAL]

§1.1 City .....

§1.2 City Council.....

§1.3 City Facilities.....

§1.4 Code.....

§1.5 Company.....

§1.6 Company Facilities.....

§1.7 Design and Construction Standards.....

§1.8 Electric Gross Revenues.....

§1.9 Energy Conservation .....

§1.10 Energy Efficiency.....

§1.11 Force Majeure.....

§1.12 Gross Revenues .....

§1.13 Other City Property .....

§1.14 Private Project .....

~~§1.15 Public Easement.....~~

§1.16~~5~~ Public Project.....

§1.16~~7~~ Public Utilities Commission.....

~~§1.17 Relocate.....~~

§1.18 Residents.....

§1.19 Street Lighting Agreement .....

§1.20 Streets .....

§1.21 Supporting Documentation.....

§1.22 Tariffs .....

§1.23 Traffic Facilities .....

§1.24 Utility Service.....

ARTICLE 2 GRANT OF FRANCHISE .....

§2.1 Grant of Franchise. ....

§2.2 Conditions and Limitations. ....

§2.3 Effective Date and Term. ....

ARTICLE 3 CITY POLICE POWERS .....

§3.1 Police Powers .....

§3.2 Regulation of Streets or Other City Property .....

§3.3 Compliance with Laws .....

ARTICLE 4 FRANCHISE FEE .....

§4.1 Franchise Fee.....

§4.2 Remittance Of Franchise Fee. ....

§4.3 Franchise Fee Payment Not In Lieu of Permit or Other Fees .....

§4.4 Change of Franchise Fee .....

ARTICLE 5 ADMINISTRATION OF FRANCHISE.....[PAGE #'S WILL BE IN FINAL]

- §5.1 City Designee .....
- §5.2 Company Designee.....
- §5.3 Coordination of Work.....

ARTICLE 6 SUPPLY, CONSTRUCTION, AND DESIGN.....

- §6.1 Purpose .....
- §6.2 Supply.....
- §6.3 Service To City Facilities. ....
- §6.4 Restoration Of Service. ....
- §6.5 Obligations Regarding Company Facilities.....
- §6.6 Excavation And Construction.....
- §6.7 Restoration.....
- §6.8 Relocation Of Company Facilities. ....
- §6.9 Service To New Areas.....
- §6.10 City Not Required to Advance Funds .....
- §6.11 Technological Improvements .....

ARTICLE 7 RELIABILITY.....

- §7.1 Reliability .....
- §7.2 Franchise Performance Obligations .....
- §7.3 Reliability Reports.....

ARTICLE 8 COMPANY PERFORMANCE OBLIGATIONS .....

- §8.1 New or Modified Service to City Facilities.....
- §8.2 Adjustments to Company Facilities.....
- §8.3 Third Party Damage Recovery.....

ARTICLE 9 BILLING AND PAYMENT.....

- §9.1 Billing for Utility Services. ....
- §9.2 Payment to City .....

ARTICLE 10 USE OF COMPANY ELECTRIC DISTRIBUTION POLES.....

- §10.1 City Use of Company Electric Distribution Poles.....
- §10.2 Existing Signs.....
- §10.3 Third Party Use of Company Facilities.....
- §10.4 City Use of Company Transmission Rights-of-Way.....
- §10.5 Emergencies .....

ARTICLE 11 UNDERGROUNDING OF OVERHEAD FACILITIES .....

- §11.1 Underground Electrical Lines.....
- §11.2 Underground Conversion at Expense of Company. ....
- §11.3 Undergrounding Performance .....
- §11.4 Audit of Underground Fund .....
- §11.5 Cooperation With Other Utilities .....
- §11.6 Planning and Coordination of Undergrounding Projects .....

ARTICLE 12 PURCHASE OR CONDEMNATION.....[PAGE #'S WILL BE IN FINAL]

    §12.1 City's Right to Purchase or Condemn.....

ARTICLE 13 MUNICIPALLY-PRODUCED UTILITY SERVICE.....

    §13.1 City Reservation.....

    §13.2 Franchise Not to Limit City's Rights.....

ARTICLE 14 ENVIRONMENT AND CONSERVATION.....

    §14.1 Environmental Leadership.....

    §14.2 Energy Conservation and Efficiency.....

    §14.3 Continuing Commitment.....

    §14.4 PUC Approval.....

ARTICLE 15 TRANSFER OF FRANCHISE.....

    §15.1 Consent of City Required.....

    §15.2 Transfer Fee.....

ARTICLE 16 CONTINUATION OF UTILITY SERVICE.....

    §16.1 Continuation of Utility Service.....

ARTICLE 17 INDEMNIFICATION AND IMMUNITY.....

    §17.1 City Held Harmless.....

    §17.2 Immunity.....

ARTICLE 18 BREACH.....

    §18.1 Non-Contestability.....

    §18.2 Breach.....

ARTICLE 19 AMENDMENTS.....

    §19.1 Proposed Amendments.....

    §19.2 Effective Amendments.....

ARTICLE 20 EQUAL OPPORTUNITY.....

    §20.1 Economic Development.....

    §20.2 Employment.....

    §20.3 Contracting.....

    §20.4 Coordination.....

ARTICLE 21 MISCELLANEOUS.....

    §21.1 No Waiver.....

    §21.2 Successors and Assigns.....

    §21.3 Third Parties.....

    §21.4 Notice.....

    §21.5 Examination of Records.....

    §21.6 Reliability Reports.....

    §21.7 List of Utility Property.....

    §21.8 Other Information.....

    §21.9 Payment of Taxes and Fees.....

§21.10 Conflict of Interest.....[PAGE #'S WILL BE IN FINAL]  
§21.11 Certificate of Convenience and Necessity.....  
§21.12 Authority.....  
§21.13 Severability.....  
§21.14 Force Majeure.....  
§21.15 Earlier Franchises Superseded.....  
§21.16 Titles Not Controlling.....  
§21.17 Applicable Law .....  
§21.18 Payment of Expenses Incurred by City in Relation to Franchise  
Agreement .....

## ARTICLE 1 DEFINITIONS

For the purpose of this franchise, the following words and phrases shall have the meaning given in this Article. When not inconsistent with context, words used in the present tense include the future tense, words in the plural include the singular, and words in the singular include the plural. The word "shall" is mandatory and "may" is permissive. Words not defined in this Article shall be given the meaning assigned to them in the regulations of the Colorado Public Utilities Commission, 4 C.C.R. 723-3, or if undefined in such regulations, their common and ordinary meaning.

- § 1.1 "City" refers to the City of Boulder, a municipal corporation of the State of Colorado.
- § 1.2 "City Council" or "Council" refers to the legislative body of the City.
- § 1.3 "City Facilities" refers to all facilities owned by the City including but not limited to buildings, structures, City-owned street lights, traffic signals, parking lots, parks and recreational facilities, and water, sewer, storm water, reclaimed water, telecommunication and transportation systems.
- § 1.4 "Code" refers to the Boulder Revised Code, 1981, as the same may be amended from time to time.
- § 1.5 "Company" refers to Public Service Company of Colorado d/b/a Xcel Energy and its successors and assigns, including affiliates or subsidiaries that undertake to perform any of the obligations under this franchise.
- § 1.6 "Company Facilities" refer to all facilities of the Company reasonably necessary to provide gas and electric service into, within and through the City, including but not limited to plants, works, systems, substations, transmission and distribution structures, lines, equipment, pipes, mains, conduit, transformers, underground lines, gas compressors, meters, meter reading devices, communication and data transfer equipment, control equipment, gas regulator stations, Company-owned street lights, wire, cables and poles.
- § 1.7 "Design and Construction Standards" refers to those design and construction standards adopted by the City, as the same may be amended from time to time.
- § 1.8 "Electric Gross Revenues" refers to those amounts of money that the Company receives from the sale or delivery of electricity in the City, after adjusting for refunds, net write-offs of uncollectible accounts, corrections, or regulatory adjustments. Regulatory adjustments include, but are not limited to, credits, surcharges, refunds, and pro-forma adjustments pursuant to federal or state regulation. "Electric Gross Revenues" shall exclude any revenue for the sale or delivery of electricity to the City.
- § 1.9 "Energy Conservation" refers to the decrease in energy requirements of specific customers during any selected time period, resulting in a reduction in end-use services.

- § 1.10 “Energy Efficiency” refers to the decrease in energy requirements of specific customers during any selected period with end-use services of such customers held constant.
- § 1.11 “Force Majeure” refers to the inability to undertake an obligation of this franchise due to a cause that could not be reasonably anticipated by a party or is beyond its reasonable control after exercise of best efforts to perform, including but not limited to fire, strike, war, riots, terrorist acts, acts of governmental authority, acts of God, floods, epidemics, quarantines, labor disputes, unavailability or shortages of materials or equipment or failures or delays in the delivery of materials.
- § 1.12 “Gross Revenues” refers to those amounts of money which the Company receives from the sale of gas and electricity within the City under rates authorized by the Public Utilities Commission, as well as from the transportation of gas to its customers within the City and from the use of Company facilities in Streets, ~~P~~ublic ~~E~~asements and Other City Property (unless otherwise preempted by applicable federal or state law), as adjusted for refunds, net write-offs of uncollectible accounts, corrections, or regulatory adjustments. Regulatory adjustments include, but are not limited to, credits, surcharges, refunds, and pro-forma adjustments pursuant to federal or state regulation. “Gross Revenues” shall exclude any revenues from the sale of gas or electricity to the City or the transportation of gas to the City.
- § 1.143 “Other City Property” refers to the surface, the air space above the surface and the area below the surface of any property owned or controlled by the City or hereafter held by the City, not including Streets or ~~P~~ublic ~~E~~asements, that are suitable locations for the placement of Company Facilities, as determined by the City in its sole discretion.
- § 1.145 “Private Project” refers to any project that is not covered by the definition of Public Project.
- ~~§ 1.16 “Public Easement” refers to a public interest in land owned by another person that entitles the public to a specific limited use or enjoyment of said land for the use or installation, construction, reconstruction, repair or maintenance of public infrastructure such as utilities, drainage systems or transportation improvements.~~
- § 1.175 “Public Project” refers to (1) any public work or improvement within the City that is wholly or beneficially owned by the City; or (2) any public work or improvement within the City where fifty percent (50%) or more of the funding is provided by any combination of the City, the federal government, the State of Colorado, any Colorado county, the Regional Transportation District, and the Urban Drainage and Flood Control District, but excluding all other entities established under Title 32 of the Colorado Revised Statutes.
- § 1.168 “Public Utilities Commission” or “PUC” refers to the Public Utilities Commission of the State of Colorado or such other state agency succeeding to the regulatory powers of the Public Utilities Commission.

§ 1.17 “Relocate,” “Relocating” or “Relocation” refers to any temporary or permanent removal, relocation, change or alteration in the position of any Company Facility in accordance with the terms of Section 6.8 of this franchise agreement.

§ 1.1918 “Residents” refer to all persons, businesses, industries, governmental agencies, including the City, and any other entity whatsoever, presently located or to be hereinafter located, in whole or in part, within the incorporated boundaries of the City.

§ 1.2019 “Street Lighting Agreement” refers to the Street Lighting and Traffic Signal Lighting Service Agreement entered into by the City and the Company contemporaneously with this franchise agreement

§ 1.2120 “Streets” or “City Streets” refers to the surface, the air space above the surface and the area below the surface of any City-dedicated streets, alleys, bridges, roads, lanes, and other public rights-of-way within the City, which are primarily used for ~~motorized vehicle~~vehicular traffic. Streets shall not include ~~P~~ublic ~~E~~asements or Other City Property.

§ 1.212 “Supporting Documentation” refers to all information necessary or reasonably required in order to allow the Company to design and construct any work performed under the provisions of this franchise.

§ 1.232 “Tariffs” refer to those tariffs of the Company on file and in effect with the PUC, as the same may be amended from time to time.

§ 1.243 “Traffic Facilities” refers to any City-owned or authorized traffic signal, traffic signage or other traffic control or monitoring device, equipment or facility, including all associated controls, connections and other support facilities or improvements, located in any Streets, ~~P~~ublic ~~E~~asements or Other City Property.

§ 1.254 “Utility Service” refers to the sale of gas or electricity to Residents by the Company, as well as the delivery of gas to Residents by the Company.

## ARTICLE 2 GRANT OF FRANCHISE

§ 2.1 Grant of Franchise.

A. Grant. The City hereby grants to the Company, subject to all conditions, limitations, terms, and provisions contained in this franchise agreement, the non-exclusive right to make reasonable use of City Streets, ~~P~~ublic ~~E~~asements and Other City Property as may be necessary to carry out the terms of this franchise agreement, subject to the applicable requirements and review process set forth in the Code and the Design and Construction Standards:

(1) To provide Utility Service to the City and to its Residents; and

(2) To acquire, purchase, construct, install, locate, maintain, operate, and extend into, within and through the City all Company Facilities reasonably necessary for the generation, production, manufacture, sale, storage, purchase, exchange, transmission, transportation and distribution of Utility Service within and through the City.

B. Street Lighting and Traffic Signal Lighting Service. The rights granted by this franchise encompass the nonexclusive right to provide street lighting service and traffic signal lighting service as directed by the City, and the applicable provisions of this franchise agreement shall apply with full and equal force to street lighting service and traffic signal lighting service provided by the Company. Wherever reference is made in this franchise agreement to the sale or provision of Utility Service, these references shall be deemed to include the provision of street lighting service and traffic signal lighting service. Conflicting provisions of this franchise agreement notwithstanding, street lighting service and traffic signal lighting service within the City shall be governed by applicable tariffs on file with the PUC and the terms of the Street Lighting Agreement.

C. Company Facilities on Other City Property. The City's grant to the Company of the right to locate Company Facilities in or on Other City Property shall be subject to (1) the Company's already having or first receiving from the City a revocable license, permit or other written agreement approving the location of such Company Facilities; and (2) the terms and conditions of such revocable license agreement, permit or other written agreement. The City shall not be required to grant the Company an easement for Company Facilities. Nothing in this subsection C. shall modify or extinguish pre-existing Company property rights. To the extent that the Company's use of Other City Property is not specifically addressed by separate license agreements, permits or other written agreements, but has otherwise been authorized by the City prior to the effective date of this franchise agreement, the Company may continue such use of Other City Property under the terms of this franchise agreement; provided, however, that such prior authorization does not include an authorization for the Company to increase the size or carrying capacity of Company Facilities or the location of Company Facilities on Other City Property without prior approval of the City in writing.

D. Conveyance of City Streets, Public Easements or Other City Property.

(1) In the event the City vacates, releases or sells, conveys, transfers or otherwise disposes of a City Street, or any portion of a public easement or Other City Property in which Company Facilities are located along with City utilities, the City shall reserve unto itself a public easement over that portion of the Street, public easement or Other City Property in which such utilities are located. The Company and the City shall work together to prepare the necessary legal description to effectuate such reservation.

(2) In the event the City vacates, releases, sells, conveys, transfers or otherwise disposes of a City Street, public easement or Other City Property and no City utilities are co-located with Company Facilities within such Street, public easement or Other City Property, the City agrees to use its best efforts not to finalize such conveyance until the

resulting owner has provided the Company with an easement for the existing Company Facilities. For the purposes of Section 6.8.A of this agreement, the land vacated, released, sold, conveyed, transferred or otherwise disposed of by the City shall no longer be deemed to be a Street, public easement or Other City Property from which the City may demand the Company temporarily or permanently Relocate Company Facilities at the Company's sole expense.

§ 2.2 Conditions and Limitations.

- A. Scope of Franchise. The grant of this franchise shall extend to all areas of the City as it is now or hereafter constituted; however, nothing contained in this franchise agreement shall be construed to authorize the Company to engage in activities other than the provision of Utility Service.
- B. Subject to City Usage. The right to make reasonable use of City Streets, ~~P~~ublic ~~E~~asements and Other City Property to provide Utility Service to the City and its Residents pursuant to the franchise is subject to and subordinate to any City usage of said Streets, ~~P~~ublic ~~E~~asements and Other City Property.
- C. Prior Grants Not Revoked. This grant is not intended to revoke any prior license, grant, or right to use the Streets, ~~p~~ublic ~~E~~asements and Other City Property and such licenses, grants or rights of use are hereby affirmed.
- D. Franchise Not Exclusive. The rights granted by this franchise agreement are not, and shall not be deemed to be, granted exclusively to the Company, and the City reserves the right to make or grant a franchise to any other person, firm, or corporation.

§ 2.3 Effective Date and Term.

- A. Term. This franchise shall take effect on \_\_\_\_\_, \_\_\_\_ and shall supersede any prior franchise grants to the Company by the City. This franchise shall terminate on \_\_\_\_\_, \_\_\_\_\_, unless extended by mutual consent.
- B. Execution. The Company shall execute this franchise agreement and deliver five (5) executed originals to the City Manager prior to the City formally scheduling the City's grant of a franchise to the Company for a vote of the registered electors of the City. Within forty-five (45) days after approval of the City's grant of a franchise by vote of the registered electors of the City, the Mayor of the City and other necessary or proper officials of the City are hereby authorized and directed to sign this franchise agreement in the name of the City, and the City Clerk is hereby authorized and directed to attest to the same under seal of the City, and to do all things necessary for the delivery of this franchise agreement and for fully carrying out the grant of the franchise.
- C. Condition Subsequent. Concurrently with this franchise agreement, the City and the Company have agreed to the terms of the Street Lighting Agreement. The Street Lighting Agreement shall be adopted by the City Council of the City of Boulder within

60 days of voter approval of the grant of the franchise. The Company shall signify its acceptance of the Street Lighting Agreement by executing the Street Lighting Agreement and delivering five (5) executed originals to the City Manager concurrently with its delivery of the executed originals of this franchise agreement. Failure to execute and deliver the Street Lighting Agreement to the City in accordance with this section shall render this franchise void and of no further force and effect.

### **ARTICLE 3 CITY POLICE POWERS**

§ 3.1 Police Powers. The City and the Company do not waive any of their rights under the statutes and Constitution of the State of Colorado and the United States, except as otherwise specifically set forth herein. The Company expressly acknowledges the City's right to adopt, from time to time, in addition to the provisions contained herein, such laws, including ordinances and regulations, as it may deem necessary in the exercise of its governmental powers. If the City considers making any substantive changes in its local codes or regulations that in the City's reasonable opinion will significantly impact the Company's operations in the City's Streets, ~~P~~ublic ~~E~~asements and Other City Property, it will make a good faith effort to advise the Company of such consideration; provided, however, that lack of notice shall not be justification for the Company's non-compliance with any applicable local requirements.

§ 3.2 Regulation of Streets, Public Easements and Other City Property. The Company expressly acknowledges the City's right to enforce regulations concerning the Company's access to or use of the Streets, ~~P~~ublic ~~E~~asements, and Other City Property, including requirements for permits.

§ 3.3 Compliance with Laws. The Company shall promptly and fully comply with all laws, regulations, permits and orders enacted or issued by the City and with all applicable federal, state and local laws, regulations, permits, and orders that relate to the terms and conditions of this franchise agreement or the City's grant of franchise to the Company. This provision shall not be interpreted to allow the City to make a determination of whether the Company is in compliance with federal and state laws, regulations, permits and orders. The parties expressly agree that a determination of compliance with federal and state laws, regulations, permits and orders shall reside exclusively with the judicial or regulatory body having jurisdiction over the subject matter.

### **ARTICLE 4 FRANCHISE FEE**

§ 4.1 Franchise Fee.

A. Fee. In partial consideration for the franchise, which provides for the Company's use of City Streets, ~~P~~ublic ~~E~~asements and Other City Property, which are valuable public properties acquired and maintained by the City at great expense to its Residents, and in recognition that the grant to the Company of the use of City Streets, ~~P~~ublic ~~E~~asements and Other City Property is a valuable right, the Company shall pay the City a

sum equal to three percent (3%) of all Gross Revenues. The Company shall collect this fee from a surcharge upon Residents who are customers of the Company.

B. Obligation in Lieu of Fee. In the event that the franchise fee specified herein is declared void for any reason by a court of competent jurisdiction, unless prohibited by law, the Company shall be obligated to pay the City, at the same times and in the same manner as provided in the franchise, an aggregate amount equal to the amount which the Company would have paid as a franchise fee as partial consideration for use of the City Streets, ~~P~~ublic ~~E~~asements and Other City Property. To the extent required by law, the Company shall collect the amounts agreed upon through a surcharge upon Utility Service provided to Residents, not including the City.

C. Changes in Utility Service Industries.

(1) The City and the Company recognize that utility service industries are the subject of restructuring initiatives by legislative and regulatory authorities, and are also experiencing other changes as a result of mergers, acquisitions, and reorganizations. Some of such initiatives and changes have or may have an adverse impact upon the franchise fee revenues provided for herein. In recognition of the length of the term of this franchise, the Company agrees that in the event of any such initiatives or changes and to the extent permitted by law, upon receiving a written request from the City, the Company will cooperate with and assist the City in modifying this franchise agreement to assure that the City receives an amount in franchise fees or some other form of compensation that is the same amount of franchise fees that would have been paid to the City pursuant to this franchise agreement.

(2) The Company and the City recognize that many aspects of the gas and electric utility business are currently the subject of discussion, examination and inquiry by different segments of the industries, the PUC and the Colorado General Assembly and that these activities may ultimately result in fundamental changes in the way the Company conducts its business and meets its service obligations. In recognition of the present state of uncertainty respecting these matters, the Company and the City agree, upon the request of the other during the term of this franchise agreement, to meet with the other and discuss in good faith whether it would be appropriate, in view of developments of the kind referred to above during the term of this franchise agreement, to amend this franchise agreement or to enter into separate, mutually satisfactory arrangements to effect a proper accommodation of any such developments. However, nothing contained in this section shall be deemed to require either Party to consent to any amendment proposed by the other party.

D. Utility Service Provided to City. No franchise fee shall be charged to the City for Utility Service provided to the City for its own consumption, including street lighting service and traffic signal service.

§ 4.2 Remittance Of Franchise Fee.

A. Remittance Schedule. Franchise fee revenues shall be remitted by the Company to the City as directed by the City in monthly installments not more than thirty (30) days following the close of each month.

B. Correction of Franchise Fee Payments. In the event that either the City or the Company discovers that there has been an error in the calculation of the franchise fee payment to the City, it shall provide written notice to the other party within a reasonable time after discovering the error. If the party receiving written notice of error does not agree with the written notice of error, that party may challenge the written notice of error pursuant to Section 4.2.D of this franchise agreement; otherwise, the error shall be corrected in the next monthly payment. However, if the error results in an overpayment of the franchise fee to the City, and said overpayment is in excess of Five Thousand Dollars (\$5,000.00), credit for the overpayment shall be spread over the same period of time during which the error occurred. All franchise fee underpayments shall be corrected in the next monthly payment, together with interest computed at the rate set by the PUC for customer security deposits held by the Company, from the date when due until the date paid. In no event shall either party be required to fund or refund any overpayment or underpayment made as a result of a Company error which occurred more than five (5) years prior to the discovery of the Company error.

C. Audit Of Franchise Fee Payments.

(1) Every three (3) years commencing at the end of the third year of this franchise, the Company shall conduct an internal audit to investigate and determine the correctness of the franchise fee paid to the City. Such audit shall be limited to the previous three (3) calendar years. The Company shall provide a written report to the City Manager containing the audit findings regarding the franchise fee paid to the City for the previous three (3) calendar years.

(2) If the City disagrees with the results of the audit, and if the parties are not able to informally resolve their differences, the City may conduct its own audit at its own expense, and the Company shall cooperate fully, including but not necessarily limited to, providing the City's auditor with all information reasonably necessary to complete the audit.

(3) If the results of a City audit conducted pursuant to subsection C.(2) concludes that the Company has underpaid the City by two percent (2%) or more, in addition to the obligation to pay such amounts to the City, the Company shall also pay all costs of the audit.

D. Fee Disputes. Either party may challenge any written notification of error as provided for in Section 4.2.B of this franchise agreement by filing a written notice to the other party within thirty (30) days of receipt of the written notification of error. The written notice shall contain a summary of the facts and reasons for the party's notice.

The parties shall make good faith efforts to resolve any such notice of error by any reasonable means, including the sharing of relevant documents, before initiating any formal legal proceedings for the resolution of such error.

E. Reports. Upon written request by the City, but not more than once per year, the Company shall supply the City with reports, in such formats and providing such details as reasonably requested by the City, of all suppliers of utility service that utilize Company Facilities to sell or distribute utility service to Residents and the names and addresses of each such supplier.

§ 4.3 Franchise Fee Payment Not In Lieu of Permit or Other Fees. Payment of the franchise fee does not exempt the Company from any other lawful tax or fee imposed generally upon persons doing business within the City, including any fee for a revocable license, a right-of-way permit, a street closure permit, an excavation permit, a street cut permit, or other lawful permits hereafter required by the City, except that the franchise fee provided for herein shall be in lieu of any occupation or similar tax for the use of City Streets, ~~P~~ublic ~~E~~asements and Other City Property.

§ 4.4 Change of Franchise Fee.

A. The Company shall report to the City, within sixty days, the execution or change of any franchise agreement under which a municipality receives a franchise fee greater than is provided for herein or in which the undergrounding fund percentage is greater than established in this Article.

B. Once each year the City Council may, by ordinance, change the franchise fee and the undergrounding fund percentage established in Article 11, below, to that provided under any municipal franchise entered into by the Company in Colorado, after first giving thirty days' written notice to the Company.

## ARTICLE 5 ADMINISTRATION OF FRANCHISE

§ 5.1 City Designee. The City shall designate in writing to the Company an official having full power and authority to administer the franchise. The City may also designate one or more City representatives to act as the primary liaison with the Company as to particular matters addressed by this franchise agreement and shall provide the Company with the name and telephone numbers of said City representatives. The City may change these designations by providing written notice to the Company. The City's designee shall have the right, at all reasonable times, to inspect any Company Facilities in City Streets, ~~P~~ublic ~~E~~asements and Other City Property.

§ 5.2 Company Designee. The Company shall designate a representative to act as the primary liaison with the City and shall provide the City with the name, address, and telephone number for the Company's representative under this franchise agreement. The Company may change its designation by providing written notice to the City. The City shall use this liaison to communicate with the Company regarding Utility Service and related service needs for City

Facilities, unless it is appropriate for the City to communicate with another Company representative regarding a particular issue.

§ 5.3 Coordination of Work.

A. The Company agrees to coordinate its activities in City Streets, ~~P~~ublic ~~E~~asements and Other City Property with the City. The City and the Company shall meet semi-annually upon the written request of the City designee to exchange their respective short-term and long-term forecasts and/or work plans for construction and other similar work which may affect City Streets, ~~P~~ublic ~~E~~asements, Other City Property, or City Facilities, including but not limited to any planned City street paving projects, transportation projects, utilities projects or other capital improvement projects, and to share information regarding anticipated projects which will require ~~r~~elocation of Company Facilities in City Streets, ~~P~~ublic ~~e~~asements or Other City Property. In addition, the City and the Company shall exchange additional information with a view towards coordinating their respective activities in those areas where such coordination may prove beneficial and so that the City will be assured that all provisions of this franchise agreement, building and zoning codes, and air and water pollution regulations are complied with, and that aesthetic and other relevant planning principles have been given due consideration. Meetings shall be held at a greater frequency if either party deems it necessary.

B. In addition to the foregoing meetings, the Company agrees to provide sufficient notice to the City whenever the Company initiates plans to significantly upgrade its infrastructure, including without limitation the placement of utility poles or other Company Facilities in order to allow for City input and consultation on Company work plans prior to the time that said work plans are finalized so that the beneficial coordination described in A., above, may occur.

**ARTICLE 6**  
**SUPPLY, CONSTRUCTION, AND DESIGN**

§ 6.1 Purpose. The Company acknowledges the critical nature of the municipal services performed or provided by the City to the Residents which require the Company to provide prompt and reliable Utility Service and to perform related services for City Facilities. The City and the Company wish to provide for certain terms and conditions under which the Company will provide Utility Service and perform related services for the City in order to facilitate and enhance the operation of City Facilities. They also wish to provide for other processes and procedures related to the provision of Utility Service to the City.

§ 6.2 Supply. Subject to the jurisdiction of the PUC, the Company shall take all reasonable and necessary steps to provide a sufficient supply of gas and electricity to Residents.

§ 6.3 Service to City Facilities.

A. Transport Gas. To the extent the City is or elects to become a gas transport customer of the Company, the Company shall transport natural gas purchased by the City for use in City Facilities pursuant to separate contracts with the City.

B. Transport Electricity. To the extent the City is permitted by law to become and elects to become an electric transport customer of the Company, the Company shall transport electricity purchased by the City for use in City Facilities pursuant to separate contracts with the City.

§ 6.4 Restoration of Service.

A. Notification. The Company shall provide to the City daytime and nighttime telephone numbers of a designated Company representative from whom the City designee may obtain status information from the Company on a twenty-four (24) hour basis concerning interruptions of Utility Service in any part of the City.

B. Restoration. In the event the Company's gas system or electric system, or any part thereof, is partially or wholly destroyed or incapacitated, the Company shall use due diligence to restore such systems to satisfactory service within the shortest practicable time, or provide a reasonable alternative to such system if the Company elects not to restore such system.

§ 6.5 Obligations Regarding Company Facilities.

A. Company Facilities. All Company Facilities within City Streets, ~~P~~public ~~E~~asements and Other City Property shall be maintained in good repair, appearance and condition.

B. Company Work within the City. All work within City Streets, ~~P~~public ~~E~~asements and Other City Property performed or caused to be performed by the Company shall be done:

- (1) In a high-quality manner;
- (2) In a timely and expeditious manner;
- (3) In a manner which minimizes inconvenience to the public;
- (4) In a cost-effective manner, which may include the use of qualified contractors;
- (5) In accordance with all applicable laws, ordinances, and regulations; and
- (6) In accordance with requirements set forth in the City's Code, Design and Construction Standards, and all applicable licenses, permits and written agreements between the parties.

C. No Interference With City Facilities. Subject to federal and state laws and regulations regarding vegetation management programs to which the Company is subject,

Company Facilities shall not interfere with any City Facilities, or other City uses of the Streets, ~~P~~ublic ~~E~~asements or Other City Property. Company Facilities shall be installed and maintained in City Streets, ~~P~~ublic ~~E~~asements and Other City Property so as to minimize interference with other property, trees, and other improvements and natural features in and adjoining the Streets, ~~p~~ublic ~~e~~asements and Other City Property.

D. Permit and Inspection. The installation, renovation, and replacement of any Company Facilities in the City Streets, ~~P~~ublic ~~E~~asements or Other City Property by or on behalf of the Company shall be subject to permit, inspection and approval by the City. Such permitting, inspection and approval may include, without limitation, the following matters: location of Company Facilities, cutting and trimming of trees and shrubs, and disturbance of pavement, sidewalks, and surfaces of City Streets, ~~P~~ublic ~~E~~asements or Other City Property. The Company agrees to cooperate with the City in conducting inspections and shall promptly perform any remedial action lawfully required by the City pursuant to any such inspection.

E. Compliance. The Company, and all of its contractors and subcontractors, shall comply with the requirements of the Code, the Design and Construction Standards and all City laws, ordinances, regulations, permits, and standards, including without limitation, requirements of all building and zoning codes, and requirements regarding curb and pavement cuts, excavating, digging, and other construction activities. The Company shall assure that its contractors working in City Streets, ~~P~~ublic ~~E~~asements and Other City Property hold the necessary licenses and permits required by law, including City licenses to work in the public right-of-way.

F. Increase in Voltage. Unless otherwise provide by law, the Company shall reimburse the City for the cost of upgrading the electrical system or facility of any City building or facility that uses Utility Service where such upgrading is solely caused or occasioned by the Company's decision to increase the voltage of delivered electrical energy. This provision shall not apply to voltage increases requested by the City. The Company shall not be required to reimburse the City for costs caused by voltage increases if the voltage increases are requested by the City, if they are required by law, or if by lawful order the PUC determines that the Company shall not be responsible for the cost of upgrading the electrical system or facility of any City building or facility.

§ 6.6 Excavation and Construction. The Company shall be responsible for obtaining, paying for, and complying with all applicable permits including, but not limited to, right-of-way, excavation, street closure and street cut permits, in the manner required by the laws, ordinances, and regulations of the City. Although the Company shall be responsible for obtaining and complying with the terms of such permits when performing ~~r~~elocations requested by the City under Section 6.8 of this franchise agreement and undergrounding requested by the City under Article 11 of this franchise agreement, the City will not require the Company to pay the fees charged for such permits

§ 6.7 Restoration. When the Company does any work in or affecting the City Streets, it shall, at its own expense, promptly remove therefrom any Company-placed obstructions and restore such City Streets or Other City Property to a condition that meets applicable City standards, including the Design and Construction Standards. If weather or other conditions do not permit the complete restoration required by this Section, the Company may with the approval of the City, temporarily restore the affected City Streets, Public Easements or Other City Property, provided that such temporary restoration is at the Company's sole expense and provided further that the Company promptly undertakes and completes the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration. Upon the request of the City, the Company shall restore the Streets, Public Easements or Other City Property to a better condition than existed before the work was undertaken, provided that the City shall be responsible for any additional costs of such restoration.

A. If the Company fails to promptly restore the City Streets, Public Easements or Other City Property when there is no immediate public health and safety issue, upon giving fourteen (14) days written notice to the Company, the City may restore such City Streets, Public Easements or Other City Property or remove the Company-placed obstruction therefrom. The Company shall be responsible for the actual cost incurred by the City to restore such City Streets, Public Easements or Other City Property or to remove any Company-placed obstructions and shall reimburse the City within thirty (30) days of being billed for such work. In the course of its restoration of City Streets, Public Easements or Other City Property under this Section, the City shall not perform work on Company Facilities unless specifically authorized by the Company in writing on a project by project basis and subject to the terms and conditions agreed to in such authorization.

B. If the Company fails to promptly restore the City Streets, Public Easements or Other City Property as required by this Section, and if, in the reasonable discretion of the City immediate action is required for the protection of public health and safety, the City may restore such City Streets, Public Easements or Other City Property or remove the obstruction therefrom. However, in the course of its restoration of City Streets, Public Easements or Other City Property under this sub-section, the City shall not perform work on Company Facilities unless specifically authorized by the Company in writing on a project by project basis and subject to the terms and conditions agreed to in such authorization.

§ 6.8 Relocation of Company Facilities.

A. Relocation Obligation. The Company shall ~~temporarily or permanently remove, relocate, change or alter the position of~~ Relocate any Company Facility in City Streets, Public Easements or Other City Property at no cost to the City whenever the City shall determine that such ~~removal, relocation, change or alteration~~ Relocation is necessary for the completion of any Public Project. If such ~~Relocation of Company Facilities~~ Relocation is necessary due to lack of space for Company Facilities within the Public Street, Public Easement or Other City Property after City Facilities are installed, then the Company shall be required to ~~Relocate~~ Relocate the Company Facilities at its own cost and expense,

including the acquisition of any necessary real property right to accommodate such ~~relocated~~ Company Facilities. For all ~~relocations~~, the Company and the City agree to cooperate on the location and ~~relocation~~ of the Company Facilities in the City Streets, ~~public easements~~ or Other City Property in order to achieve ~~relocation~~ in the most efficient and cost-effective manner possible. Notwithstanding the foregoing, once the Company has ~~relocated~~ any Company Facility at the City's direction, if the City requests that the same Company Facility be ~~relocated~~ within two years from the completion (as such completion is required by Section 6.8.F., below) of the first Relocation, the subsequent ~~relocation~~ shall not be at the Company's expense. Nothing provided herein shall prevent the Company from obtaining reimbursement of its ~~relocation~~ costs from third parties. ~~The cost responsibility for relocations of Company Facilities from easements that are ten feet in width or less and are identified on a plat simply as "Public Utilities" shall be determined on a case by case basis, unless the City and the Company otherwise agree in writing.~~

B. Relocation from Company Property.

(1) If the City requests that the Company relocate Company Facilities from property that the Company owns in fee, or in which the Company has another real property interest that is superior to all City real property interests, the Company shall not be responsible for the costs of such relocation. Nothing herein contained shall be construed to require a Relocation of any Company Facilities from property (a) owned by the Company in fee; (b) in which the Company has a private easement; or (c) in which the Company has another type of privately-held property right. In the event of a conflict between the property interests of the City and the property interests of the Company, the parties agree that principles of Colorado state property law shall control.

(2) Notwithstanding the requirements of Section 6.8.A., above, if Company Facilities are located within a public easement identified on a plat as "Public Utilities," "Utilities," or words of similar meaning or intent and said easement does not contain any City utilities, the Company shall not be responsible for the cost of Relocating Company Facilities from such easement. However, if (a) the City determines that the Relocation of Company Facilities is necessary for the completion of a Public Project; and (b) if the City is of the opinion that the originally intended purpose of such easement included the use contemplated by the Public Project even though City utilities are not presently located in such easement, then the City and the Company shall meet to discuss the originally intended purpose of such easement and, based on that intended purpose, shall determine at that time whether the City or the Company or both shall pay to Relocate the Company Facilities. The parties agree that principles of Colorado state property law shall control in determining the intended purpose of the easement.

C. Private Projects. Notwithstanding anything to the contrary herein, the Company shall not be responsible for the expenses of any relocation required by Private Projects, and the Company has the right to require the payment of estimated relocation expenses from the affected party or parties before undertaking such relocation.

D. Relocation Performance. The Relocations set forth in Section 6.8.A of this franchise agreement shall be completed within a reasonable time, not to exceed 90 days from the later of the date on which the City designee requests in writing that the Relocation commence, or the date when the Company is provided all Supporting Documentation. The City shall provide sufficient advance notice to the Company to provide the Company at least the 90 day notice period set forth above, in order to allow the Company adequate time to comply with all applicable City code and permit requirements. Subject to Section 6.8.E, below, the Company shall be entitled to an extension of time to complete a Relocation where the Company's performance was delayed due to Force Majeure or the failure of the City to provide Supporting Documentation. The Company has the burden of presenting evidence to reasonably demonstrate the basis for the delay. Upon request of the Company, the City may also grant the Company reasonable extensions of time for good cause shown and the City shall not unreasonably withhold any such extension.

E. City Revision of Supporting Documentation. The parties acknowledge that in order to prepare Supporting Documentation, the City may be required to rely upon information from the Company regarding the type and location of Company Facilities in the area. Any revision by the City of Supporting Documentation provided to the Company that causes the Company to substantially redesign and/or change its plans regarding facility Relocation shall be deemed good cause for a reasonable extension of time to complete the Relocation under the franchise agreement unless the information provided by the Company was the cause of the City's need to revise the Supporting Documentation. Revisions necessitated by errors in information provided to the Company by the City shall be excluded from Company-caused revisions of the Supporting Documentation.

F. Completion. Each such Relocation shall be deemed complete only when the Company actually Relocates the Company Facilities, restores the Relocation site in accordance with Section 6.7 of this franchise agreement or as otherwise agreed with the City, and removes from the site or properly abandons on site all unused facilities, equipment, material and other impediments.

G. Scope of Obligation. The Relocation obligations set forth in this Section 6.8 shall only apply to Company Facilities located in City Streets, Public Easements or Other City Property.

H. Underground Relocation. Underground facilities shall be Relocated underground. Above-ground facilities shall be placed above ground unless the Company is paid for the incremental amount by which the underground cost would exceed the above ground cost of Relocation, or the City requests that such additional incremental cost be paid out of available funds under Article 11 of this franchise agreement.

I. Coordination.

(1) When requested in writing by the City or the Company, representatives of the City and the Company shall meet to share information regarding anticipated projects which will require ~~re~~location of Company Facilities in City Streets, ~~Public E~~asements or Other City Property. Such meetings shall be for the purpose of minimizing conflicts where possible and to facilitate coordination with any timetable established by the City for any Public Project.

(2) The City shall make reasonable best efforts to provide the Company with two (2) years advance notice of any planned street repaving. The Company shall make reasonable best efforts to complete any necessary or anticipated repairs or upgrades to Company Facilities that are located underneath the Streets within the two-year period if practicable.

J. Proposed Alternatives or Modifications. Upon receipt of written notice of a required ~~re~~location, the Company may propose an alternative to or modification of the Public Project requiring the ~~re~~location in an effort to mitigate or avoid the impact of the required ~~re~~location of Company Facilities. The City shall in good faith review the proposed alternative or modification. The City's acceptance of the proposed alternative or modification shall be at the sole discretion of the City. In the event the City accepts the proposed alternative or modification, the Company agrees to promptly compensate the City for all additional costs, expenses or delay that the City reasonably determines resulted from the implementation of the proposed alternative.

§ 6.9 Service To New Areas. If the territorial boundaries of the City are expanded during the term of the franchise, the Company shall, to the extent permitted by law, extend service to Residents in the expanded area at the earliest practicable time if the expanded area is within the Company's PUC-certificated service territory.

§ 6.10 City Not Required to Advance Funds. Upon receipt of the City's authorization for billing and construction, the Company shall install Company Facilities to provide Utility Service to the City as a customer, without requiring the City to advance funds prior to construction. The City shall pay for the installation of Company Facilities once completed in accordance with Company Tariffs.

§ 6.11 Technological Improvements. The Company shall use its best efforts to incorporate, as soon as practicable, technological advances in its equipment and service within the City when such advances are technically and economically feasible, and are safe and beneficial to the City and its Residents.

**ARTICLE 7  
RELIABILITY**

§ 7.1 Reliability. The Company shall install, operate, maintain, relocate and replace Company Facilities efficiently and economically and in accordance with the high standards and best

systems, methods, and skills consistent with the provision of adequate, safe, and reliable Utility Service.

§ 7.2 Franchise Performance Obligations. The Company recognizes that, as part of its obligations and commitments under this franchise agreement, the Company shall carry out each of its performance obligations in a timely, expeditious, efficient, economical, and workmanlike manner.

§ 7.3 Reliability Reports. Upon written request, the Company shall provide the City with a report regarding the reliability of Company Facilities and Utility Service.

## ARTICLE 8 COMPANY PERFORMANCE OBLIGATIONS

§ 8.1 New or Modified Service to City Facilities. In providing new or modified Utility Service to City Facilities, the Company agrees to perform as follows:

A. Performance. The Company shall complete each project requested by the City within a reasonable time. The Parties agree that a reasonable time shall not exceed one hundred eighty (180) days from the date upon which the City designee makes a written request and provides the required Supporting Documentation for all Company Facilities other than Traffic Facilities as described in this section. The Company shall notify the City within ten (10) days of receipt of the request if the Supporting Documentation is insufficient to complete the project. The Company shall be entitled to an extension of time to complete a project where the Company's performance was delayed due to Force Majeure. Upon request of the Company, the City may also grant the Company reasonable extensions of time for good cause shown and the City shall not unreasonably withhold any such extension.

B. City Revision of Supporting Documentation. In order to prepare the Supporting Documentation, the City may be required to rely upon information from the Company regarding the type and location of Company Facilities in the area. Any revision by the City of Supporting Documentation provided to the Company that causes the Company to substantially redesign and/or change its plans regarding new or modified service to City facilities shall be deemed good cause for a reasonable extension of time to complete its performance, unless the information provided by the Company was the cause of the City's need to revise the Supporting Documentation.

C. Completion/Restoration. Each such project shall be complete only when the Company actually provides the service installation or modification required, restores the project site in accordance with Section 6.7 of the franchise agreement or as otherwise agreed upon with the City and removes from the site or properly abandons on site any unused facilities, equipment, material and other impediments.

§ 8.2 Adjustments to Company Facilities. The Company shall perform adjustments to Company Facilities, including raising or lowering manholes and other appurtenances in Streets,

Public Easements and Other City Property, to accommodate City maintenance, repair and paving operations at no cost to the City. At the City's request, the Company shall provide manhole extension rings to the City and/or City's contractor for installation directly behind paving operations whenever this method for adjustment is deemed appropriate by the Company. In providing such adjustments to Company Facilities, the Company agrees to perform as follows:

A. Performance. The Company shall complete each requested adjustment within a reasonable time, not to exceed thirty (30) days from the date upon which the City makes a written request and provides to the Company all information reasonably necessary to perform the adjustment. The Company shall be entitled to an extension of time to complete an adjustment where the Company's performance was delayed due to Force Majeure. Upon request of the Company, the City may also grant the Company reasonable extensions of time for good cause shown and the City shall not unreasonably withhold any such extension.

B. Completion/Restoration. Each such adjustment shall be complete only when the Company actually adjusts the Company Facility to accommodate the City operations in accordance with City instructions.

C. Coordination. As requested by the City or the Company, representatives of the City and the Company shall meet regarding anticipated street maintenance operations which will require such adjustments to Company Facilities in Streets, Public Easements or Other City Property. Such meetings shall be for the purpose of coordinating and facilitating performance under this Section.

### § 8.3 Third Party Damage Recovery.

A. Damage to Company Interests. If any individual or entity damages any Company Facilities that the Company is responsible to repair or replace, then, to the extent permitted by law, the City will notify the Company within 45 days after the City has knowledge of any such incident and will provide to the Company within a reasonable time all pertinent information within its possession regarding the incident and the damage, including the identity of the responsible individual or entity.

B. Damage to City Interests. If any individual or entity damages any Company Facilities for which the City is obligated to reimburse the Company for the cost of the repair or replacement of the damaged facility, to the extent permitted by law the Company will notify the City within 45 days after the Company has knowledge of any such incident and will provide to the City within a reasonable time all pertinent information within its possession regarding the incident and the damage, including the identity of the responsible individual or entity.

C. Meeting. The Company and the City agree to meet periodically, upon written request of either party, for the purpose of developing, implementing, reviewing, improving and/or modifying mutually beneficial procedures and methods for the efficient gathering and transmittal of information useful in recovery efforts against third parties for damaging Company Facilities.

**ARTICLE 9  
BILLING AND PAYMENT**

§ 9.1 Billing for Utility Services.

A. Unless otherwise provided in its tariffs, the rules and regulations of the PUC, or the Public Utilities Law, the Company shall render bills monthly to the offices of the City for Utility Service and other related services for which the Company is entitled to payment and for which the City has authorized payment.

B. Billings for Utility Service rendered during the preceding month, except for billings pursuant to the Street Lighting Agreement which shall be governed by the terms of the Street Lighting Agreement, shall be sent to the person(s) designated by the City and payment for same shall be made pursuant to the Tariffs. Billings for services other than Utility Service rendered during the preceding months, shall be sent to the person designated by the City to receive such bill and payment for same shall be made within thirty (30) days of receipt.

C. Unless otherwise requested by the City, the Company shall provide all billings and any underlying support documentation reasonably requested by the City in an editable and manipulable electronic format that is acceptable to the Company and the City.

D. The Company agrees to meet with the City designee at least annually for the purpose of developing, implementing, reviewing, and/or modifying mutually beneficial and acceptable billing procedures, methods, and formats which may include, without limitation, electronic billing and upgrades or beneficial alternatives to the Company's current most advanced billing technology, for the efficient and cost effective rendering and processing of such billings submitted by the Company to the City.

§ 9.2 Payment to City. If the City determines after written notice to the Company that the Company is liable to the City for payments, costs, expenses or damages of any nature, then subject to the Company's right to challenge such determination, the City may deduct all monies due and owing the City from any other amounts currently due and owing the Company. Upon receipt of such written notice, the Company may request a meeting between the Company's designee and a designee of the City Manager to discuss such determination. The City agrees to attend such a meeting. As an alternative to such deduction, the City may bill the Company for such assessment(s), in which case the Company shall pay each such bill within thirty (30) days of the date of receipt of such bill. If the Company challenges the City determination of liability, the City shall make such payments pursuant to the Company's tariffs until the challenge has been finally resolved.

**ARTICLE 10  
USE OF COMPANY ELECTRIC DISTRIBUTION POLES**

§ 10.1 City Use of Company Electric Distribution Poles. The City shall be permitted to make use of Company electric distribution poles in the City at no cost to the City for the placement of City equipment or facilities necessary to serve a legitimate police, fire, emergency, public safety

or traffic control purpose, or for any other purpose consistent with the City's police powers. The City will notify the Company in advance and in writing or by electronic mail of its intent to use Company electric distribution poles and the nature of such use unless it is impracticable to provide such advance notice because of emergency circumstances, in which event the City will provide such notice as soon as practicable. The City shall be responsible for costs associated with modifications to Company electric distribution poles to accommodate the City's use of such Company electric distribution poles and for any electricity used. No such use of Company electric distribution poles shall be required if it would constitute a safety hazard or would interfere with the Company's use of Company electric distribution poles. Any such City use must comply with the National Electric Safety Code and all other applicable laws, rules and regulations.

§ 10.2 Existing Signs. The City shall not be required to remove its existing signs, equipment or facilities from Company electric distribution poles, unless the Company determines after consultation with the City that attachment of specific equipment or facilities on specific poles creates a safety hazard or interferes with the Company's use of its those poles. If after such determination the City is required to remove its existing equipment or facilities from those poles, the Company shall allow the City ten (10) days from the date of written notice, including by electronic mail, within which to remove its equipment or facilities. If the City fails to remove the equipment or facilities, the Company may perform the removal at the City's sole expense.

§ 10.3 Third Party Use of Company Facilities. If requested in writing by the City, the Company may allow other companies who hold franchises, or otherwise have obtained consent from the City to use the Streets, ~~P~~ublic ~~E~~asements or Other City Property to utilize Company electric distribution poles for the placement of their facilities upon approval by the Company and agreement upon reasonable terms and conditions including payment of fees established by the Company. No such use shall be permitted if it would constitute a safety hazard or would interfere with the Company's use of Company Facilities. The Company shall not be required to permit third party use of Company distribution facilities for the provision of utility service except as otherwise required by law.

§ 10.4 City Use of Company Transmission Rights-of-Way. The Company shall offer to grant to the City use of transmission rights-of-way which it now, or in the future, owns in fee within the City for trails, parks and open space on terms comparable to those offered to other municipalities; provided, however, that the Company shall not be required to make such an offer in any circumstance where such offer would constitute a safety hazard or would interfere with the Company's use of the transmission right-of-way. In order to exercise this right, the City must make specific written request to the Company for any such use

§ 10.5 Emergencies. Upon written request, the Company shall assist the City in developing an emergency management plan. In the case of any emergency or disaster, the Company shall, upon verbal request of the City, make available Company Facilities for emergency use during the emergency or the disaster period. Such use of Company Facilities shall be of a limited duration and will only be allowed if the use does not interfere with the Company's own use of Company Facilities.

**ARTICLE 11**  
**UNDERGROUNDING OF OVERHEAD FACILITIES**

§ 11.1 Undergrounding of Electrical Lines. The Company shall place all newly constructed electrical distribution lines in newly developed areas underground in accordance with applicable laws, regulations and orders.

§ 11.2 Underground Conversion at Expense of Company.

A. Underground Fund. The Company shall budget and allocate an annual amount, equivalent to one percent (1%) of the preceding year's Electric Gross Revenues (the "Fund"), for the purpose of undergrounding existing overhead distribution facilities in the City, as may be requested by the City. Except as provided in §Section 6.98.H, no relocation expenses which the Company would be required to expend pursuant to Article 6 of this franchise agreement shall be charged to this Fund.

B. Unexpended Portion and Advances. Any unexpended portion of the Fund shall be carried over to succeeding years and, in addition, upon request by the City, the Company agrees to expend amounts anticipated to be available under the preceding paragraph for up to three (3) years in advance. Any amounts so expended shall be credited against amounts to be expended in succeeding years. Any Fund balance accumulated under any prior franchise shall be carried over to this franchise. The City shall have no vested interest in the Fund and any monies in the Fund not expended at the expiration or termination of this franchise shall remain the property of the Company. At the expiration or termination of this franchise, the Company shall not be required to underground any existing overhead facilities under this Article, but may do so in its sole discretion.

C. System-wide Undergrounding. If, during the term of this franchise, the Company should receive authority from the PUC to undertake a system-wide program or programs of undergrounding its electric distribution facilities, the Company will budget and allocate to the program of undergrounding in the City such amount as may be determined and approved by the PUC, but in no case shall such amount be less than the one percent (1%) of annual Electric Gross Revenues provided above.

D. City Requirement to Underground. In addition to the provisions of this Article, the City may require any above ground Company Facilities to be moved underground at the City's expense.

§ 11.3 Undergrounding Performance. Upon receipt of a written request from the City, the Company shall, to the extent of monies available in the Fund and as otherwise provided herein, underground Company Facilities in accordance with the procedures set forth in this Section.

A. Estimates. Promptly upon receipt of an undergrounding request from the City and the Supporting Documentation necessary for the Company to design the undergrounding

project, the Company shall prepare a detailed, good faith cost estimate of the anticipated actual cost of the requested project for the City to review and, if acceptable to the City, the City will issue a project authorization. The Company shall notify the City within ten (10) days of receipt of the request if the Supporting Documentation is insufficient to prepare the cost estimate for the project. The City and the Company agree to meet during the period when the Company is preparing its estimate to discuss all aspects of the project toward the end of enabling the Company to prepare an accurate cost estimate. At the City's request, the Company will provide all documentation that forms the basis of the estimate. The Company will not proceed with any requested project until the City has provided a written acceptance of the Company's estimate and authorized the Company to proceed with the project. The Company's cost estimate shall be void unless accepted by the City within sixty (60) days after it has been transmitted to the City.

B. Performance. The Company shall have a reasonable time to design and complete each undergrounding project requested by the City, which may be fewer than but shall not exceed two hundred forty (240) days after it receives a written request from the City designee and all Supporting Documentation. The City shall be permitted a sixty (60) day period in which to review the Company's estimate and designs, which shall toll<sup>1</sup> the running of the 240-day period. The City and the Company shall agree to a longer completion date when required for large scale undergrounding projects. The Company shall be entitled to an extension of time to complete each undergrounding project where the Company's performance was delayed due to a Force Majeure condition. Upon written request of the Company, the City may also grant the Company reasonable extensions of time for good cause shown and the City shall not unreasonably withhold any such extension.

C. City Revision of Supporting Documentation. In order to prepare the Supporting Documentation, the City may rely upon information from the Company regarding the type and location of Company Facilities in the area. Any revision by the City of Supporting Documentation provided to the Company that causes the Company to substantially redesign and/or change its plans regarding an undergrounding project shall be deemed good cause for a reasonable extension of time to complete the undergrounding project under the franchise, unless the information provided by the Company was not the cause of the City's need to revise the Supporting Documentation.

D. Project Management. Upon the City's request that the Company underground distribution facilities using the Fund, the Company and the City shall each assign a project manager to represent it during the undergrounding project. The City's project manager shall be identified at the time it submits its Supporting Documentation for the project. The Company's project manager shall be identified during the design phase of the project. The project managers, along with identified support staff, shall meet bi-weekly during construction, unless the parties agree otherwise, to review the progress of the undergrounding project, project costs, changes and projected completion dates and cost. The project managers shall be accessible throughout the duration of the undergrounding project.

---

<sup>1</sup> To "toll" means to suspend or stop temporarily.

E. Completion/Restoration. Each undergrounding project shall be deemed complete only when the Company actually undergrounds the designated Company Facilities, restores the undergrounding site in accordance with Section 6.7 of this franchise agreement or as otherwise agreed with the City and removes from the site any unused overhead or ground-mounted facilities, equipment, material and other impediments and properly abandons on site any unused underground facilities, equipment, material and other impediments. "Unused" for the purposes of this section shall mean the Company is no longer using the facilities in question and has no plans to use the facilities in the foreseeable future.

F. Report of Actual Costs. Upon completion of each undergrounding project, the Company shall submit to the City a detailed report of the Company's actual cost to complete the project and the Company shall reconcile this total actual cost with the accepted cost estimate. The report shall be provided within 120 days after completion of the underground project.

G. Audit of Underground Projects. The City may require that the Company undertake an independent audit of up to two (2) undergrounding projects in any calendar year. The cost of any such independent audit shall reduce the amount of the Fund. The Company shall cooperate fully with any audit and the independent auditor shall prepare and provide to the City and the Company a final audit report showing the actual costs associated with completion of the project. If a project audit is required by the City, only those actual project costs confirmed and verified by the independent auditor as commercially reasonable and commercially necessary to complete the project shall be charged to the Fund balance.

§ 11.4 Audit of Underground Fund. Upon written request of the City, but no more frequently than once every three (3) years, the Company shall, at its sole cost and expense, audit the Fund for the City. Such audits shall be limited to the previous three (3) calendar years. The Company shall provide the audit report to the City and shall reconcile the Fund consistent with the findings contained in the audit report. If the City has concerns about any material information contained in the audit, the parties shall meet and make good faith attempts to resolve any outstanding issues. If the matter cannot be resolved to the City's reasonable satisfaction, the Company shall, at its expense, cause an independent auditor to investigate and determine the correctness of the charges to the Fund. The independent auditor shall provide a written report containing its findings to the City and the Company. Only those costs confirmed and verified by the independent auditor as commercially reasonable and commercially necessary to complete the undergrounding projects requested by the City shall be charged to the Fund. The Company shall reconcile the balance of the Fund consistent with the findings contained in the independent auditor's written report.

§ 11.5 Cooperation with Other Utilities. When the Company is undertaking an undergrounding project, the City and the Company shall coordinate with other utilities or companies that have their facilities above ground to attempt to have all facilities undergrounded as part of the same project. When other utilities or companies are placing their facilities underground, to the extent

the Company has received prior notification, the Company shall cooperate with these utilities and companies and undertake to underground Company facilities as part of the same project where financially, technically and operationally feasible. The Company shall not be required to pay for the cost of undergrounding the facilities of other companies.

§ 11.6 Planning and Coordination of Undergrounding Projects. The City and the Company agree to meet, as required, to review planned future undergrounding projects. The purpose of such meetings shall be to further cooperation between the City and the Company to achieve the orderly undergrounding of Company Facilities. At such meetings, the parties shall review future undergrounding requests, including but not limited to, conversions, known or anticipated Public Projects, known or anticipated Private Projects, known or anticipated Company projects and the Company's plans for additional undergrounding.

## **ARTICLE 12 PURCHASE OR CONDEMNATION**

§ 12.1 City's Right to Purchase or Condemn. The right of the City to construct, purchase or condemn any public utility works or ways and the Company's rights in connection therewith, as provided by the Colorado Constitution and statutes, are hereby expressly reserved and each party shall have the rights provided by law relating to condemnation; provided, however, no award shall be made for the value of the franchise or public rights-of-way.

## **ARTICLE 13 MUNICIPALLY-PRODUCED UTILITY SERVICE**

§ 13.1 City Reservation. The City expressly reserves the right to engage in the production of utility service to the extent permitted by law. The Company agrees to negotiate in good faith long-term contracts to purchase City-generated power made available for sale, consistent with PUC requirements. The Company further agrees to offer transmission and delivery services to the City that are ~~required~~ permitted by judicial, statutory and/or regulatory directives and that are comparable to the services offered to any other customer with similar generation facilities.

§ 13.2 Franchise Not to Limit City's Rights. Nothing in this franchise agreement prohibits the City from becoming an aggregator of utility service or from selling utility service to customers should it be permissible under law.

## **ARTICLE 14 ENVIRONMENT AND CONSERVATION**

§ 14.1 Environmental Leadership. The City and the Company agree that sustainable development, environmental excellence and innovation shall form the foundation of the Utility Service provided by the Company under this franchise agreement. The Company is committed to sustainable development and energy conservation for the term of this agreement by continuing to provide leadership, support and assistance, in collaboration with the City, to identify, develop, implement and maintain new and creative programs. The Company agrees to continue to actively pursue reduction of carbon emissions attributable to its electric generation facilities with a

rigorous combination of Energy Conservation and Energy Efficiency measures, Clean Energy measures, and promoting and implementing the use of Renewable Energy Resources on both a distributed and centralized basis. The Company shall strive to conduct its operations in a way that avoids adverse environmental impacts where feasible, subject to the ongoing regulatory oversight of the Colorado PUC and other state and federal regulatory agencies. The Company shall continue to cost-effectively monitor its operations to mitigate environmental impacts; shall meet or exceed the requirements of environmental laws, regulations and permits; shall invest in cost-effective environmentally-sound technologies; shall consider environmental issues in its planning and decision-making; and shall support environmental research and development projects and partnerships in its service territory through various means, including but not limited to corporate giving and employee involvement. The Company shall continue to explore ways to reduce water consumption at its facilities and to use recycled water, where feasible. The Company shall continue to work with the U.S. Fish and Wildlife Service to develop and implement avian protection plans to reduce electrocution and collision risks by eagles, raptors and other migratory birds with transmission and distribution lines. On or before December 1 of each year, the Company shall provide the City with a written report describing its progress in carbon reduction and other environmental efforts, including the actions the Company has taken or plans to take to reduce greenhouse gas emissions. The parties shall meet at a mutually convenient time and place for a discussion of such. In meeting its obligation under this section, the Company is not precluded from providing existing internal and external reports that may be used for other reporting requirements.

§ 14.2 Energy Conservation and Efficiency.

A. Energy Efficiency Programs. The City and the Company recognize and agree that Energy Conservation and Energy Efficiency programs offer opportunities for the efficient use of energy and reduction of customers' energy consumption and costs. The City and the Company further recognize that creative and effective Energy Conservation solutions are crucial to sustainable development. The Company recognizes and shares the City's desire to advance the implementation of cost-effective Energy Conservation and Energy Efficiency programs that direct opportunities to Residents to manage more efficiently their use of energy and, thereby, create the opportunity to reduce their energy consumption, costs, and impact on the environment in order to assist the City in meeting its Climate Action Plan goals. The Company shall seek authority from the PUC to develop and offer Energy Efficiency programs to its customers. Subject to PUC approval, the Company commits to offer programs that attempt to capture market opportunities for cost-effective Energy Efficiency improvements such as municipal specific programs that provide cash rebates for efficient lighting, energy design programs to assist architects and engineers to incorporate energy efficiency in new construction projects, and recommissioning programs to analyze existing systems to optimize performance and conserve energy. Subject to PUC approval, the Company commits to offer Demand Side Management (DSM) programs and succeeding programs, which provide customers the opportunity to reduce their energy usage. In doing so, the Company recognizes the importance of (i) implementing cost-effective programs, the benefits of which could otherwise be lost if not pursued in a timely fashion and (ii) developing cost-effective energy management programs for the various classes of the Company's customers,

including low-income Residents. The Company shall advise the City and City Residents of the availability of assistance that the Company makes available for investments in Energy Conservation through its account managers, area manager, newspaper advertisements, bill inserts and Energy Efficiency workshops and by maintaining information of these programs on the Company's website. Further, the Company shall designate a conservation representative to act as the primary liaison with the City who will provide the City with information on how the City may take advantage of reducing energy consumption in City Facilities and how the City may participate in Energy Conservation and Energy Efficiency programs sponsored by the Company.

B. Renewable Energy Resource Programs. The Company agrees to consider Renewable Energy Resource programs as an integral part of the Company's provision of Utility Service to its customers. The Company agrees to comply with the mandates of United States and Colorado law concerning Energy Efficiency and clean energy technologies. Unless otherwise required by law, the Company shall obtain electricity from renewable sources equivalent to at least 30% of retail sales by 2020. The Company will promote a significant role for Renewable Energy Resources in its future resource acquisitions, consistent with acceptable rate impacts, legislative requirements, and applicable provisions of law.

C. The Company will continue to promote existing or new programs in its service territory to comply with applicable provisions of law relating to renewable resources. The City actively supports the Company's compliance with the renewable resource standards required by law. The Company agrees that, in complying with this provision, it shall take the following steps to encourage participation by the City and the Company's customers in available renewable resource programs:

- (1) Notify the City regarding all eligible renewable resource programs;
- (2) Provide the City with support regarding how the City may participate in eligible renewable resource programs;
- (3) Advise Residents regarding participation in eligible renewable resource programs.

Notwithstanding the foregoing, to the extent that any Company assistance is needed to support Renewable Energy Resource Programs that are solely for the benefit of Company customers located within the City, the Company retains the sole discretion as to whether to incur such costs.

§ 14.3 Continuing Commitment. It is the express intention of the City and the Company that the collaborative effort provided for in this article continue for the entire term of this agreement. The City and the Company also recognize, however, that the programs identified in this article may be for a limited duration and that the regulations and technologies associated with Energy Efficiency and Energy Conservation are subject to change. Given this variability, the Company agrees to maintain its commitment to sustainable development, Energy Efficiency and Energy

Conservation and renewable resource energy programs for the term of this franchise by continuing to provide leadership, support and assistance, in collaboration with the City, to identify, develop, implement and maintain new and creative programs similar to the programs identified in this franchise agreement in order to assist the City achieve its environmental and Climate Action Plan goals.

§ 14.4 PUC Approval. The Company shall not be required to invest in technologies or to incur costs for the implementation and maintenance of programs without having received approval from the PUC that enables the Company to recover the cost of that investment or those programs through the ratemaking process.

## **ARTICLE 15 TRANSFER OF FRANCHISE**

§ 15.1 Consent of City Required. The Company shall not transfer or assign any rights under the franchise to an unaffiliated third party, unless the City approves such transfer or assignment in writing. Approval of the transfer or assignment shall not be unreasonably withheld.

§ 15.2 Transfer Fee. In order that the City may share in the value this franchise adds to the Company's operations, any transfer or assignment of rights granted under this franchise requiring City approval, as set forth herein, shall be subject to the condition that the Company shall promptly pay to the City a transfer fee in an amount equal to the proportion of the City's then-population provided Utility Service by the Company to the then-population of the City and County of Denver provided Utility Service by the Company multiplied by One Million Dollars (\$1,000,000.00). Except as otherwise required by law, such transfer fee shall not be recovered from a surcharge placed only on the rates of Residents.

## **ARTICLE 16 CONTINUATION OF UTILITY SERVICE**

§ 16.1 Continuation of Utility Service. In the event this franchise is not renewed at the expiration of its term or is terminated for any reason, and the City has not provided for alternative utility service, the Company shall have no right to remove any Company Facilities pending resolution of the disposition of the system unless otherwise ordered by the PUC, and shall continue to provide Utility Service within the City until the City arranges for utility service from another provider. The Company further agrees that it will not withhold any temporary Utility Services necessary to protect the public. The City agrees that in the circumstances of this Article, the Company shall be entitled to monetary compensation as provided in the Company's tariffs on file with the Public Utilities Commission and the Company shall be entitled to collect from Residents and shall be obligated to pay the City, at the same times and in the same manner as provided in the franchise, an aggregate amount equal to the amount which the Company would have paid as a franchise fee as consideration for use of the City's Streets, ~~P~~ublic ~~E~~asements and Other City Property. Only upon receipt of written notice from the City stating that the City has adequate alternative Utility Service for Residents and upon order of the PUC shall the Company be allowed to discontinue the provision of Utility Service to the City and its Residents. This provision shall survive the termination of this franchise agreement.

**ARTICLE 17**  
**INDEMNIFICATION AND IMMUNITY**

§ 17.1 City Held Harmless. The Company shall indemnify, defend and hold the City harmless from and against claims, demands, liens and all liability or damage of whatsoever kind on account of or arising from the grant of this franchise, the exercise by the Company of the related rights, or from the operations of the Company within the City, and shall pay the costs of defense plus reasonable attorneys' fees. The City shall (a) give prompt written notice to the Company of any claim, demand or lien with respect to which the City seeks indemnification hereunder and (b) unless in the City's judgment a conflict of interest may exist between the City and the Company with respect to such claim, demand or lien, shall permit the Company to assume the defense of such claim, demand, or lien with counsel satisfactory to the City. If such defense is assumed by the Company, the Company shall not be subject to any liability for any settlement made without its consent. If such defense is not assumed by the Company or if the City determines that a conflict of interest exists, the parties reserve all rights to seek all remedies available in this franchise against each other. Notwithstanding any provision hereof to the contrary, the Company shall not be obligated to indemnify, defend or hold the City harmless to the extent any claim, demand or lien arises out of or in connection with any negligent or intentional act or failure to act of the City or any of its officers or employees.

§ 17.2 Immunity. Nothing in this Section or any other provision of this agreement shall be construed as a waiver of the notice requirements, defenses, immunities and limitations the City may have under the Colorado Governmental Immunity Act (§ 4-10-101, C.R.S., *et. seq.*) or of any other defenses, immunities, or limitations of liability available to the City by law.

**ARTICLE 18**  
**BREACH**

§ 18.1 Non-Contestability. The City and the Company agree to take all reasonable and necessary actions to assure that the terms of this franchise agreement are performed and neither will take any legal action to secure modification of this franchise agreement. However, the Company reserves the right to seek a change before the PUC in its tariffs, including but not limited to the rates, charges, terms, and conditions of providing Utility Service to the City and its Residents and the City retains all rights it may have to intervene and participate in any such proceedings. The City, similarly, reserves the right to amend the Code and the Design and Construction Standards.

§ 18.2 Breach.

A. Notice/Cure/Remedies. Except as otherwise provided in this franchise agreement, if a party (the "breaching party") to this franchise agreement fails or refuses to perform any of the terms or conditions of this franchise agreement (a "breach"), the other party (the "non-breaching party") may provide written notice to the breaching party of such breach. Upon receipt of such notice, the breaching party shall be given a reasonable time, not to exceed thirty (30) days, in which to remedy the breach.

B. Termination of Franchise by City. In addition to the foregoing remedies, if the Company fails or refuses to perform any material term or condition of this franchise agreement (a "material breach"), the City may provide written notice to the Company of such material breach. Upon receipt of such notice, the Company shall be given a reasonable time, not to exceed ninety (90) days, within which to remedy the material breach. If the Company does not remedy the material breach within the time allowed in the notice, the City may, at its sole option, terminate the franchise and this franchise agreement. This remedy shall be in addition to the City's right to exercise any of the remedies provided for elsewhere in this franchise agreement. Upon such termination, the Company shall continue to provide Utility Service to the City and its Residents until the City makes alternative arrangements for such service and until otherwise ordered by the PUC, and the Company shall be entitled to collect from Residents and shall be obligated to pay the City, at the same times and in the same manner as provided in this franchise agreement, an aggregate amount equal to the amount which the Company would have paid as a franchise fee as consideration for use of the City Streets, ~~P~~ublic ~~E~~asements and Other City Property. This provision shall survive the termination of the franchise and this franchise agreement.

C. Company Shall Not Terminate Franchise. In no event does the Company have the right to terminate this franchise agreement.

D. No Limitation. Except as provided herein, nothing in this franchise agreement shall limit or restrict any legal rights or remedies that either party may possess arising from any alleged breach of this franchise agreement.

## **ARTICLE 19 AMENDMENTS**

§ 19.1 Proposed Amendments. At any time during the term of this franchise, the City or the Company may propose amendments to this franchise agreement by giving thirty- (30-) days written notice to the other of the proposed amendment(s) desired, and both parties thereafter, through their designated representatives, will, within a reasonable time, negotiate in good faith in an effort to agree upon mutually satisfactory amendment(s). However, nothing contained in this section shall be deemed to require either Party to consent to any amendment proposed by the other Party.

§ 19.2 Effective Amendments. No alterations, amendments or modifications to this franchise agreement shall be valid unless executed by an instrument in writing by the parties, adopted with the same formality used in adopting this franchise agreement, to the extent required by law. Neither this franchise agreement, nor any term hereof, may be changed, modified or abandoned, in whole or in part, except by an instrument in writing, and no subsequent oral agreement shall have any validity whatsoever.

**ARTICLE 20**  
**EQUAL OPPORTUNITY**

§ 20.1 Economic Development. The Company is committed to the principle of stimulating, cultivating and strengthening the participation and representation of persons of color, women and members of other under-represented groups within the Company and in the local business community. The Company believes that increased participation and representation of under-represented groups will lead to mutual and sustainable benefits for the local economy. The Company is also committed to the principle that the success and economic well-being of the Company is closely tied to the economic strength and vitality of the diverse communities and people it serves. The Company believes that contributing to the development of a viable and sustainable economic base among all Company customers is in the best interests of the Company and its shareholders.

§ 20.2 Employment.

A. The Company is committed to undertaking programs that identify, consider and develop persons of color, women and members of other under-represented groups for positions at all skill and management levels within the Company.

B. The Company recognizes that the City and the business community in the City, including women- and minority-owned businesses, provide a valuable resource in assisting the Company to develop programs to promote persons of color, women and members of under-represented communities into management positions, and agrees to keep the City regularly advised of the Company's progress by providing the City a copy of the Company's annual affirmative action report upon the City's written request.

C. In order to enhance the diversity of the employees of the Company, the Company is committed to recruiting diverse employees by strategies such as partnering with colleges, universities and technical schools with diverse student populations, utilizing diversity specific media to advertise employment opportunities, internships, and engaging recruiting firms with diversity specific expertise.

D. The Company is committed to developing a world-class workforce through the advancement of its employees, including persons of color, women and members of under-represented groups. In order to enhance opportunities for advancement, the Company will offer training and development opportunities for its employees. Such programs may include mentoring programs, training programs, classroom training, and leadership programs.

E. The Company is committed to a workplace free of discrimination based on race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability or any other protected status in accordance with all federal, state or local laws. The Company shall not, solely because of race, creed, color, religion, sex, age, national origin or ancestry or handicap, refuse to hire, discharge, promote, demote or discriminate in matters of compensation, against any person

otherwise qualified, and further agrees to insert the foregoing provision or its equivalent in all agreements the Company enters into in connection with this franchise.

F. The Company shall identify and consider women, persons of color and other under-represented groups to recommend for its Board of Directors, consistent with the responsibility of boards to represent the interests of the Shareholders, customers and employees of the Company.

§ 20.3 Contracting.

A. It is the Company's policy to make available to minority- and women-owned business enterprises and other small and/or disadvantaged business enterprises the maximum practical opportunity to compete with other service providers, contractors, vendors and suppliers in the marketplace. The Company is committed to increasing the proportion of Company contracts awarded to minority- and women-owned business enterprises and other small and/or disadvantaged business enterprises for services, construction, equipment and supplies to the maximum extent consistent with the efficient and economical operation of the Company.

B. The Company agrees to maintain and continuously develop contracting and community outreach programs calculated to enhance opportunity and increase the participation of minority- and women-owned business enterprises and other small and/or disadvantaged business enterprises to encourage economic vitality. The Company agrees to keep the City regularly advised of the Company's programs.

C. The Company shall maintain and support partnerships with local chambers of commerce and business organizations, including those representing predominately minority-owned, women-owned and disadvantaged businesses, to preserve and strengthen open communication channels and enhance opportunities for minority-owned, women-owned and disadvantaged businesses to contract with the Company.

§ 20.4 Coordination. City agencies provide collaborative leadership and mutual opportunities or programs relating to City based initiatives on economic development, employment and contracting opportunity. The Company agrees to review Company programs and mutual opportunities responsive to this Article with these agencies, upon their request, and to collaborate on best practices regarding such programs and coordinate and cooperate with the agencies in program implementation.

**ARTICLE 21  
MISCELLANEOUS**

§ 21.1 No Waiver. Neither the City nor the Company shall be excused from complying with any of the terms and conditions of this franchise agreement by any failure of the other, or any of its officers, employees, or agents, upon any one or more occasions, to insist upon or to seek compliance with any such terms and conditions.

§ 21.2 Successors and Assigns. The rights, privileges, and obligations, in whole or in part, granted and contained in this franchise agreement shall inure to the benefit of and be binding upon the Company, its successors and assigns, to the extent that such successors or assigns have succeeded to or been assigned the rights of the Company pursuant to Article 15 of this franchise agreement.

§ 21.3 Third Parties. Nothing contained in this franchise agreement shall be construed to provide rights to third parties.

§ 21.4 Notice. Both parties shall designate from time to time in writing representatives for the Company and the City who will be the persons to whom notices shall be sent regarding any action to be taken under this franchise agreement. Notice shall be in writing and forwarded by certified mail or hand delivery to the persons and addresses as hereinafter stated, unless the persons and addresses are changed at the written request of either party, delivered in person or by certified mail. Until any such change shall hereafter be made, notices shall be sent as follows:

**To the City:**

Mayor of Boulder  
1777 Broadway  
Boulder, Colorado 80306

City Manager  
City of Boulder  
1777 Broadway  
Boulder, Colorado 80306

With a copy to:

City Attorney  
City of Boulder  
1777 Broadway  
Boulder, Colorado 80306

**To the Company:**

Regional Vice President, Customer and Community Services  
Public Service Company of Colorado  
P.O. Box 840  
Denver, Colorado 80201

With a copy to:

Legal Department  
Public Service Company of Colorado  
P.O. Box 840  
Denver, Colorado 80201

§ 21.5 Examination of Records.

A. The parties agree that a duly authorized representative of the City shall have the right to examine any books, documents, papers, and records of the Company reasonably related to the Company's compliance with the terms and conditions of this franchise agreement. Information shall be provided within thirty (30) days of any written request. Any books, documents, papers, and records of the Company in any form that are requested by the City that contain confidential information shall be conspicuously identified as "confidential" or "proprietary" by the Company. In no case shall any privileged communication be subject to examination by the City pursuant to the terms of this section. "Privileged communication" means any communication that would not be discoverable due to the attorney-client privilege or any other privilege that is generally recognized in Colorado, including but not limited to the work product privilege. The work product privilege shall include information developed by the Company in preparation for PUC proceedings.

B. With respect to any information requested by the City which the Company identifies as "Confidential" or "Proprietary":

(1) The City will maintain the confidentiality of the information by keeping it under seal and segregated from information and documents that are available to the public;

(2) The information shall be used solely for the purpose of determining the Company's compliance with the terms and conditions of this franchise agreement;

(3) The information shall only be made available to City employees and consultants who represent in writing that they agree to be bound by the provisions of this subsection B;

(4) The information shall be held by the City for such time as is reasonably necessary for the City to address the franchise issue(s) that generated the request and shall be returned to the Company when the City has concluded its use of the information. The parties agree that in most cases, the information should be returned within one hundred twenty (120) days. However, in the event that the information is needed in connection with any action that requires more time, including, but not necessarily limited to litigation, administrative proceedings and/or other disputes, the City may maintain the information until such issues are fully and finally concluded.

C. If an Open Records Act request is made by any third party for confidential or proprietary information that the Company has provided to the City pursuant to this franchise agreement, the City will promptly notify the Company of the request and shall allow the Company to defend such request at its sole expense, including filing a legal action in any court of competent jurisdiction to prevent disclosure of such information. In any such legal action the Company shall join the person requesting the information and the City. In no circumstance shall the City provide to any third party confidential

information provided by the Company pursuant to this franchise agreement without first conferring with the Company. The Company shall defend, indemnify and hold the City harmless from any claim, judgment, costs or attorney fees incurred in participating in such proceeding.

D. Unless otherwise agreed between the Parties, the following information shall not be provided by the Company: confidential employment matters, specific information regarding any of the Company's customers, information related to the compromise and settlement of disputed claims including but not limited to PUC dockets, information provided to the Company which is declared by the provider to be confidential, and which would be considered confidential to the provider under applicable law.

E. Reports. Upon written request by the City, but not more than once per year, the Company shall supply the City with reports, in such formats and providing such details as reasonably requested by the City, of all suppliers of utility service that utilize Company Facilities to sell or distribute utility service to Residents and the names and addresses of each such supplier.

§ 21.6 Reliability Reports. Upon written request, the Company shall provide the City with a report regarding the reliability of Company Facilities and Utility Service.

§ 21.7 List of Utility Property. The Company shall provide the City, upon request not more than every two (2) years, a list of utility related property owned or leased by the Company within the City. All such records must be kept for a minimum of four (4) years.

§ 21.8 Other Information. Upon written request, the Company shall provide the City Manager or the City Manager' designee with:

A. Copies of all applications, advice letters and periodic reports, together with any accompanying non-confidential testimony and exhibits, filed by the Company with the PUC;

B. A copy of the Company's or its parent company's consolidated annual financial report, or alternatively, a URL link to a location where the same information is available on the Company's web site;

C. Maps or schematics indicating the location of specific Company Facilities, including gas or electric lines, located within the City, to the extent those maps or schematics are in existence at the time of the request; and

D. A copy of any report required to be prepared for a federal or state agency detailing the Company's efforts to comply with federal and state air and water pollution laws.

§ 21.9 Payment of Taxes and Fees.

A. The Company shall pay and discharge as they become due, promptly and before delinquency, all taxes, assessments, rates, charges, license fees, municipal liens, levies, excises, or imposts, whether general or special, or ordinary or extra-ordinary, of every name, nature, and kind whatsoever, including all governmental charges of whatsoever name, nature, or kind, which may be levied, assessed, charged, or imposed, or which may become a lien or charge against this agreement (“Impositions”), provided that Company shall have the right to contest any such Impositions and shall not be in breach of this section so long as it is actively contesting such Impositions.

B. The City shall not be liable for the payment of taxes, late charges, interest or penalties of any nature other than pursuant to applicable tariffs on file and in effect from time to time with the PUC.

§ 21.10 Conflict of Interest. The parties agree that no official, officer or employee of the City shall have any personal or beneficial interest whatsoever in the services or property described herein and the Company further agrees not to hire or contract for services any official, officer or employee of the City to the extent prohibited by law, including ordinances and regulations of the City.

§ 21.11 Certificate of Convenience and Necessity. The City agrees to support any application the Company may file with the PUC to obtain a certificate of public convenience and necessity to exercise the rights and obligations granted under this franchise.

§ 21.12 Authority. Each party represents and warrants that except as set forth below, it has taken all actions that are necessary or that are required by its ordinances, regulations, procedures, bylaws, or applicable law, to legally authorize the undersigned signatories to execute this agreement on behalf of the parties and to bind the parties to its terms. The persons executing this agreement on behalf of each of the parties warrant that they have full authorization to execute this agreement. The City acknowledges that notwithstanding the foregoing, the Company requires a certificate of public convenience and necessity from the PUC in order to operate under the terms of this franchise agreement.

§ 21.13 Severability. Should any one or more provisions of this franchise agreement be determined to be unconstitutional, illegal, unenforceable or otherwise void, all other provisions nevertheless shall remain effective; provided, however, the parties shall forthwith enter into good faith negotiations and proceed with due diligence to draft one or more substitute provisions that will achieve the original intent of the parties hereunder.

§ 21.14 Force Majeure. Neither the City nor the Company shall be in breach of this franchise if a failure to perform any of the duties under this franchise is due to Force Majeure as defined herein.

§ 21.15 Earlier Franchises Superseded. This franchise agreement shall constitute the only franchise agreement between the City and the Company for the furnishing of Utility Service, , and it supersedes and cancels all former franchises agreements between the parties hereto.

§ 21.16 Titles Not Controlling. Titles of the paragraphs herein are for reference only, and shall not be used to construe the language of this franchise agreement.

§ 21.17 Applicable Law. Colorado law shall apply to the construction and enforcement of this franchise agreement. The parties agree that venue for any litigation arising out of this franchise agreement shall be in the District Court for Boulder County, State of Colorado.

§ 21.18 Payment of Expenses Incurred by City in Relation to Franchise Agreement. The Company shall pay for expenses incurred for the franchise election, including the publication of notices, publication of ordinances, and photocopying of documents.

**IN WITNESS WHEREOF**, the parties have caused this agreement to be executed as of the day and year first above written.

**CITY OF BOULDER**

ATTEST:

\_\_\_\_\_  
City Clerk on behalf of the  
Director of Finance and Record

APPROVED AS TO FORM:

\_\_\_\_\_  
Attorney for the City of Boulder

\_\_\_\_\_  
Susan Osborne, Mayor

**PUBLIC SERVICE COMPANY OF  
COLORADO**

By: \_\_\_\_\_  
~~Jay Herrmann~~ Jerome Davis  
Regional Vice President

Attest: \_\_\_\_\_  
Asst. Secretary

## AGREEMENT FOR A CLEAN ENERGY FUTURE

THIS AGREEMENT FOR A CLEAN ENERGY FUTURE (this "Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, between PUBLIC SERVICE COMPANY OF COLORADO, a corporation duly organized and existing under the laws of the State of Colorado (the "Company") and the CITY OF BOULDER, a Colorado home rule municipal corporation (the "City") [the Company and the City sometimes collectively hereafter referred to as the "parties"].

### RECITALS

- A. The City has informed the Company that the City has committed to meet or exceed the carbon reduction goals set forth in the Kyoto Protocol. These goals are set forth in the City's Climate Action Plan ("CAP").
- B. Boulder voters have evidenced their commitment to the City's CAP goals by voting to tax themselves through approval of the CAP tax, which funds the City's efforts toward carbon reduction and a clean energy future.
- C. The City has requested the Company's partnership in reducing the carbon footprint produced by the municipal enterprise, as well as the collective carbon footprint of Boulder Residents.<sup>1</sup>
- D. The Company is pleased to assist the City toward meeting its CAP goals because the Company also strongly supports the reduction of carbon dioxide emissions and the Company's overall environmental impact.
- E. The parties wish to memorialize their commitments to further the joint goals of the City and the Company toward reducing carbon dioxide emissions associated with gas and electric consumption within the City and for a clean energy future.

NOW THEREFORE, in consideration of the premises and of the mutual covenants and promises of the parties hereto, it is hereby agreed as follows:

### AGREEMENT

- Condition Precedent.** This agreement is conditioned on the approval by the City's Residents at the general election in November, 2010, of a franchise agreement with the Company to replace the Company's franchise agreement with the City that will expire August 3, 2010; on the Company's agreement to extend the franchise expiring August 3, 2010, in order for the voter approval process to occur; and on the obtaining of any required approvals of that replacement franchise agreement (as approved by the

---

<sup>1</sup>As used herein, the defined term "Residents" refers to all persons, businesses, industries, governmental agencies, including the City and any other entity whatsoever, presently located or to be hereinafter located, in whole or in part, within the incorporated boundaries of the City.

City's voters) and this Agreement, both in their entirety, by the Colorado Public Utilities Commission (the "PUC").

**2. Advisory Panel.** For purposes of overseeing the implementation of this Agreement, the parties shall establish an advisory panel, which shall include designated representatives of both the Company and City staff and/or elected officials (the "Advisory Panel"). Ex-officio representatives from institutional partners may also be invited to participate in Advisory Panel discussions, subject to consent of both parties, to contribute technical, financial, legal or institutional expertise. The Advisory Panel shall meet at least quarterly for the longer of a period of two years, or the time required to draft a report describing the various technological, financial and other resource commitments necessary for the City to achieve 100% decarbonization, as further described below. The Advisory Panel shall review and discuss energy-related issues of shared importance to the Company and the City, with purposeful attention given to ideas, proposals or specific plans that could eventually be implemented not only in Boulder, but throughout Colorado to the benefit of all Company customers, including SmartGridCity™, decarbonization of the City's electricity supply, energy efficiency and demand-side management, the sharing of customer usage data as described below, and moving forward with other progressive programs as deemed feasible for helping to reduce Boulder's greenhouse gas emissions. The Advisory Group shall be self-empowered to determine its ultimate lifespan, including whether to continue beyond the two-year commitment, as well as meeting frequency and report format. The Company and the City shall agree on which new proposals or information should be made public and the source and timing for any public announcements.

**3. Community Solar Gardens.** Both the Company and the City were major forces behind the passage of the community solar garden legislation enacted by the General Assembly during the 2010 session (HB10-1342). This legislation permits Colorado residents to participate in the Company's Solar\*Rewards programs by investing in community solar gardens located on property other than their own. The Company and the City will continue to work together to support the implementation of this legislation, before the General Assembly and the PUC, and to support Boulder Residents in their efforts to take advantage of the benefits of solar gardens as part of the Company's assistance to the City in reaching its emission reduction goals.

**4. SmartGridCity Implementation.** Since 2008, the City has hosted the Company's SmartGridCity™ project (hereafter, the "SGC Project"). The SGC Project was undertaken by the Company to prove or disprove a number of value propositions, including enhanced system reliability, lower system maintenance costs, lower line losses, reduced generation fuel expenses and emissions, increased access to distributed generation, as well as the expected favorable impacts of providing more customer information, choice and pricing options for reducing carbon footprints. The SGC Project enables new strategies, tools and technologies that directly affect Residents and that are critical to helping the City achieve its CAP goals. In light of these and other shared interests in the SGC Project, the Company and the City agree to

the following protocols for SGC Project communication for so long as the Advisory Panel is in existence.

- A. The Company and the City will confer quarterly for two years regarding the SGC Project. The purposes of this regular communication include but are not limited to:
- i. Providing the City an update on the various aspects of the project, including deployment of SGC systems, regulatory initiatives/dockets, customer programs and marketing and communications strategies.
  - ii. Assuring that the Company seeks and considers the City's input into these issues.
  - iii. Enabling the City and the Company in an efficiently coordinated manner to consider suggestions, questions, concerns or complaints raised by Residents as represented by the City concerning the SGC Project.
  - iv. Enabling the City and the Company jointly to consider and address the possible value of the SGC Project on the CAP, and vice-versa, and more broadly to enable the parties to avoid conflict between their respective goals and programs to the extent practical, and to ensure that any City initiative to provide or facilitate premises-specific energy management technologies or strategies do not compromise the security or integrity of the SGC Project.
  - v. Assuring that the parties confer in advance on how new Boulder SGC Project features, proposals, enhancements, expansions or information may be made public, and the parties' respective roles in related public announcements.
  - vi. Considering together the value in jointly pursuing PUC approval for new pilot programs that could test the state-wide benefits of smart grid systems and advanced metering technology, including by way of example and not limitation, dynamic pricing options, in-home device testing and remote metering.
  - vii. Researching and evaluating City-funded enhancements to the SGC Project, when feasible.
- B. To make the meetings as productive as possible, the Company and the City will exchange a proposed agenda two weeks in advance of each meeting and will finalize the agenda one week in advance of the meeting

date. If either party requests that the other party provide a substantive response at the meeting concerning an agenda item the requesting party has proposed, the requesting party shall make such request no less than one week in advance of the meeting.

- C. The representatives of the Company and the City shall prepare joint meeting minutes each quarter to the Advisory Panel in advance of the latter's quarterly meetings. The minutes shall contain a review as appropriate of the discussions, activities, concerns and proposals of the SGC Project representatives with respect to their meetings over the previous three months.
- D. The Company will not be required to disclose to the City information that would compromise confidentiality agreements with vendors or information that would compromise electric system security.
- E. In addition to any other Company-City interface specified herein, upon the City Manager's request, the Company shall appear in a public meeting before the Boulder City Council once a year for two years to apprise the Council of SGC Project developments and issues and to answer questions posed by the City Council members and members of the public.
- F. On a quarterly basis for two years, the Company will provide to the City the Company's best estimate of energy savings and greenhouse gas reductions resulting from the various applications associated with the SGC Project.
- G. Section 4 of this Agreement addressing SmartGridCity Implementation is contingent upon approval by the Colorado Public Utilities Commission of a certificate of public convenience and necessity ("CPCN") for SmartGridCity. The City agrees to support the granting of a CPCN for SmartGridCity.

**5. Customer Usage Data Pilot Program.**

- A. To provide the necessary data the City needs to measure changes in customer energy usage resulting from CAP program implementation, the Company agrees to work with the City to design and operate a customer usage data access pilot program (the "Data Pilot"). The purpose of the Data Pilot would be to provide the City with aggregated customer energy usage information in a format that would allow the City to test and verify the success of its CAP and to encourage participation in the City's CAP programs, without disclosing individual customer usage information or compromise the Company's relationship with its customers. During the design phase, the Company shall make a good faith estimate of the cost of the Data Pilot and as the Data Pilot progresses make good-faith

estimates of the cost of operating the program on a permanent basis after the Data Pilot has concluded.

- B. The Data Pilot and its permanent successor shall be designed to:
- i. Provide historic monthly customer usage information for Residents from 2006 to the time of the Data Pilot's implementation, continuing thereafter with quarterly updates during the pilot period of two years and after the Data Pilot becomes permanent
  - ii. Provide the data either (i) directly to the City in an appropriate aggregated format or (ii) indirectly to the City through an acceptable third-party data analysis contractor under contract with the Company to aggregate the data on behalf of the Company. Any such third party contractor shall be subject to the same privacy restrictions that apply to the Company for using this data and the contractor will not gain any independent right to use the data beyond the purposes outlined for the Data Pilot.
- C. Prior to submitting an application to the PUC for approval of the Data Pilot, the Company will enter into a separate written agreement with the City that will address, among other things, the parties' expectations for the Data Pilot, including:
- i. The amount and specifications of the data that the City and/or the third-party contractor would receive;
  - ii. The type and anticipated frequency of data aggregation that may be required by the City for CAP program evaluation and for aggregate tract, neighborhood or sub-neighborhood "peer" comparisons to mobilize participation in the City's programs;
  - iii. The acceptable level of data aggregation and disaggregation necessary to protect individual customer privacy;
  - iv. The frequency of the data updates;
  - v. The ownership and limited uses for this data;
  - vi. The necessary security for this data; and
  - vii. The expected cost incurred by the Company to provide this data and who will bear that cost.
- D. At the conclusion of the design phase, the parties shall determine how best to obtain approval of the Data Pilot from the PUC. This could include filing an application for approval of the Data Pilot within the parameters of Docket No. 09I-593EG, recently opened to investigate security and

privacy concerns regarding enhanced energy usage information resulting from the deployment of smart-grid technology. The parties shall make best efforts to file for PUC approval of the Data Pilot on or before November 15, 2010 with the objective of commencing the Data Pilot in the first half of 2011.

- E. The parties understand and agree that the Data Pilot will have to satisfy the PUC's rules, including those that govern pilot studies, protection of customer private information, and any related or additional requirements for protection of individual customer privacy. The Data Pilot will also have to comply with any other federal and state standards that may govern access and use of customer usage information.
- F. The Company and the City will cooperate in advocating for PUC approval of the Data Pilot and a subsequent permanent continuation thereof.
- G. The Company agrees that Symbiotic Engineering, LLC ("Symbiotic") of Boulder, Colorado would be an acceptable third-party data analysis contractor for purposes of the Data Pilot. The Company and the City will, as necessary, enter into or modify service support agreements with Symbiotic to govern data transfer and applicable privacy and security concerns unique to this Data Pilot. At the City's option, Symbiotic shall continue the foregoing roles in the permanent version of the Data Pilot following the latter's conclusion.

**6. Energy Efficiency and Demand-Side Management.** Currently, there is significant participation by Boulder Residents in the energy efficiency and demand-side management programs sponsored by Xcel Energy. These programs assist City Residents in reducing their energy consumption and/or using energy in a more efficient manner, and assist the Company in meeting its statewide goals. To continue to support these high levels of participation, the Company and the City agree as follows:

- A. *Company Collaboration on City Initiatives.* The Company shall continue to work collaboratively with the City, including our regular communications and agreeing to meet as needed, to discuss the design, implementation and promotion of Boulder's community-based energy efficiency initiatives. The City representatives shall prepare and submit to the Advisory Panel a detailed report on their own previous quarterly activities for consideration by the Advisory Panel at each of the latter's quarterly meetings.
- B. *Prescriptive DSM Program.* The Company has determined that Boulder residents and commercial customers will continue to be eligible for its present demand-side management and energy efficiency programs (collectively "DSM programs") if the City adopts energy efficiency standards that (i) are applicable to existing residential housing and commercial buildings and (ii) exceed the average energy efficiency standards in effect in the State of Colorado. The Company shall support

Boulder residential and commercial customers' continued eligibility for the Company's prescriptive DSM programs<sup>2</sup> in any action before the PUC including with respect to the Company's 2009-2010 biennial DSM program and any extension(s) thereof, and with respect to the Company's 2012 DSM program (or whatever Company multi-year DSM program next follows the last extension of the 2009-2010 biennial program) (hereafter, the "2012 DSM program").

In its 2012 DSM program, the Company shall request permission to develop prescriptive DSM programs, applicable to existing housing and existing commercial buildings, that use as the base energy efficiency standard from which energy efficiency subsidies are calculated the standard that is then in place for the majority of the Company's customers in Colorado. Currently, that standard is International Energy Conservation Code ("IECC") 2006. Should the majority of the Company's Colorado customers be subjected to a higher IECC standard than IECC 2006 at the time the Company files its 2012 DSM plan, the Company may use such higher IECC standard as the base energy efficiency standard for its prescriptive DSM programs. Unless the Company's proposal is disapproved by the PUC, if the City adopts an energy efficiency code that is stricter than IECC 2006, and the City's code remains stricter than the codes that affect the majority of the Company's Colorado customers at the time the Company files its next DSM plan, then City residents will not be disadvantaged when they participate in the Company's prescriptive DSM programs because their assumed energy savings, for purposes of qualifying for rebates, will continue to be measured from the lower IECC standard affecting the majority of the Company's Colorado customers.

- C. *Custom DSM Programs.* The Company currently offers energy efficiency incentives through custom, non-prescriptive DSM programs, such as the Company's Energy Design Assistant program (for commercial customers) and the Company's Energy Star New Homes program (for residents). The Company agrees to propose similar incentives for Boulder customers that will maintain cost-effectiveness in any application it files with the PUC to continue these programs during any extension(s) of the 2009-2010 DSM biennial program and in connection with the Company's 2012 DSM program. To be eligible for these incentives, the Company may require that improvements surpass the energy efficiency standards established by the City. The City understands that the Company adjusts its qualification requirements for participation in these programs based on local requirements; however, if the City has adopted home energy rating (HERS) requirements that may be met through measures *other than* energy efficiency measures (such as solar, for example), adjustments for

---

<sup>2</sup> A prescriptive DSM program is a program that is available to all customers where the rebates are set in advance for each measure that is installed by the customer, based upon assumed energy savings from that measure.

local requirements will be done in such a manner that removes the participation penalty for these measures. The Company's proposals are subject to approval by the Colorado PUC.

- D. *Joint Support.* The City and the Company shall diligently advocate adoption of these proposals by the PUC.

**7. Valmont Conversion.** House Bill 10-1365 requires all investor-owned utilities that own or operate coal-fired electric generating units to submit an emission reduction plan to the PUC by August 15, 2010. The legislation specifically requires Xcel Energy to reduce oxides of nitrogen emissions from at least 900 MW of coal generation within Colorado. In its August 2010 emission reduction plan, under this legislation the Company must include a plan for reducing coal plant emissions either by installing emissions controls, decommissioning coal-fired electric generation units or completely converting coal units to natural gas, while also considering other low-emitting resources such as renewable energy and energy efficiency. The Company agrees to give serious consideration to either decommissioning Valmont 5 or converting it to natural gas or other low-emitting resources including energy efficiency. Valmont 5 is the only coal-burning generation unit at the Company's Valmont Station.

**8. Plan for a Clean Energy Future.** Recognizing that the challenges of climate change call for new partnerships and creative, innovative, well-informed strategies, the Company and the City agree to collaborate on a study and to develop a shared strategy that will define a set of options that will allow the City to accomplish 100% decarbonization of its electric supply on an accelerated basis.

- A. Beginning one month after all the approvals called for in Section 1 of this Agreement have been obtained, the Company and the City shall engage in a joint study process to define timetables and a set of technological, financing and legal options that will inform City Residents of the choices they can make that could lead, on an accelerated basis, to obtaining 100% of the electricity they consume from supply sources and technologies that generate electricity using exclusively "renewable energy resources," as that term is used in Colo. Rev. Stat., § 40-2-124(1)(a)(IV) (hereafter, "100% decarbonization"). The timetables to be considered by the study shall include but not be limited to timetables that achieve 100% decarbonization by 2012, 2015 and 2020. The options for 100% decarbonization may include implementation of various aspects of the SGC Project, deployment of retail distributed generation (as defined in Colo. Rev. Stat., § 40-2-124(1)(a)(V)), recent commitments by the Company in relation to its regional energy mix, recent local actions related to energy efficiency, DSM and local renewable generation, and additional potential actions that could play a role in the achievement of 100% decarbonization on an accelerated basis. The study shall be jointly funded by the Company and the City on an equal basis up to a Company investment of \$150,000. Elements of the collaborative partnership study process shall include:

- i. Joint issuance of an RFP to engage the services of a consultant or consultant team (the "Consultants") representing preeminent authorities on new energy technologies, smart grid, renewable energy resources, the deployment of retail distributed generation, efficiency, conservation, other clean energy technologies and strategies, regulated utilities, regulatory guidelines, financing, rates, generation, transmission and distribution of utility-scale energy, and other areas of expertise, to be jointly determined. The RFP would define the parameters for success and scope of the Consultants' work.
  - ii. Formation of an Independent Experts Group to review the Consultants' work and provide objective technical, financial, legal and logistical evaluation and feedback. The Independent Experts Group shall consist of five members jointly chosen by the Company and the City. None of its members shall be affiliated with the Company or the City. Each member shall have expertise in one or more of the areas in which the Consultants are required to be authorities. The Independent Experts Group shall be given the opportunity to provide feedback to the Consultants, the Company and the City on at least one pre-release draft of the Final Report described below. The Independent Experts Group shall issue a public report or statement regarding the final version of the Final Report within a month after the latter's release.
  - iii. City management of public review and feedback processes, including regular updates to City Council and the community to ensure transparency and to seek input regarding priorities and trade-offs. As part of this effort the City shall form an Energy Stakeholders Group representing key businesses, institutions and citizen organizations in the City. The group will meet regularly with the City. The City will regularly report to the Company and the Consultants concerning concerns, questions and other input from the Energy Stakeholders Group. At least once during the study process, the Energy Stakeholders shall meet directly with the Consultants.
- B. The conclusion of the study process shall be the issuance of a report by the Consultants setting forth timetables and options for 100% decarbonization, including, for each option, an evaluation of the costs, benefits and challenges of the option, including any legal challenges (the "Final Report"). The City and the Company shall attempt to reach consensus on all aspects of their input to the Consultants for the Final Report. The parties shall work in good faith to attempt to assure that the Final Report is issued by the end of the second quarter of 2012.

- C. Working from and based on options and timetables in the Final Report, the City shall decide on a preferred plan for achieving 100% decarbonization on a timetable or timetables of the City's choice (hereafter, the "Preferred Plan"). The City shall seek, and the Company shall provide, input on the Preferred Plan. The City and the Company shall determine whether new, separate agreements or partnerships between them are feasible to implement the City's Preferred Plan.

9. **Windsorce.** In addition to its other undertakings under this Agreement, the Company agrees immediately following the obtaining of the approvals described in section 1, above, to work with the City to advertise the Company's Windsorce program to increase subscriptions pursuant to the terms described in Exhibit A, attached hereto and incorporated herein by this reference.

*[Signature page follows.]*

**IN WITNESS WHEREOF**, the parties have caused this Agreement to be executed as of the day and year first above written.

**CITY OF BOULDER**

\_\_\_\_\_  
Jane S. Brautigam, City Manager

**ATTEST:**

\_\_\_\_\_  
City Clerk on behalf of the  
Director of Finance and Record

**APPROVED AS TO FORM:**

\_\_\_\_\_  
City Attorney

**PUBLIC SERVICE COMPANY OF  
COLORADO**

By: \_\_\_\_\_  
David L. Eves  
President and Chief Executive Officer

**ATTEST:**

\_\_\_\_\_  
Asst. Secretary

**STREET LIGHTING AND TRAFFIC SIGNAL LIGHTING SERVICE  
AGREEMENT**

THIS STREET LIGHTING AND TRAFFIC SIGNAL LIGHTING AGREEMENT (this "Agreement") is made and entered into this \_\_\_ day of \_\_\_\_\_, 2010, by and between PUBLIC SERVICE COMPANY OF COLORADO, a corporation duly organized and existing under the laws of the State of Colorado (the "Company"), and the CITY OF BOULDER, a Colorado home rule municipality (the "City").

**WITNESSETH:**

WHEREAS, the Company is a public utility engaged in the distribution and sale of electric energy and electric service within the corporate limits of the City under the terms of a Franchise granted by the people of the City, which franchise expires \_\_\_\_\_ and presently provides Street Lighting and Traffic Signal Lighting Service to the City; and

WHEREAS, the City and the Company have reached agreement regarding the grant of a new franchise authorized by the City by Ordinance No. \_\_\_\_\_ (the "Franchise"), which will be presented to the voters of the City at an election held on \_\_\_\_\_, which Franchise, if approved by the voters, will be effective \_\_\_\_\_; and

WHEREAS, the City and the Company desire to enter into an agreement for the continued non-exclusive provision of Street Lighting Service and Traffic Signal Lighting Service to the City, which agreement shall be contingent upon the approval by the registered electors of the City at an election to be held on \_\_\_\_\_ of a Franchise granting to the Company the right to continue to use City Streets, public easements and Other City Property for the distribution and sale of electric energy and electric service in the City;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and promises of the Parties hereto, it is hereby agreed as follows:

**ARTICLE 1  
DEFINITIONS**

For the purpose of this Street Lighting and Traffic Signal Lighting Service Agreement, the following words and phrases shall have the meaning given in this Article. When not inconsistent with context, words used in the present tense include the future tense, words in the plural include the singular, and words in the singular include the plural. The word "shall" is mandatory and "may" is permissive. Words not defined in this Article shall be given the meaning assigned to them in the regulations of the

Colorado Public Utilities Commission, 4 C.C.R. 723-3, or if undefined in such regulations, their common and ordinary meaning.

- §1.1 “Agreement” refers to this agreement for the non-exclusive provision of Street Lighting Service and Traffic Signal Lighting Service between the City and the Company. This Agreement expressly does not limit the City’s ability to own and maintain City Street Lighting Facilities and to receive Utility Service from the Company for such City Street Lighting Facilities under an appropriate Tariff.
- §1.2 “Applicable Authority” refers to any governmental body or forum vested by law with authority to do the act or to make the order, rule or regulation involved.
- §1.3 “City” refers to the City of Boulder, a home rule municipal corporation of the State of Colorado.
- §1.4 “City Council” or “Council” refers to the legislative body of the City.
- §1.5 “City Facilities” refer to all facilities owned by the City including but not limited to buildings, structures, street lights, traffic signals, parking lots, parks and recreational facilities, and water, sewer, storm water, reclaimed water, telecommunication and transportation systems.
- §1.6 “City Manager” refers to the manager of the City or the manager’s authorized representative.
- §1.7 “City Street Lighting Facilities” refers to all City Facilities used to provide Street Lighting Service in the City.
- §1.8 “Code” refers to the Boulder Revised Code, 1981, as the same may be amended from time to time.
- §1.9 “Company” refers to Public Service Company of Colorado, an Xcel Energy company, and its successors and assigns, and including its affiliates or subsidiaries that undertake to perform any of the obligations under this Agreement.
- §1.10 “Company Facilities” refers to all facilities of the Company reasonably necessary to provide Utility Service into, within and through the City, including but not limited to plants, works, systems, substations, transmission and distribution structures, lines, equipment, conduit, pipes, mains, gas compressors, gas regulator stations, transformers, switch cabinets, underground lines, meters, meter reading devices, communication and data transfer equipment, control equipment, Company-owned street lights, wire, cables and poles.
- §1.11 “Company-Owned Non-Ornamental Street Lights” refers to luminaires and arms mounted on the Company’s electric system distribution poles.

- §1.12 “Company-Owned Ornamental Street Lights” refers to Company-owned street lighting poles together with the arm and luminaire attached thereto, and to luminaires attached directly to vehicular underpass structures or vehicular tunnels.
- §1.13 “Company Street Lighting Facilities” refers to all Company Facilities used exclusively to provide Street Lighting Service in the City.
- §1.14 “Design and Construction Standards” refers to those design and construction standards adopted by the City, as the same may be amended from time to time.
- §1.15 “Franchise” refers to the City’s grant to the Company of a non-exclusive right to make use of Streets, public easements and Other City Property to provide Utility Service to the City and its Residents, which franchise was authorized by the City by Ordinance No. \_\_\_\_\_ and presented to and approved by the voters of the City at an election on \_\_\_\_\_.
- §1.16 “Franchise Agreement” refers to the agreement between the City and the Company that memorializes the terms and conditions of the City’s grant of the Franchise to the Company.
- §1.17 “Non-Routine Maintenance” includes the installation, maintenance and replacement of all Company Street Lighting Facilities other than the ordinary and routine maintenance and replacement of lamps and light sensitive devices.
- §1.18 “Other City Property” refers to the surface, the air space above the surface and the area below the surface of any property owned or controlled by the City or hereafter held by the City, not including Streets or public easements, that are suitable locations for the placement of Company Facilities, as determined by the City in its sole discretion.
- §1.19 “Parties” refers to the City and the Company, collectively.
- §1.20 “Public Utilities Commission” or “PUC” refers to the Public Utilities Commission of the State of Colorado or other state agency succeeding to the regulatory powers of the Public Utilities Commission.
- §1.21 “Residents” refers to all persons, businesses, industries, governmental agencies, and any other entity whatsoever, presently located or to be hereinafter located, in whole or in part, within the territorial boundaries of the City.
- §1.22 “Streets” or “City Streets” refers to the surface, the air space above the surface and the area below the surface of any City-dedicated streets, alleys, bridges, roads, lanes, and other public rights-of-way within the City, which are primarily used for vehicular traffic. Streets shall not include public easements or Other City Property.

- §1.23 “Street Lighting Facilities” refers to those facilities specifically installed for the provision of Street Lighting Service in the City, whether owned by the City or the Company. Street Lighting Facilities does not include the Company’s electric distribution facilities.
- §1.24 “Street Lighting Service” refers to the illumination of Streets, public easements and Other City Property by means of the furnishing of electric energy from the Company’s distribution system for use in Street Lighting Facilities as provided in the applicable Tariffs.
- §1.25 “Supporting Documentation” refers to all information necessary or reasonably required in order to allow the Company to design and construct any work performed under the provisions of this Agreement.
- §1.26 “Tariffs” refers to the schedules of rates, charges, terms and conditions, governing the Company’s provision of Utility Service to Street Lighting Facilities and Traffic Facilities on file and in effect with the PUC, as the same may be amended from time to time.
- §1.27 “Traffic Facilities” refers to the City-owned traffic signals, traffic signage and other traffic control or monitoring devices, equipment or facilities, including all associated controls, connections and other support facilities or improvements, located in any Streets, public easements or Other City Property, and on the load side of the point of delivery.
- §1.28 “Traffic Signal Lighting Service” refers to the furnishing of electric energy from the Company’s distribution system for use in Traffic Facilities as provided in the applicable Tariffs.
- §1.29 “Utility Service” refers to the sale of gas or electricity and the delivery of natural gas to the City and its Residents by the Company.

**ARTICLE 2  
PURPOSE AND SCOPE**

- §2.1 Purpose. The City and the Company wish to provide for certain terms and conditions under which the Company will provide Street Lighting Service and Traffic Signal Lighting Service within the City in order to facilitate and enhance the operations of City Facilities. The Parties also wish to provide for other processes and procedures related to the provision of Street Lighting Service and Traffic Signal Lighting Service to the City. The Company acknowledges the critical nature of the municipal services performed or provided by the City to its Residents which require the Company to provide prompt and reliable Street Lighting and Traffic Signal Lighting Service.

- §2.2 Scope. This Agreement shall extend to all areas of the City as it is now or hereafter constituted, to the extent those areas are within the Company's PUC-certificated service territory.
- §2.3 Compliance with Laws. The Company shall promptly and fully comply with all laws, regulations, permits and orders enacted or issued by the City and with all applicable federal, state and local laws, ordinances, regulations, permits and orders that relate to the terms and conditions of this Agreement. This provision shall not be interpreted to allow the City to make a determination of whether the Company is in compliance with federal and state laws, regulations, permits and orders. The Parties expressly agree that a determination of compliance with federal and state laws, regulations, permits and orders shall reside exclusively with the judicial or regulatory body having jurisdiction over the subject matter.
- §2.4 Subject to Franchise and Tariffs. The Parties expressly acknowledge that this Agreement is subject to the terms and conditions of the Franchise Agreement and to the applicable Tariffs. Nothing in this Agreement shall be construed as a waiver by the City of its rights to assert any legal protection that is available to the City under the federal or Colorado constitution or statutes with respect to the applicable Tariffs.
- §2.5 Term and Execution of Agreement.
- A. Term. This Agreement shall be effective for a period coincident with the term of the Franchise granted to the Company by the City and approved by the electors of the City at the election to be held on \_\_\_\_\_. If the Franchise is not approved by the electors of the City at the election, this Agreement shall be void and of no force or effect.
- B. City Council Approval. Approval by the City Council of the City, acting by ordinance, shall be an express condition precedent to the lawful and binding execution, effect and performance of this Agreement. Such approval shall authorize the City Manager to sign this Agreement on behalf of the City.

### ARTICLE 3 CITY POLICE POWERS

- §3.1 Police Powers. The Company expressly acknowledges the City's right to adopt, from time to time, in addition to the provisions contained herein, such laws, including but not limited to, ordinances and regulations, as it may deem necessary in the exercise of its governmental powers.
- §3.2 Regulation of Streets and Other City Property. The Company expressly acknowledges the City's right to enforce regulations concerning the Company's access to or use of the Streets, public easements, and Other City Property, including requirements for permits.

**ARTICLE 4  
STREET LIGHTING SERVICE AND BILLING**

§4.1 The Company shall provide Street Lighting Service within the territorial boundaries of the City that are within the Company's PUC-certificated service territory in accordance with the terms of this Agreement and the applicable Tariffs.

§4.2 Billing And Payment.

A. The Company shall render bills monthly to the City for Street Lighting Service.

B. Billings for Street Lighting Service rendered during the preceding month shall be sent to the person(s) designated by the City Manager, and payment for the same shall be made as prescribed in the applicable Tariffs.

C. The Company shall render bills for Non-Routine Maintenance within 60 days after the Non-Routine Maintenance has been completed.

D. Billings for Non-Routine Maintenance shall be sent to the person(s) designated by the City Manager and payment for the same shall be made as required by applicable Tariffs.

E. The Company shall provide all billings and any underlying support documentation reasonably requested by the City in an editable and manipulatable electronic format that is mutually acceptable to the Company and the City.

F. The Company agrees to meet with the City Manager upon the City's reasonable written request for the purpose of developing, implementing, reviewing, and/or modifying mutually beneficial and acceptable billing procedures, methods and formats for the efficient rendering and processing of such billings submitted by the Company to the City.

§4.4 Customer Communication Regarding Street Light Outages. At least annually, the Company shall provide and mail, or deliver as otherwise agreed by the Parties, a section in a customer communication to all Residents informing them of specific procedures for reporting outages of street lights.

**ARTICLE 5  
INSTALLATION, OPERATION AND MAINTENANCE OF STREET LIGHTING  
SERVICE**

§5.1 Installation of Facilities. Company Street Lighting Facilities will be installed when requested and authorized by the City in accordance with the following:

A. Company shall furnish and install permanent Company Street Lighting Facilities supplied by overhead or underground feed from overhead or

underground distribution circuits in accordance with the Code and the Service Connection and Distribution Line Extension Policy contained the Tariffs; provided, however, that the City shall install any conduit and foundations for street lighting units on new bridges, viaducts, underpasses and other similar structures where such facilities are an integral part of the structures, to supply street lighting requested by the City. Company-Owned Ornamental Street Lights will be supplied by an underground feed unless otherwise mutually agreed.

B. At the City's request, the Company shall install temporary street lighting installations, provided that the City shall bear the cost of installing and removing all Company Facilities necessary to supply the service requested, less the salvage value of the materials used. Temporary installations shall mean the installation of any Street Lighting Facility which is known to be a temporary installation at the time of such installation. Temporary installations shall be limited to eighteen (18) months, except where construction is of a known duration but longer than eighteen (18) months.

C. The type and rating of all Company Street Lighting Facilities shall not be less than the standard of the equipment most recently installed in the City and comparable to that currently accepted in the industry; provided, however, that the type and rating of special ornamental standards installed by the City to accommodate Traffic Facilities to which Company Street Lighting Facilities are attached shall be subject to mutual agreement by the City and the Company.

D. The Company shall have the right to excavate and to make pavement cuts as necessary for the operation and maintenance of Company Street Lighting Facilities, including the installation of new or the relocation of existing Company Street Lighting Facilities, in accordance with all requirements set forth in the City's Code, Design and Construction Standards, and all applicable licenses, permits and written agreements between the Parties.

E. All new Company-Owned Ornamental Street Light poles shall comply with the American Association of State Highway and Transportation Officials ("AASHTO") requirements for roadway setbacks. The Company will obtain easements for its street lighting units in those instances where the distance between the curb line and the property line along the Street is less than three (3) feet. If, after reasonable efforts to obtain the necessary easements have been made by the Company, the Company is unable to obtain the necessary easements, it shall notify the City and the City may attempt to obtain the necessary easements. If the City is unable to obtain the easements, the Parties will work together to find alternate locations for pole installations. However, if a relocation of Company Facilities that are currently located in a City Street, public easement or Other City Property is necessary, then the provisions of Section 6.8. of the Franchise Agreement shall control.

F. So long as the City has elected to take service under the special provisions of Schedule SL applicable to municipal customers and has agreed to pay the applicable surcharge, the Company shall annually provide the City with a spreadsheet in Excel format of all street lights billed by the Company under Schedule SL, specifying the location, and the type and lumen rating of each lamp, and shall provide with each monthly bill a list of all additions and deletions, specifying the same information.

§5.2 Repair, Replacement And Maintenance. The Company shall maintain, repair and, if necessary, replace all Company Street Lighting Facilities within the City in accordance with the applicable Tariffs on file with the Public Utilities Commission.

§5.3 Improvements.

A. The City shall at all times be the beneficiary of improvements in street illumination that are economically and technically feasible, and the Company agrees to cooperate with the City in the application of such improvements to Street Lighting Service. As burn-outs occur, the Company agrees to install substitute lamps of increased efficiency so long as such lamps are included within the inventory offered by the Company under its tariffed Street Lighting Service offering and can be accommodated in the existing luminaire. The Company shall be responsible for all costs of such routine maintenance and replacement of lamps as provided in the applicable Tariffs.

B. The Company also agrees upon request of the City to increase the light intensity on Streets by replacing its existing street lighting lamps at no cost to the City so long as such substitute lamps are included within the inventory offered by the Company under its tariffed Street lighting Service offering and can be accommodated in the existing luminaire. The City will designate the lumen rating required and will pay the appropriate monthly rate set forth in the applicable Tariffs.

C. The Company agrees to investigate and, if appropriate, to offer to the City, new, alternative Company Street Lighting Facilities when economically and technically feasible, and to support before the PUC applicable tariffs that are consistent with and reflect the purchase, installation and/or maintenance of such facilities by the Company.

§5.5 Determination of Lumen Rating. The lumen rating of electric discharge lamps shall be considered as the nominal rated initial lumens determined in accordance with standard industry practices.

**ARTICLE 6**  
**PERFORMANCE MEASURES FOR STREET LIGHTING SERVICE**

- §6.1 Street Light Outage Reporting. The Company shall provide a convenient and effective means for any persons to report street light outages. Such procedures may include, but are not limited to, establishing a single purpose telephone number, a single-purpose electronic mail address or a single purpose reporting form accessible through the Company's website, currently "xcelenergy.com." The Company shall, upon receiving notice of a street light not being operational, use its best efforts to repair the street light to an operational condition within five (5) days of receiving notice.
- §6.2 Election to Receive Special Services Pursuant to Tariffs. Schedule SL in the Tariffs provides for an election for municipalities to receive burn out rate sampling studies, street light restoration reports, street light inventory reports and bill credits for excessive burn out rates and late repairs. This service is available under the Tariffs for a monthly charge. The City hereby elects to subscribe to this service and agrees to pay the monthly charge for the service set forth in the Tariffs. The City may withdraw this election by providing 30 days advance written notice to the Company.
- §6.3 Notice of Proposed Tariff Changes. If the Company considers making any substantive changes to the Tariffs that in the Company's reasonable opinion will significantly impact the Company's provision of Street Lighting Service under the terms of this Agreement, it will make a good faith effort to advise the City of such consideration.
- §6.4 No Duty To Third Parties. The performance measures established by the Tariffs and by this Article 6 reflect a financial arrangement between the City and the Company to ensure that the City has received fair value for its payment for Street Lighting Services. Nothing in this Agreement shall be construed to create a standard of care or any duty to any third person or to the general public with respect to Street Lighting Service.

**ARTICLE 7**  
**PERFORMANCE MEASURES FOR TRAFFIC SIGNAL LIGHTING SERVICE**

- §7.1 General. In providing Utility Service to Traffic Facilities and in performing all services relating to the provision of such Utility Service to Traffic Facilities, the Company agrees as follows:
- A. The Company shall meet its obligations hereunder efficiently and economically and in accordance with the high standards and best systems, methods, and skills then commercially reasonable and available for the provision of Utility Service.

B. The Company shall maintain Company Facilities servicing Traffic Facilities in good repair and condition.

C. The Company shall perform or cause to be performed by the Company all services related to Traffic Facilities:

- (1) in a high-quality manner;
- (2) in a timely and expeditious manner;
- (3) in a manner which minimizes interference with the operation or use of Traffic Facilities or inconvenience to the City or the public;
- (4) in a cost-effective manner, which may include the use of qualified contractors; and
- (5) in accordance with the applicable Tariffs, the Code, the Design and Construction Guidelines and all applicable laws, ordinances, and regulations.

D. The Company shall complete installation or relocation of Company Facilities necessary to provide new or modified electric service to a Traffic Facility in an area already served by the Company within a reasonable time, not to exceed one hundred twenty (120) days from the date upon which the City makes a work request that includes all required Supporting Documentation.

E. Upon receiving notice from the City that there has been an interruption of electric service to a Traffic Facility, the Company shall provide the City with a best estimate of when the Company expects to be able to restore electric service to or otherwise repair electric service to the Traffic Facility. Within one hour of learning any information that indicates there is a change in the initial or any subsequently revised estimate the Company shall provide an update of the status of the restoration. The Company agrees to employ its best efforts in responding to a Traffic Facility outage and in restoring and/or repairing Company Facilities affecting Traffic Facility outages.

## **ARTICLE 8**

### **BILLING AND PAYMENT FOR TRAFFIC SIGNAL LIGHTING SERVICE**

#### **§8.1 Billing.**

A. The Company shall render bills monthly to the City for Traffic Signal Lighting Service.

B. Billings for service rendered during the preceding month, shall be sent to the person(s) designated by the City Manager and payment for same shall be made as prescribed in the applicable Tariffs.

C. The Company shall provide all billings and any underlying support documentation reasonably requested by the City and in an editable and manipulatable electronic format that is acceptable to the Company and the City.

D. The Company agrees to meet with the City Manager upon the City's reasonable written request for the purpose of developing, implementing, reviewing, and/or modifying mutually beneficial and acceptable billing procedures, methods, and formats for the efficient rendering and processing of such billings submitted by the Company to the City.

## ARTICLE 9 LIABILITY

§9.1 City Held Harmless. The Company shall indemnify, defend and hold the City harmless from and against claims, demands, liens and all liability or damage of whatsoever kind on account of or arising from the grant of this Agreement, the exercise by the Company of the related rights, or from the operations of the Company within the City, and shall pay the costs of defense plus reasonable attorneys' fees. The City shall (a) give prompt written notice to the Company of any claim, demand or lien with respect to which the City seeks indemnification hereunder and (b) unless in the City's judgment a conflict of interest may exist between the City and the Company with respect to such claim, demand or lien, permit the Company to assume the defense of such claim, demand, or lien with counsel satisfactory to the City. If such defense is assumed by the Company, the Company shall not be subject to any liability for any settlement made without its consent. If such defense is not assumed by the Company or if the City determines a conflict of interest exists, the Parties reserve all rights to seek all remedies against each other. Notwithstanding any provision hereof to the contrary, the Company shall not be obligated to indemnify, defend or hold the City harmless to the extent any claim, demand or lien arises out of or in connection with any negligent or intentional act or failure to act of the City or any of its officers or employees, contractors, vendors or affiliates, or to the extent any claim arises out of a defect or malfunction of a Traffic Facility or other City Facility, including City-owned Street Lighting Facility, including without limitation, defective manufacture, operation, or maintenance.

§9.2 Immunity. Nothing in this Section or any other provision of this Agreement shall be construed as a waiver of the notice requirements, defenses, immunities and limitations the Parties may have under the Colorado Governmental Immunity Act (§24-10-101, C.R. S., *et seq.*) or to any other defenses, immunities, or limitations of liability available to the City by law.

**ARTICLE 10  
BREACH**

§10.1 Non-Contestability. The City and the Company agree to take all reasonable and necessary actions to assure that the terms of this Agreement are performed and neither will take any action to secure modification of this Agreement before any applicable authority.

§10.2 Breach.

A. Notice/Cure/Remedies. If a party (the “breaching party”) to this Agreement fails or refuses to perform any of the terms or conditions of this Agreement (a “breach”), the other party (the “non-breaching party”) may provide written notice to the breaching party of such breach. Upon receipt of such notice, the breaching party shall be given a reasonable time, not to exceed thirty (30) days, in which to remedy the breach. If the breaching party does not remedy the breach within the time allowed in the notice, the non-breaching party may exercise the following remedies for such breach:

- (1) specific performance of the applicable term or condition; and
- (2) recovery of actual damages from the date of such breach incurred by the non-breaching party in connection with the breach, but excluding any consequential damages.

B. Termination of Agreement by City. In addition to the foregoing, if the Company fails or refuses to perform any material term or condition of this Agreement (a “material breach”), the City may provide written notice to the Company of such material breach. Upon receipt of such notice, the Company shall be given a reasonable time, not to exceed ninety (90) days, in which to remedy the material breach. If the Company does not remedy the material breach within the time allowed in the notice, the City may, at its sole option, and except as otherwise provided by law, terminate all of the Company’s rights under this Agreement. This remedy shall be in addition to the right to exercise any of the remedies provided for in Article 11. Upon such termination, the Company shall continue to provide Street Lighting Service and Traffic Signal Lighting Service to the City, except as otherwise provided in its Tariffs and the rules and regulations of the PUC, or until otherwise ordered by the PUC.

C. Company Shall Not Terminate Agreement. In no event does the Company have the right to terminate this Agreement.

D. No Limitation. Except as provided herein, nothing herein shall limit or restrict any legal rights or remedies that either party may possess arising from any alleged breach of this Agreement.

**ARTICLE 11  
DISPUTE RESOLUTION**

§11.1 It is the express preference of the parties to this Agreement that all disputes of any nature whatsoever regarding the Agreement, including but not limited to, any claims for compensation or damages arising out of breach or default under this Agreement shall be resolved through informal means including negotiation and mediation, but not by arbitration, prior to initiating any legal action.

**ARTICLE 12  
MISCELLANEOUS**

§12.1 Amendments. No alterations, amendments or modifications hereof shall be valid unless executed by an instrument in writing by the Parties with the same formality as this Agreement. Neither this Agreement, nor any term hereof, can be changed, modified or abandoned, in whole or in part, except by an instrument in writing, and no subsequent oral agreement shall have any validity whatsoever.

§12.2 Approval By City Council. This Agreement, and each and every one of its provisions and terms, is expressly subject to, and shall not be or become effective or binding on the City or the Company, until approved by the City Council.

§12.3 Subject To Laws; Venue. Each and every term, provision or condition herein is subject to and shall be construed in accordance with the provisions of Colorado law, the Charter of the City, the Code and the applicable ordinances and regulations enacted or promulgated by the City pursuant thereto. Venue for any legal action relating to this Agreement shall lie in the District Court in and for Boulder County, Colorado.

§12.4 Examination of Records.

A. A duly authorized representative of the City shall have the right to examine any books, documents, papers, and records of the Company reasonably related to the Company's compliance with the terms and conditions of this Agreement. Information shall be provided within thirty (30) days of any written request. Any books, documents, papers, and records of the Company in any form that are requested by the City, that contain confidential information shall be conspicuously identified as "confidential" or "proprietary" by the Company. In no case shall any privileged communication be subject to examination by the City pursuant to the terms of this section. "Privileged communication" means any communication that would not be discoverable due to the attorney client privilege or any other privilege that is generally recognized in Colorado, including but not limited to the work product privilege. The work product privilege shall include information developed by the Company in preparation for PUC proceedings.

B. With respect to any information requested by the City which the Company identifies as "Confidential" or "Proprietary":

(1) The City will maintain the confidentiality of the information by keeping it under seal and segregated from information and documents that are available to the public;

(2) The information shall be used solely for the purpose of determining the Company's compliance with the terms and conditions of this Agreement;

(3) The information shall only be made available to City employees and consultants who represent in writing that they agree to be bound by the provisions of this subsection B;

(4) The information shall be held by the City for such time as is reasonably necessary for the City to address the Agreement issue(s) that generated the request, and shall be returned to the Company when the City has concluded its use of the information. The parties agree that in most cases, the information should be returned within one hundred twenty (120) days. However, in the event that the information is needed in connection with any action that requires more time, including, but not necessarily limited to litigation, administrative proceedings and/or other disputes, the City may maintain the information until such issues are fully and finally concluded.

C. If an Open Records Act request is made by any third party for confidential or proprietary information that the Company has provided to the City pursuant to this Agreement, the City will promptly notify the Company of the request and shall allow the Company to defend such request at its sole expense, including filing a legal action in any court of competent jurisdiction to prevent disclosure of such information. In any such legal action the Company shall join the person requesting the information and the City. In no circumstance shall the City provide to any third party confidential information provided by the Company pursuant to this Agreement without first conferring with the Company. The Company shall defend, indemnify and hold the City harmless from any claim, judgment, costs or attorney fees incurred in participating in such proceeding.

D. Unless otherwise agreed between the Parties, the following information shall not be provided by the Company: confidential employment matters, personal information regarding any of the Company's customers, information related to the compromise and settlement of disputed claims including but not limited to PUC dockets, information provided to the Company which is declared by the provider to be confidential, and which would be considered confidential to the provider under applicable law.

§12.5 Assignment. The benefits of this Agreement shall inure to and its obligations shall be binding upon the successors and assigns of the respective Parties hereto.

§12.6 Notice. Both Parties shall designate from time to time in writing representatives for the Company and the City who will be the persons to whom notices shall be sent regarding any action to be taken under this Agreement. Notice shall be in writing and forwarded by certified mail or hand delivery to the persons and addresses as hereinafter stated, unless the persons and addresses are changed at the written request of either Party, delivered in person or by certified mail. Until any such change shall hereafter be made, notices shall be sent as follows:

To the City:

City Manager  
Municipal Building  
1777 Broadway  
P.O. Box 791  
Boulder, CO 80302

With a copy to:

City Attorney  
Municipal Building  
1777 Broadway  
P.O. Box 791  
Boulder, CO 80302

To the Company:

Regional Vice President,  
Customer and Community Services  
Public Service Company of Colorado  
P.O. Box 840  
Denver, Colorado 80201

With a copy to:

Legal Department  
Public Service Company of Colorado  
P.O. Box 840  
Denver, Colorado 80201

§12.7 No Discrimination In Employment. The Company shall not refuse to hire, discharge, promote or demote or discriminate in matters of compensation against any person otherwise qualified, solely because of race, creed, color, religion, sex, age, national origin or ancestry or handicap; and further agrees to insert the

foregoing provision or its equivalent in all contracts to which the Company is a party, which affect or relate to its activities in connection with this Agreement.

- §12.8 No Third Party Beneficiaries. It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the Company and the City; and nothing contained in this Agreement shall create any obligation toward or give or allow any such claim or right of action by any other or third person or the general public.
- §12.9 Entire Agreement. This Agreement shall constitute the only Street Lighting and Traffic Signal Lighting Service Agreement between the City and the Company and supersedes and cancels all former street lighting agreements and traffic signal lighting agreements between the Parties hereto.
- §12.10 Paragraph Headings. The captions and headings set forth herein are for convenience of reference only, and shall not be construed so as to define or limit the terms and provisions hereof.
- §12.11 Severability. Should any one or more provisions of this Agreement be determined to be illegal or unenforceable, all other provisions nevertheless shall remain effective; provided, however, the Parties shall forthwith enter into good faith negotiations and proceed with due diligence to draft a term that will achieve the original intent of the Parties hereunder to the extent lawfully allowed.
- §12.12 Authority. Each Party represents and warrants that it has taken all actions that are necessary or that are required by its procedures, bylaws, or applicable law, to legally authorize the undersigned signatories to execute this Agreement on behalf of the Parties and to bind the Parties to its terms. The person(s) executing this Agreement on behalf of each of the Parties warrants that they have full authorization to execute this Agreement.
- §12.13 Counterparts Of Agreement. This Agreement may be executed in counterparts, each of which shall be deemed to be an original of this Agreement, and all of which, taken together, shall constitute one and the same document.

**IN WITNESS WHEREOF**, the parties have caused this Agreement to be executed as of the day and year first above written.

July 27, 2010

**CITY OF BOULDER**

By: \_\_\_\_\_  
Jane S. Brautigam, City Manager

ATTEST:

\_\_\_\_\_  
City Clerk on behalf of the  
Director of Finance and Record

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

**PUBLIC SERVICE COMPANY OF  
COLORADO**

By: \_\_\_\_\_  
Jerome Davis, Regional Vice President,  
Customer and Community Services

ATTEST:

\_\_\_\_\_  
Asst. Secretary

## **Xcel Franchise- Large Customer Meeting**

**July 22, 2010**

### **In attendance:**

<b>Name</b>	<b>Organization</b>
Joel Brown	Boulder Community Hospital
Moe Tabrizi	CU
Ron Ried	CU
John P. Morris	CU
Sam Cohen	Elevations Credit Union
Ghita Carroll	BVSD
Robert Anderson	Covidien
Frances Draper	BEC
David Ziegert	Celestial Seasonings
Susan Graf	Boulder Chamber
Wayne Schacher	Ball Aerospace
Karl Gerken	Ball Aerospace
Rob Humphries	IBM
David Patterson	UCAR
Matt McMullen	UCAR
Frank Bruno	CU
John Tayer	Roche Colorado

### **Comments/Questions:**

- Conversation has been theoretical to this point; need to know the rate and cost impact to largest customers.
- The largest customers are essentially the “decarb” team. The success of the community emission reduction goals rests on the decisions and efforts by this sector.
- The franchise agreement prevents further work on some options. That is essentially why the off-ramps are included at 10 and 15 years.
- When will the city know what the stranded costs are? When do we engage with the State PUC and FERC on this issue?
- What is the relationship between the franchise and Smart Grid?
- Rate based programs such as Solar Rewards and DSM will continue without a franchise; I assume the city is thinking about how to take over these programs if we develop a municipal utility.
- Are we sure that Xcel will continue to serve and maintain the system without a franchise?

- What is the role of the PUC if we are a municipal utility?
- Like the idea of creating an energy brokerage system rather than looking at owning our own power plants.
- Do we have a franchise and side-agreement that Xcel will agree to right now?
- The overarching goals are more control over electricity supply, increased renewable or clean energy and rate stabilization
- Are there exemptions to the excise tax?
- Will service requests be negatively impacted (slower) if the city does not sign or agree to put the franchise on the ballot?
- Could we have some type of agreement with Xcel if we do not extend the franchise that guarantee's service reliability?
- How is clean energy phased in to the side-agreements?

**Follow-up issues/items:**

1. Provide the cost and rate information with and without the additional funding for the study.
2. Need a complete information package.
3. CU has a dedicated feeder. How is that impacted with a municipal option?
4. Interested in ROI from Winter park Fl. Municipalization effort.
5. Would like to see the survey results.