

DISTRICT COURT, BOULDER COUNTY, COLORADO  
1777 6<sup>th</sup> Street  
Boulder, Colorado 80302  
(303) 441-3750

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**Plaintiff:** PUBLIC SERVICE COMPANY OF COLORADO,  
a Colorado corporation,

v.

**Defendants:** THE CITY OF BOULDER, COLORADO;  
THE CITY COUNCIL for the CITY OF BOULDER,  
COLORADO; MATTHEW APPELBAUM, in his official  
capacity as MAYOR; GEORGE KARAKEHIAN, in his  
official capacity as MAYOR PRO TEM; and MACON  
COWLES, SUZANNE JONES, LISA MORZEL, TIM  
PLASS, ANDREW SHOEMAKER, SAM WEAVER, and  
MARY YOUNG, in their official capacities as member of the  
CITY COUNCIL.

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Case No. 2014-CV-030681

Division: 5

**CITY OF BOULDER'S BRIEF  
IN SUPPORT OF ITS MOTION TO DISMISS**

## I. INTRODUCTION

The Complaint in this case is an attempt to challenge a decision made by the Boulder City Council on August 20, 2013, by purporting to challenge a different decision made on May 6, 2014. The Complaint is targeted at the Boulder City Council's decision to create a municipal electric utility through the adoption of Ordinance No. 7969 on May 6, 2014.<sup>1</sup> In fact, the Complaint does not include any allegations relating to the May 6, 2014 decision. The Complaint is devoted entirely to disputing the bases for an August 20, 2013 Boulder City Council decision that the voter-approved prerequisites to allow the establishment of a municipal electric utility had been met.

The August 20, 2013 decision was quasi-judicial in nature and therefore would have been subject to review under C.R.C.P. 106(a)(4), but the time in which to bring such a challenge has long since passed. A challenge to a quasi-judicial decision must be brought within 28 days of the final action. C.R.C.P. 106(b). As a result, to the extent that the Plaintiff's Complaint is intended to seek review under C.R.C.P. 106(a)(4) it must be dismissed. Moreover, the Plaintiff cannot avoid the constraints of C.R.C.P. 106(b) by attempting to re-plead its claim in the form of a declaratory judgment action. The remedy afforded by C.R.C.P. 106(a)(4) is exclusive and cannot be circumvented through a declaratory judgment action. Therefore, the Complaint should be dismissed.

In addition, although a court will undertake review of whether a quasi-judicial act involves an abuse of discretion or exceeds municipal authority, courts review legislative acts only if the act is alleged to be unconstitutional. The Complaint is devoid of any allegation that

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<sup>1</sup> The May 6, 2014 ordinance was an act of general application and therefore legislative in nature. As a legislative act, that decision is not subject to challenge under C.R.C.P. 106(a)(4). Thus, there is no basis for this Court to consider a C.R.C.P. 106 challenge to the May 6, 2014 decision.

the May 6, 2014 ordinance is unconstitutional, since all allegations relate to the factual premises for the August 20, 2013 decision. In the absence of any allegation of unconstitutionality, any attempt to seek review of a legislative act also must be dismissed. While a Court can review a legislative act under provisions other than C.R.C.P. 106(a)(4), under no circumstances should the judiciary put itself in the position of substituting its judgment for that of an elected legislative body.

In the alternative, the Complaint also should be dismissed because the Plaintiff does not have standing. To challenge a legislative act under C.R.C.P. 57, a plaintiff must have standing. The Plaintiff lacks standing to bring this claim because the Complaint does not allege a specific injury to a legally protected right through the adoption of either ordinance.

Finally, if the Court does not dismiss the Complaint for any of the foregoing reasons, the Complaint should be dismissed pursuant to C.R.C.P. 8.

## II. BACKGROUND

At the election on November 1, 2011, Boulder voters approved adding Article XIII, “Light and Power Utility,” to the Boulder Home Rule Charter; Complaint ¶ 18. Article XIII provided for the creation and operation of a light and power electric utility under certain conditions. Charter section 178(a) describes the main prerequisites to the creation of the utility as follows:

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

comparable to Xcel Energy and a plan for reduced greenhouse gas emissions and other pollutants and increased renewable energy

Charter Art. XIII, § 178(a), B.R.C. 1981; Complaint ¶ 20 (emphasis added). The highlighted text reflects the two decisions. The first sentence relates to the May 6, 2014 ordinance and the second relates to the August 20, 2013 ordinance.

The Complaint purports to challenge the City Council's decision of May 6, 2014, adopting Ordinance No. 7969. However, all the allegations in the Complaint relate to the August 20, 2013 decision of the City Council that the prerequisites contained in Charter section 178(a) had been met. The August 20, 2013 ordinance was the final action following a series of decisions by City Council. The City Council's efforts in this regard included the following:

- On November 15, 2012, after notice and a three-hour public hearing, the City Council adopted criteria, which it referred to as metrics,<sup>2</sup> to define how it would measure whether requirements of Charter section 178(a) had been met.
- On February 26, 2013, the City Council conducted a public study session at which it reviewed materials and received data reflecting projections of the city's ability to meet the Charter criteria as further defined through the metrics adopted on November 15, 2012; Complaint ¶ 29.
- On April 16, 2013, after providing notice, the City Council conducted a public hearing at which 44 people testified, including one of the Plaintiff's employees.

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<sup>2</sup> For example, Charter section 178(a) requires that the City Council demonstrate, "that the utility can acquire the electrical distribution system in Boulder and charge rates that do not exceed those rates charged by Xcel at the time of acquisition. Rates must also remain competitive over the life of the Utility." To refine that analysis, the City Council adopted the following metric:

The comparison between a municipal utilities rates and Xcel's rates at the time of acquisition will be calculated by sector (residential, commercial, industrial) using the average rate charged per kilowatt hour (kWh) of electricity compared to Xcel's average rates charged per kWh.

See <https://bouldercolorado.gov/energy-future/energy-future-work-plan-metrics>

City Council adopted Ordinance No. 7898; Complaint ¶ 33. This ordinance, in which the City Council made a preliminary determination that the conditions precedent to the creation of a light and power utility had been satisfied, was the first step in compliance with Section 178(a). *See* attached Exhibit 1, Ordinance No. 7898.

- On August 20, 2013, after notice and public hearing, the City Council accepted the report of a third-party evaluator and made final findings, concluding that the conditions precedent to the creation of a light and power utility in Charter section 178(a) had been satisfied; Complaint ¶ 38. *See* attached Exhibit 2, Ordinance No. 7917. The Plaintiff did not seek judicial review of this ordinance.

The other decisions related to the formation of the electric utility, but unrelated to whether the section 178(a) prerequisites had been met, included:

- On August 20, 2013, the City Council also passed Ordinance No. 7918, which authorizes the acquisition of property interests owned by Xcel Energy, by negotiation and purchase or through the power of eminent domain; Complaint ¶ 39. *See* attached Exhibit 3, Ordinance No. 7918.
- On May 6, 2014, the City Council passed Ordinance No. 7969, forming the electric utility. *See* Exhibit A to Plaintiff's Complaint.

The May 6, 2014 ordinance forming the electric utility was a legislative action under the city's police powers. The ordinance includes four sections. Section 1 adds a new chapter 7 to title 11 of the Boulder Revised Code. Chapter 11-7 has three sections: Section 11-7-1 sets forth the legislative intent; Section 11-7-2 provides the new electric utility with certain powers and establishes it as an enterprise under Article X, Section 20 of the Colorado Constitution, which is

also known as the Taxpayer's Bill of Rights; and Section 11-7-3 provides for governance of the utility.

Section 2 of the May 6, 2014 ordinance creates a new section 2-3-23 of the Boulder Revised Code, establishing an Electric Utility Board. Section 3 declares that the ordinance is necessary to protect the public health, safety, and welfare of the residents of the city, and that it covers matters of local concern. Section 4 orders the ordinance to be published by title only and provides for copies to be made available by the clerk.

All these actions are legislative decisions of the City Council, authorized by the Boulder Home Rule Charter. The Complaint includes no allegations related to any of the sections of the May 6, 2014 ordinance.

The Plaintiff now brings this action. The Plaintiff disagrees with the City Council's interpretation of the Charter that the prerequisites to forming a utility have been met and asks this Court to substitute its judgment for that of the City Council. However, because the Plaintiff missed the jurisdictional deadline for challenging the City Council's quasi-judicial decision, this challenge is untimely and should be dismissed.

### **III. ARGUMENT**

#### **A. This Court Lacks Subject Matter Jurisdiction.**

Article III of the Colorado Constitution prohibits any branch of government from assuming the powers of another branch. *Wimberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977). Courts cannot assume powers vested in either the executive or the legislative branches of government. *Id.* Courts must avoid making decisions that are legislative in nature. It is not up to the court to make policy or to weigh policy. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000). The general principle that the judicial branch has no direct

control over the legislation branch applies to legislative actions of municipal governments. *Town of Minturn v. Sensible Housing Co., Inc.*, 273 P.3d 1154, 1159 (Colo. 2012). The Plaintiff seeks to have this Court substitute its judgment for that of the City Council. The Court should not interpose itself into the decision-making of a duly elected legislative body.

**1. The May 6, 2014 Ordinance Creating a Municipal Electric Utility was a Legislative Act Not Subject to Challenge under C.R.C.P. 106(a)(4).**

The May 6, 2014 ordinance forming the municipal electric utility is a legislative act and therefore not reviewable under C.R.C.P. 106(a)(4). The plain language of C.R.C.P. 106(a)(4) expressly limits its application to judicial or quasi-judicial actions:

(a) . . . In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure: . . .

(4) Where any governmental body or officer or any lower judicial body *exercising judicial or quasi-judicial* functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law . . .

C.R.C.P. 106(a)(4)(emphasis added).

Judicial or quasi-judicial actions involve a determination of rights, duties, or obligations based on the application of existing legal standards to facts developed at a hearing. *Verrier v. Colorado Dep't of Corrections*, 77 P.3d 875, 879 (Colo. App. 2003). The three-part test of a quasi-judicial decision is whether notice is required prior to a public hearing, the public hearing itself and the body making the decision applies facts to certain criteria established by law. *Jafay v. Board of County Commissioner of Boulder County*, 848 P.2d 892, 897 (Colo. 1993) (citing *Snyder v. Lakewood*, 542 P.2d 371, 374 (Colo. 1975)). Legislative action, such as that effected by the May 6, 2014 ordinance creating the municipal electric utility, is a public policy matter of a permanent or general character and is prospective in nature. *Cherry Hills Resort Development*

*Co. v. City of Cherry Hills Village*, 757 P.2d 622, 625 (Colo. 1988). A legislative act is one that represents “a declaration of public policy of general applicability.” *Vagneur v. City of Aspen*, 295 P.3d 493, 507 (Colo. 2013) (quoting *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1254 (Colo. 1987)). As an example, the Colorado Supreme Court has consistently held that original zoning decisions are legislative in character since this original act is of a general and permanent character and involves a general rule or policy. *Margolis v. District Court, In and For Arapahoe County*, 638 P.2d 297, 303-04 (Colo. 1981). Actions necessary to carry out existing legislative policies are deemed to be administrative. *City of Aurora v. Zwerdinger*, 571 P.2d 1074, 1077 (Colo. 1977). Legislative and administrative actions are not reviewable pursuant to C.R.C.P. 106(a)(4). *U.S. West Communication, Inc. v. City of Longmont*, 924 P.2d 1071, 1083 (Colo. App. 1995), aff’d, 948 P.2d 509 (Colo. 1997); *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203, 1208 (Colo. App. 2000).

The May 6, 2014 ordinance did three things: (i) created the utility; (ii) provided for a governance structure; and (iii) specified that the utility should be an enterprise for TABOR purposes. The ordinance represents a declaration of public policy of general applicability. The ordinance sets policies for the utility that are similar to those governing the city’s other three utilities. *See* Chapter 11-1 “Water Utility,” Chapter 11-2 “Wastewater Utility,” and Chapter 11-5 “Stormwater and Flood Management Utility,” B.R.C. 1981. This was clearly a legislative decision. There is no application of facts to established criteria. Therefore, the May 6, 2014 ordinance establishing the municipal electric utility was a legislative act not subject to review under C.R.C.P. 106(a)(4).

**2. Any Challenge to the August 20, 2013 Under C.R.C.P. 106(a)(4) is Time-Barred.**

In reality, the Plaintiff does not seek to challenge the May 6, 2014 ordinance, but instead seeks judicial review of the City Council's August 20, 2013 decision determining that the Charter section 178(a) criteria had been met. This is evident from the recitations in paragraphs 1, 2, 5, 19, 20, 21, 23, 28, 29, 30, 45 and the three "Flaws" alleged in paragraphs 46-58 of the Complaint. In fact, in paragraph 38 of its Complaint, the Plaintiff concedes that the City Council on August 20, 2013, by passing Ordinance No. 7917, "determined the Charter section 178(a) preconditions had been met."

Any challenge under C.R.C.P. 106(a)(4) must be brought within 28 days of the final decision of the action challenged. C.R.C.P. 106(b) provides as follows:

[A] complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than 28 days after the final decision of the body or officer. A timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and such amendment shall relate back to the date of filing of the original complaint.

C.R.C.P. 106(b). To the extent that the Complaint seeks to challenge the findings that the section 178(a) Charter criteria had been met, it is untimely because more than 28 days have passed since the Council took final action on the August 20, 2013 ordinance. The 28 day limit is jurisdictional (*Wallin v. Cosner*, 210 P.3d 479, 480 (Colo. App. 2009); *Baker v. City of Dacono*, 928 P.2d 826 (Colo. App. 1996)); and cannot be tolled or waived. *Slaughter v. County Court*, 712 P.2d 1105, 1106 (Colo. App. 1985). Thus, to the extent that the Plaintiff seeks to challenge the final decision that the Charter prerequisites had been met, that claim must be dismissed because it is untimely and therefore this Court lacks subject matter jurisdiction over such a claim.

In addition, under the Boulder Revised Code, a party seeking to challenge a quasi-judicial action, must first present the grounds for the challenge to the decision-maker. § 1-3-5(j), B.R.C. 1981, “No defense or objection may be presented for judicial review unless it is first presented to the agency or hearing officer, prior to the decision thereof.” See *McClellan v. State, Dep't of Revenue, Motor Vehicle Div.*, 731 P.2d 769, 772 (Colo. App. 1986). This rule is intended to prevent exactly the situation before this Court. The Complaint purports to raise many factually based arguments for reconsideration of the City Council’s August 20, 2013 decision.<sup>3</sup> The Plaintiff never gave the City Council the opportunity to consider these facts when it conducted the public hearing on that issue. Instead, it presents them for the first time for this Court to consider on appeal. This is analogous to making factual arguments before an appellate court that had not been presented to a trial court. An appellate court would not consider such arguments and neither should this Court.

**3. A Plaintiff Cannot Circumvent the Requirements of C.R.C.P. 106(b) through C.R.C.P. 57.**

C.R.C.P. 106(a)(4) is the exclusive remedy to challenge a quasi-judicial decision. A party that has failed to bring a timely challenge pursuant to Rule 106 cannot circumvent the time limit by seeking a declaratory judgment as the Plaintiff seeks to do here. *Sullivan v. Board of County Comm'rs*, 692 P.2d 1106, 1109 (Colo. 1984); *Snyder v. City of Lakewood*, 542 P.2d 371, 376 (Colo. 1975), overruled on other grounds, *Margolis v. District Court*, 638 P.2d 297, 305 (Colo. 1981); *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 676–77 (Colo.1982); *JJR 1, LLC v. Mt. Crested Butte*, 160 P.3d 365, 369 (Colo. App. 2007). In *Snyder*, the plaintiffs sought to challenge a rezoning decision through a declaratory judgment action over a year after the Lakewood City Council’s final decision. The district court had

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<sup>3</sup> The Plaintiff did present many of these arguments to the Council on May 6, 2014, months after the Council had made its final decision regarding the Charter criteria on August 20, 2013. Complaint ¶ 3.

dismissed the plaintiffs' claim under C.R.C.P. 106(a)(4), but permitted them to proceed under Rule 57 as a declaratory judgment action. The Colorado Supreme Court reversed, holding as follows:

The failure to bring a Rule 106(a)(4) proceeding within 30 days<sup>4</sup> of the enactment of the Lakewood rezoning ordinance was a jurisdictional defect under C.R.C.P. 106(b). . . . The district court properly dismissed the original complaint, and erred in not dismissing the entire amended complaint. The time for pursuing the available remedy of certiorari had passed without an attempt of compliance. The protestors seek to accomplish by a declaratory judgment and an injunction what they can no longer accomplish directly under Rule 106(a)(4).

*Snyder*, 542 P.2d at 376 (citations omitted).

This case presents exactly the same circumstance. The City Council made three separate determinations leading up to a final decision regarding the requirements of Charter section 178. On August 20, 2013, after notice and a public hearing, City Council made the final decision that the prerequisites had been met. On that date, City Council adopted an ordinance, accepting the findings of a third-party evaluator. The City Council determined that “the conditions precedent to the creation of a light and power utility in Charter Section 178(a) **have been** satisfied.” (Bold in original.)<sup>5</sup> The Plaintiff did not challenge this decision in the time required by Rule 106(b). Now, on the eve of the city's filing of a condemnation petition, the Plaintiff seeks to challenge these decisions by attacking the purely legislative decision creating a municipal utility on May 6, 2014. The challenge is untimely and should be dismissed.

The city will be prejudiced if the Plaintiff is permitted to enter into a delayed challenge to the City Council's final decision on August 20, 2013. The city has spent thousands of dollars in reliance upon the decision, which the Plaintiff could have and should have challenged in the

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<sup>4</sup> Effective January 1, 2012, the Colorado Supreme Court implemented Rule Change 2011(18), implementing a “Rule of 7” making virtually all time limits in the Colorado Rules of Civil Procedure multiples of seven. As part of this change the time limit in Rule 106 was changed from 30 days to 28 days.

<sup>5</sup> There is no doubt that the City Council considered the August 20, 2013 ordinance to be a final act, because on that same date the City Council passed an ordinance authorizing condemnation. *See* Exhibit 3.

appropriate time period. Rule 106 is designed to give the community certainty to rely on decisions made by their elected leaders. The Colorado Supreme Court explained this rationale in the zoning context as follows:

There is also an important public policy consideration in determining that certiorari is the exclusive remedy in rezoning determinations such as the one in this case. Where the concerned parties have notice of a public hearing in which they may participate, it is not unfair to require that they litigate their challenge, be it constitutional or statutory, within the time limits established in Rule 106(b).

The present controversy has continued for over two years, the effect of which is that the surrounding landowners, the Church, the City and many other interested persons and organizations have been living under a cloud of uncertainty which is not compatible with modern comprehensive planning. The interests of all will be served if a challenger to a rezoning determination must prosecute all his causes in one certiorari action and bring it within 30 days of 'final action' unless a statute or municipal ordinance provides otherwise. C.R.C.P. 106(b).

*Snyder*, 542 P.2d at 376.

#### **4. The Complaint Does Not Allege any Basis for Review of a Legislative Act**

The Complaint does not make any allegation sufficient to support judicial review of a legislative act. “[M]unicipalities have broad police powers, including the power to establish laws that promote the health, safety, and welfare of citizens.” *Town of Dillon v. Yacht Club Condominiums Home Owners Ass'n*, 325 P.3d 1032, 1038 (Colo. 2014) . “It is well settled that a municipal regulation, having a fair relation to the protection of human life and the protection of public convenience and welfare, constitutes a reasonable application of the police power.” *U. S. Disposal System, Inc. v. City of Northglenn*, 567 P.2d 365, 367 (Colo. 1977). “The reasonable exercise of the police power, in good faith, to protect the public peace, order, health, safety, welfare, and well-being of the community may not be questioned except as to invasion of rights secured by the fundamental law, that is, limitations and restrictions expressed and implied in constitutional inhibitions.” 6A MCQUILLIN, MUNICIPAL CORPORATIONS § 24:9 (3d ed. 2007).

The Complaint does not allege that either the May 6, 2014 ordinance or the August 20, 2013 ordinance violates any constitutional right. Nor is there any allegation that either ordinance lacks a rational relationship to a legitimate public purpose. The Complaint is directed entirely to seeking review of the factual analysis that the City Council undertook before adopting the August 20, 2013 ordinance. Such a review might be appropriate under C.R.C.P. 106(a)(4) of a quasi-judicial decision. It is not appropriate, however, for a Court to engage in such a factually based analysis of a legislative decision.

*Tri-State Generation* provides a good example of the different levels of review afforded legislative and quasi-judicial actions. In that case, the plaintiffs had failed to timely join the city council in the complaint seeking review under C.R.C.P. 106(a)(4). *Tri-State Generation*, 647 P.2d 675-76. The Colorado Supreme Court dismissed the claims under C.R.C.P. 106. *Id.* The *Tri-State Generation* court permitted review of the constitutionality of the underlying ordinance, because that was a legislative and not a quasi-judicial action. *Id.* The *Tri-State Generation* undertook this review because the plaintiffs alleged that the ordinance denied them due process and equal protection of the laws. *Id.* The Complaint before this Court contains no such allegation. In the absence of any such allegation, the Complaint should be dismissed.

##### **5. The Plaintiff Lacks Standing to Bring a Declaratory Judgment Action**

Even if the Plaintiff had alleged a sufficient constitutional claim, the Plaintiff lacks standing to assert such a claim. A court does not have jurisdiction over a case unless a plaintiff has standing. *Hotaling v. Hickenlooper*, 275 P.3d 723, 725 (Colo. App. 2011). Standing is a threshold issue, which must be established before a court turns to the merits. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008); *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). To establish standing, a plaintiff must establish (1) an injury-in-fact (2) to a legally protected

interest. *Wimberly*, 570 P.2d at 538. A remote possibility of future injury or an injury overly indirect or incidental to the challenged action of the defendant is not a sufficient injury in fact to sustain standing. *Hotaling*, 275 P.3d at 725.

The Complaint does not include any explicit allegation that this Court has standing to consider this litigation. The nearest to such an allegation appears in paragraphs 3 and 66. In paragraph 3, the Plaintiff appears to allege that the injury in fact is that the city will exercise its right to condemn the Plaintiff's facilities. The possibility of condemnation cannot be an injury in fact because the property owner is guaranteed due process and just compensation in any eminent domain proceeding. *Brotman v. East Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 891 (Colo. 2001). Thus, Plaintiff has not alleged an injury in fact.

The Plaintiff also has not alleged that any legally protected interest was violated by the city adopting the May 6, 2014 ordinance forming the municipal electric utility. The closest Plaintiff comes to alleging a legally protected interest is in paragraph 66, where the Complaint appears to allege taxpayer standing. Although Colorado provides "broad taxpayer standing in the trial and appellate courts," *Barber v. Ritter*, 196 P.3d 238, 246 (Colo. 2008) (quoting *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004)), to assert such standing, a plaintiff must assert an injury different from other taxpayers in general. *Olson v. City of Golden*, 53 P.3d 747, 750 (Colo. App. 2002). The Complaint alleges neither a direct economic harm nor any harm to the Plaintiff by the formation of a municipal electric utility that is different than any other taxpayer in Boulder.

## **B. The Complaint Does Not Meet the Requirements of C.R.C.P. 8**

If the Court does not dismiss the Complaint with prejudice for the foregoing reasons, it should be dismissed because it does not contain "(a)...a short and plain statement of claim

showing that the Plaintiff is entitled to relief” as required by C.R.C.P. 8. Nor is it compliant with subsection (e), “(e) Pleading to be Concise and Direct....Each averment of a pleading shall be simple, concise, and direct....” Many of the averments in the Complaint are arguments or statements of different opinions rather than facts and could not be answered by the city. The introduction and general allegations are improper and do not comply with the requirements of C.R.C.P. 8. Answering such a Complaint would be almost impossible.

#### IV. CONCLUSION

For the reasons stated above, the city requests that this matter be dismissed with prejudice pursuant to C.R.C.P. 12(b)(1) for lack of subject matter jurisdiction. The Complaint should be dismissed because the May 6, 2014 decision is not subject to challenge under C.R.C.P. 106(a)(4), and any such challenge to the August 20, 2013 decision is untimely. Any declaratory judgment claim relating to the May 6, 2014 legislative decision should be dismissed because the Complaint does not include any allegation sufficient to justify review of a legislative act. In any event, the Plaintiff lacks standing to bring such a claim. In the alternative the city requests that the Complaint be dismissed for non-compliance with C.R.C.P. 8.

Respectfully submitted this 26<sup>th</sup> day of June, 2014.

BOULDER CITY ATTORNEY’S OFFICE

BY: /s/ signatures on file

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**ATTORNEYS FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of June 2014, a true and correct copy of the foregoing **CITY OF BOULDER'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS** was served via ICCES as follows:

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BOULDER CITY ATTORNEY'S OFFICE

By: /s/ signature on file  
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