

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

DOCKET NO. 12A-155E

IN THE MATTER OF THE APPLICATION AND PETITION FOR RULE WAIVER OF
PUBLIC SERVICE COMPANY OF COLORADO FOR AUTHORITY TO OFFER
DIFFERENT CONTRACT TERMS TO CUSTOMERS WITHIN THE CITY OF BOULDER

**THE CITY OF BOULDER'S COMMENTS
IN RESPONSE TO COMMISSION QUESTIONS**

The City of Boulder (“Boulder”), by and through its undersigned attorneys, responds to Decision No. C12-0389 in the above-referenced docket, adopted by the Colorado Public Utilities Commission (the “Commission”) on April 5, 2012, and provides the following Comments in Response to Commission Questions (these “Comments”).

SUMMARY

Boulder appreciates the Commission’s interest in this unusual docket and the opportunity to provide the Commission with information regarding Boulder’s recent activities as it attempts to meet its Energy Future Goals (defined below). Boulder is exploring a variety of paths by which it may meet these goals. And while it is the case that Boulder may decide to form its own municipal electric utility during this decade, the actual date of that decision is some number of years down the road. Indeed, given the conditions placed on the formation of a municipal electric utility in Boulder’s Home Rule Charter (discussed below) by Boulder voters, Boulder may find that it is unable to create a municipal electric utility. Nonetheless, it is prudent for Public Service Company of Colorado (“PSCo”) to begin to plan for Boulder’s possible departure from its system as it has no reasonable expectation of continuing to serve its Boulder customers.

The question before the Commission is whether the Application and Petition for Rule Waiver filed by PSCo in this docket (the “Application”) is ripe for decision. Boulder argues that it is not. PSCo has based its argument in favor of the Application on the probability of Boulder’s acquisition of the PSCo electric distribution system, while simultaneously admitting that that acquisition may never occur.¹ While municipalization is one path forward, there has not yet been a definitive decision made with regard to the acquisition of PSCo’s electric distribution system in the city and no final action has been taken by the Boulder City Council that would make the application filed by PSCo ripe for decision by the Commission.

Given the current status of Boulder’s continued exploration of the various paths toward its Energy Future Goals and the Charter restrictions on the formation of a municipal electric utility, Boulder argues that the application filed by PSCo is premature. Further, if the Commission were to approve PSCo’s request at this time, those parties who would be denied the full benefits of the programs *for which they are paying* could be entitled to damages if Boulder does not ultimately acquire the PSCo electric distribution system. Asking the Commission to approve PSCo’s proposal is asking that the Commission resolve an issue that is not yet ripe for decision.

Boulder recommends, given that there would likely be a transition period between the time bond issuance is approved by City Council and the actual beginning of municipal operations, that transition period may be the most appropriate time to consider the participation in the distributed generation and energy efficiency programs by what, at that point, will be soon-to-be former PSCo customers.

¹ Application, p, 14, “...it is not yet a certainty that Boulder will in fact ultimately depart from our system.”

PROCEDURAL BACKGROUND

On February 17, 2012, PSCo filed the Application in which PSCo requested authority to (1) include a provision in its Customer-owned Small (<10kW) Solar*Rewards contracts with its Boulder residential and small commercial customers that PSCo's obligations under the contract terminate once Boulder assumes responsibility for supplying electric service to that customer; (2) prevent Boulder customers from receiving any upfront rebates to the extent they are offered as part of PSCo's Solar*Rewards program; (3) limit PSCo's Boulder customers' participation in demand side management (DSM) programs to prevent PSCo's spending more on those programs in Boulder than the amount paid by PSCo's Boulder customers; (4) prohibit Boulder customers' participation in PSCo's Solar*Rewards Community program "unless and until [Boulder] abandons its efforts to condemn [PSCo's] electric business in Boulder;"² and (5) not make the proposed Windsource Long-Term program available to Boulder customers "unless or until such time as [Boulder] abandons its efforts to form a municipal electric utility."³

Boulder filed a petition for leave to intervene, which was granted by the Commission in the April 5th decision. The decision posed a series of questions concerning matters of ripeness; the roles of the Federal Electric Regulatory Commission ("FERC"), the courts, and the Commission in the municipalization process; effective dates for the relief sought; and Boulder's plans regarding the establishment of a municipal electric utility. Boulder appreciates the opportunity to respond to the questions posed.

INTRODUCTION

In 2005, five years before the end of its franchise agreement with PSCo, Boulder began contemplating the acquisition of PSCo's electric utility assets in the city and the formation of a

² Application, page 17.

³ Application, page 18.

new, municipal electric utility. In fact, consultants were hired to analyze and appraise the electric system in Boulder. However, when PSCo proposed that it select Boulder as its SmartGridCity™, Boulder citizens were encouraged by the direction in which PSCo appeared to be heading and franchise negotiations were begun.

During franchise negotiations, Boulder staff and consultants worked diligently with PSCo staff and consultants to find ways to work together that would meet Boulder's Energy Future Goals. Those goals include:

1. Ensuring an energy supply that is stable, safe and reliable;
2. Ensuring competitive rates while balancing short-term and long-term interests;
3. Significantly reducing carbon emissions and other pollutants to improve environmental quality;
4. Providing Boulder energy customers with a greater say about their energy supply;
5. Promoting local economic vitality; and
6. Promoting social and environmental justice.

While PSCo and Boulder staff were able to reach agreement regarding the “nuts and bolts” franchise agreement by August 2010, the Boulder City Council was frustrated that PSCo was unwilling or unable to partner with the city to explore new ways of meeting Boulder's Energy Future Goals. Part of the reason PSCo may have been unable to engage in the suggested partnership was because, as PSCo explained, it could not legally treat Boulder differently than it treats its other customers. The Boulder City Council decided not to place the franchise agreement on the November 2010 ballot since it determined that this sort of 20-year partnership with PSCo would not help the city reach its Energy Future Goals. Instead, the City Council

placed an occupation tax measure on the ballot that served as a substitute for the PSCo franchise fee. The franchise agreement was allowed to lapse.

In 2011, Boulder began investigating alternative ways in which it might receive electric power. These included alternatives as varied as buying wind in bulk, working with PSCo to create a “Boulder Rate⁴,” community choice aggregation or the creation of a new, municipal electric utility. Some of these ideas were discussed with PSCo as Boulder looked for ways to meet its Energy Future Goals without having to “buy the poles and wires.”

However, given the current status of utility law in Colorado and the regulatory structure under which PSCo, as a regulated monopoly, must operate, it became apparent that the creation of a municipal electric utility and the acquisition of the PSCo distribution system in Boulder was a path forward that Boulder would be remiss in not exploring since it is possibly one of the few paths that does not involve approval from the Colorado General Assembly.

Consequently, in order to continue exploring this path, the Boulder City Council voted to place a measure on the November 2011 ballot that would authorize City Council to form a municipal light and power utility and to issue bonds for that purpose. The conditions placed on the authorization are found in the Boulder Home Rule Charter at Sections 178 to 187, which are attached to these Comments as Exhibit 1. Subparagraph (a) of Section 178 reads as follows:

The city council shall establish a light and power utility only if it can demonstrate, with verification by a third-party independent expert, that 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

⁴ A Boulder Rate that would, for example, give Boulder the ability to determine its energy mix and rates would vary depending upon that mix. PSCo rejected this idea based on the requirement that all customers of regulated monopolies must be treated alike. However, Boulder has recently wondered whether the results of last November’s election might now qualify the city for such treatment pursuant to the provisions of C.R.S. § 40-3-104.3.

and a plan for reduced greenhouse gas emissions and other pollutants and increased renewable energy;

In order for the Boulder City Council to create a municipal electric utility, the city must demonstrate to the satisfaction of a third-party independent expert that:

1. The city can purchase the electrical distribution system in Boulder and charge rates that do not exceed those rates charged by Xcel Energy at the time of acquisition;
2. The utility's rates will produce revenues sufficient to pay for operating expenses and debt payments, plus an amount equal to 25% of the debt payments;
3. The light and power utility must have system reliability comparable to that of Xcel Energy; and
4. The light and power utility must have a plan for
 - a. Reduced greenhouse gas emissions and other pollutants; and
 - b. Increased renewable energy.

Because municipalization is an expensive and time-consuming proposition, the Boulder City Council asked voters to approve placing these conditions on the authorization to approve the formation of a municipal electric utility. That authorization in no way mandates the formation of a municipal electric utility, nor does it require, or even allow without further action by the Boulder City Council, Boulder to acquire any assets of PSCo. All conditions must be met before the Boulder City Council could move forward with the creation of a municipal electric utility.

Further, in discussions regarding potential municipalization, the Boulder City Council determined that there would be at least four decision points, or "off-ramps," regarding whether the city would, or could, proceed down the path of municipalization. These off-ramps are directly tied to the conditions placed on the authorization to form a municipal electric utility.

The off-ramps are:

1. Pre-Offer Valuation of Distribution System. Before Boulder (a) makes an offer to purchase PSCo's electric distribution facilities within the city, or (b) files an action in state court seeking to condemn PSCo's electric distribution facilities, it must be reasonably assured that the value of the assets is not so great as to prohibit the municipal electric utility from reaching rate parity with PSCo, while still meeting the other conditions recited in the Charter provisions. If it appears that the value of the system exceeds an amount that would allow for initial rate parity, the Boulder City Council could decide not to spend the time and money required to proceed with acquisition of the electric distribution system.
2. The Condemnation Action Award⁵. If, in the future, good faith negotiations regarding the acquisition of the PSCo electric distribution system fail, an eminent domain action is filed in state court and a final award from the court exceeds an amount that will permit the municipal electric utility to meet the conditions placed upon its formation, including initial rate parity, no municipal utility can be formed and the condemnation cannot go forward.
3. Ruling on Stranded Costs from FERC. Once the Federal Energy Regulatory Commission (FERC) issues an order with regard to stranded costs, Boulder will review the feasibility of meeting rate parity with PSCo, while still meeting the other conditions placed on the formation of the municipal electric utility. If the award from FERC, combined with the cost of acquiring the electric distribution system, is too

⁵ Boulder would hope to negotiate the purchase of the electric distribution system from PSCo in order to avoid a condemnation action, but realizes that may not be possible.

high, no municipal utility can be formed and the acquisition of PSCo's electric distribution system cannot go forward.

4. Bond Rates. The final off-ramp involves the interest rate on the bonds Boulder would issue to purchase the electric distribution system and pay any award of stranded costs. Even if both the acquisition cost and stranded generation cost awards fall within the realm of feasibility, it is possible that the rates the city would be charged could exceed those used previously to examine the feasibility of municipalization. In that case, the required rate parity with PSCo's electric rates might not be met, the utility could not be formed and the acquisition of PSCo's electric distribution system could not go forward.

Measures 2B and 2C⁶ were narrowly approved by Boulder voters. Since November, Boulder has hired the Denver firm of Duncan, Ostrander & Dingess, P.C., to assist the city in creating an inventory of assets and valuing those assets. Because PSCo has to date been unwilling to share information regarding its electric distribution assets in Boulder, the city is taking other approaches to creating an inventory of assets. That activity alone is estimated to take up to one year to complete. Once an inventory has been created, a qualified appraiser can determine the value of the assets in the inventory.

Once the value of the electric distribution system is appraised, the city will evaluate whether the acquisition of the electric distribution system is feasible, given the conditions placed on the formation of a municipal electric utility. If it is feasible, attorneys and negotiators would assist the city in making a good faith offer to PSCo to purchase the PSCo electric distribution

⁶ Measure 2B authorized an increase of up to \$1.9M per year for up to 5 years to fund the cost of further exploration of and planning for the creation of a municipal electric utility and the acquisition of the electric distribution system. Measure 2C authorized the formation of a municipal electric utility and the issuance of bonds for the purpose of purchasing the electric distribution system.

system in the city. If those negotiations fail, Boulder would file a condemnation action in state district court. Duncan, Ostrander & Dingess estimates that a condemnation action would go to trial roughly one year after the action was filed. Probable appeals could take another 1 -2 years.

Boulder has also hired a Washington, D.C. law firm, Duncan and Allen, to represent the city before FERC. Duncan and Allen estimates that a stranded cost action could take 5 years, with an additional 1 - 2 years of potential appeals.

The condemnation action and the FERC stranded cost action could take place concurrently, however, once a condemnation action is complete, payment of the award would be required shortly thereafter. Boulder estimates that if the Boulder City Council were to determine that acquisition of the PSCo electric distribution system was the best approach to meet the city's Energy Future Goals, necessary legal actions might not be completed until 2019.⁷ At that point, the Boulder City Council would make its final decision regarding whether to issue bonds and acquire the PSCo electric distribution system in the city.

RESPONSE TO COMMISSION QUESTIONS

PARAGRAPH 14, QUESTION A:

Is the Application ripe for adjudication before the Commission? If not, when, during the course of Boulder's municipalization process is the right time for the Commission to address the merits of the Application? Please discuss both legal and policy considerations involved in a determination of ripeness.

BOULDER'S RESPONSE:

The Application is not ripe for adjudication before the Commission because no final action with regard to the acquisition of the PSCo electric distribution system has been taken by

⁷ The times provided in these Comments in Response are, of course, estimates only. The actual time required to obtain decisions could be greater or less depending upon a host of variables. Boulder has provided information based on average length of time to complete actions in typical condemnation actions and stranded costs proceedings.

Boulder. Consequently, any decision on the Application by the Commission would be speculative at best.

A case is not ripe if it is not “real, immediate, and fit for adjudication.” *See Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002) (*en banc*). The United States Supreme Court defines ripeness as a “twofold” doctrine, “evaluating both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–149 (1967). Under Article III of the United States Constitution, a case that is not “ripe” is not justiciable.

In the context of government regulatory and legislative decisions, the Supreme Court requires issues to have the “force of law” to be ripe, and thus have declined to rule on a regulation that only amounts to a statement of the agency’s “intentions.” *Id.* at 150 (discussing *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942)). Likewise, the Supreme Court exhorts that “judicial intervention should be withheld until administrative action has reached its **complete development**.” *Abbott Laboratories, supra*, at 150 (internal citations omitted) (emphasis added).

Correspondingly, Colorado courts refuse to consider a case that involves “uncertain or contingent future matters” in the context of government plans and policies. *See Beauprez, supra* at 648 (internal citations omitted).

In contrast, Colorado courts will not rule on an issue when the government entity has not “reached a financial decision regarding the application of the regulation to the property at issue.” In *Droste v. Board of County Com’rs of County of Pitkin*, the Colorado Court of Appeals refused to consider an inverse condemnation claim, finding that a final determination had not yet been made concerning the plaintiff’s property. 85 P.3d 585, 590 (2003).

Similarly, in *Cacioppo v. Eagle County School Dist. Re-50J*, the Colorado Supreme Court declined to rule on an issue concerning a voter-approved tax increase when the city had not yet acted on the voter-approval. 92 P.3d 453, 467 (Colo. 2004).

In some cases, courts will address a government policy or action prior to enforcement on the grounds that failing to rule on the issue would create undue hardship for the complaining parties. The Supreme Court has not, however, found an undue hardship on the grounds that delaying a judicial resolution will cause harm. *Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803 (2003). Thus, the Court has held that in order to prove hardship, the complaining party must demonstrate that a delay in ruling on an issue will create “adverse effects of a *strictly legal kind*.”⁸ Even then, the United States and Colorado Supreme Courts generally refuse to rule on an administrative or public policy that necessarily concerns a legal issue or effect until the policy is final. See e.g. *Nat'l Park, supra*, and *Colorado Health Facilities Review Council v. District Court in and for the City and County of Denver*, 689 P.2d 617 (Colo. 1984) (en banc). For example, in *Ohio Forestry Ass'n*, the Court refused to rule on the legality of Ohio’s forest management plan when the forest service had not yet selected a landsite. 523 U.S. 726, 733 (1998). In so stating, the Court found that the complaining party (Sierra Club) would have an opportunity to bring its legal challenge “when harm is more imminent and more certain.” *Id.* at 734.

In the case at hand, the citizens of the city of Boulder have merely voted to (1) authorize the Boulder City Council to create a municipal electric utility; and (2) provide a tax for financing such an effort. Boulder has not yet adopted a final plan for reaching its Energy Future Goals nor

⁸ In describing the type of effects that are *not* legal in nature, the Court listed those which “do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations.” See *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998).

has its plans reached their “complete development.” As provided, the question of how Boulder’s potential acquisition of the PSCo electric distribution system in the city will affect other ratepayers in the PSCo service territory is not real, immediate, nor fit for a finding of ripeness. Just as in the *Droste* case, a final decision has not been made relating to PSCo’s property. Likewise, as was the case in *Cacioppo*, the voters have merely authorized the creation of an municipal electric utility; the Boulder City Council has taken no action on that authorization.

At this point, there is no reason for PSCo’s Boulder customers to be treated any differently than any other PSCo customer. PSCo’s customers are PSCo’s customers until they are not. This will remain the case unless and until the Boulder City Council provides approval to proceed with the sale of the bonds to purchase the PSCo electric distribution system in Boulder.⁹ If the Commission were to approve the Application and Boulder did not acquire the PSCo electric distribution system in the city, customers who would be denied the full benefit of the programs for which they are paying through both the RESA and the DSMCA could be entitled to damages for lost savings.

Boulder questions whether a comparable application filed at some future date will even be necessary:

Solar*Rewards: It is extremely unlikely that Boulder will seek to acquire the Solar*Rewards assets or contracts since those assets belong to private individuals. There is no legal prohibition against PSCo continuing to purchase RECs from generators outside its service territory. Meters placed on these systems could monitor energy production and the RECs generated could be tracked by WREGIS, the Western Renewable Energy Generation Information

⁹ The authorization to sell the bonds would be via a resolution passed by City Council and is called the Notice of Bond Sale. It would describe the bonds to be sold, set the maximum principal amount of the bonds, authorize the notice of the bond sale (the notice of bond sale is typically passed by City Council two weeks before the bond sale), prescribe certain details concerning the proposed sale of the bonds, and approve the form of a preliminary official statement.

System. Alternatively, if there is some amount due to be reimbursed, Boulder agrees with PSCo that the appropriate place for that issue to be resolved is in the state condemnation proceeding.¹⁰

Demand Side Management: In its Application, PSCo has advised that both Solar*Rewards and DSM dollars it has spent to date are matters that it expects “will be raised and addressed in a state condemnation proceeding.”¹¹ Boulder agrees, but would extend that expectation to all monies expended as of the date of the condemnation award or possibly the date Boulder actually takes possession of PSCo’s electric distribution assets. Such an award from a state court in a condemnation proceeding would make an application such as the one pending before the Commission unnecessary altogether.

Community Solar Gardens: PSCo has misinterpreted the implications of the Solar Gardens statute when it argues that its Boulder customers should not be permitted to participate in community solar gardens. PSCo cites C.R.S. 40-2-127(5)(b)(I), which provides that “the output from a community solar garden shall be sold only to the qualifying retail utility serving the geographic area where the community solar garden is located.” However, for the purposes of this docket, the focus should be on the subscriber, not the location of a particular solar garden since PSCo is requesting that all Boulder customers be prohibited from participating in its Community Solar Gardens program.

It is true that subscribers must be “a retail customer of a qualifying retail utility who owns a subscription and who has identified one or more physical locations to which the subscription shall be attributed.”¹² However, the physical location of the community solar garden to which the subscriber subscribes need only be in the same county as the subscriber; it need not be within

¹⁰ See Application, page 5, footnote 2.

¹¹ *Id.*

¹² C.R.S. § 40-2-127(2)(b)(II).

the same municipality. Consequently, if a community solar garden is located in unincorporated Boulder County or in another Boulder County community, such as Erie, PSCo's Boulder customers could subscribe to that community solar garden.

The definition of "Subscriber" further explains that a subscriber may "change the premises to which the community solar garden electricity generation is attributed, so long as the premises are within the same geographical limits allowed for a subscriber." Because subscribers are allowed to subscribe to any community solar garden within their county, if a subscriber moves out of the county in which it currently takes service, the subscriber may no longer be a customer of that particular community solar garden, but would have to find another community solar garden in the subscriber's new county. So, for example, if a Boulder resident were to move to Douglas County, the Boulder resident could no longer subscribe to the community solar garden located in Erie. That would free up a subscription in the Erie community solar garden.

If Boulder were to municipalize the PSCo electric distribution system at some point in the future, those residents of Boulder who had subscribed to a community solar garden outside of the city of Boulder would have to release their subscriptions, just as the Boulder resident who moved to Douglas County would have to release his subscription to the community solar garden located in Erie. Those subscriptions, which PSCo expects to be in great demand, would be freed up for other customers in Boulder County. The Commission's Rules address the issue of community solar garden share transfers and portability.¹³

¹³ See Commission Rule 3665(a)(II): Share transfers and portability.

(A) A CSG subscription may be transferred or assigned to the associated CSG subscriber organization or to any person or entity who qualifies to be a subscriber in the CSG.

(B) A CSG subscriber who desires to transfer or assign all or part of his subscription to the CSG subscriber organization, in its own name or to become unsubscribed shall notify the CSG subscriber organization and the transfer of the subscription to the CSG subscriber organization shall be effective upon such notification, unless the CSG subscriber specifies a later effective date.

There is nothing in the community solar garden legislation or the Commission's Rules that prohibit the release of community solar gardens subscriptions.

The Windsource Long-Term Contract: Boulder argued in Docket No. 11A-833E, in which PSCo sought approval of its Windsource Long-Term Contract program, that that docket was the appropriate place to hear issues related to the program participation of large commercial and industrial customers located in Boulder. This is particularly important because the participants in that docket were provided with a much finer level of detail regarding the program than PSCo has provided in the instant docket.

The Windsource Long-Term Contract program is a voluntary program, and according to PSCo's direct testimony, participants may leave the program at will. PSCo witness Steve Mudd described what happens "if a customer moves, goes out of business, or *decides he no longer wants to be a part of the program*" on page 24 of his Direct Testimony:

The benefits of the Windsource Long-Term Contract are non-transferable. Businesses that move to a new location within Public Service's service territory can retain their participation in the program. If a customer moves outside of Public service territory, *decides to exit the program*, or goes out of business, the customer forfeits the accumulated value in their Reward Fund and the right to future benefits. Customers who fail to perform their contractual obligations will also be excluded from re-enrolling in any Windsource option available at the time for a period of one year.

Docket No. 11A-833E, Hearing Exhibit 5, Direct Testimony of Steve Mudd, 24:1-11. (Emphasis added.)

Boulder continues to urge the Commission to resolve Boulder customers' participation in the Windsource Long-Term Contract in Docket No. 11A-833E. If the question of Boulder

(C) A CSG subscriber who desires to transfer or assign all or part of his subscription to an eligible QRU customer desiring to purchase a subscription may do so only in compliance with the terms and conditions of the subscription and will be effective in accordance therewith.

(D) If the CSG is fully subscribed, the CSG subscriber organization shall maintain a waiting list of eligible QRU customers who desire to purchase subscriptions. The CSG subscriber organization shall offer the CSG subscription of the CSG subscriber desiring to transfer or assign their interest, or a portion thereof, on a first-come, first-serve basis to customers on the waiting list

customers' participation in the program is decided in the Windsource docket, it would be unnecessary for the Commission to consider it again here.

Paragraph 14, Question b:

What roles will the FERC, the courts, and the Commission play in the municipalization process and how will such activities be timed and coordinated with one another?

Boulder's Response:

The Federal Energy Regulatory Commission. In 1996, FERC conducted a rulemaking on open access transmission service. At the conclusion of that rulemaking, FERC adopted Order No. 888,¹⁴ which created a process for utilities that have both transmission and generation assets to recover "stranded costs," i.e., costs incurred by utilities with generation assets financed for the purpose of serving utility customers when those customers seek electric service from other sources of supply by using the open access transmission service.

In a proceeding involving "retail-turned-wholesale customer stranded costs," a community forming a new municipal electric utility has relied on the transmission system of its former incumbent utility to seek an alternative supplier.¹⁵ FERC has determined that it should be the "primary forum" for determining whether and to what extent "stranded costs" were caused by a particular retail-turned-wholesale customer.¹⁶ FERC pointed out in its Preamble to Order No. 888 that "this Rule will not insulate a utility from the normal risks of competition, such as self-generation, cogeneration or industrial plant closure, that do not arise from the new availability of

¹⁴ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (Order No. 888), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1997), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

¹⁵ Order No. 888 (FERC Stats. & Regs. ¶ 31,036 at pp. 31,814-31,819).

¹⁶ FERC Stats. & Regs. ¶ 31,036 at p. 31,818.

non-discriminatory open access transmission”¹⁷ and that “[w]hether state law awards exclusive service territories and imposes a mandatory obligation to serve would be among the factors to be considered in determining whether the reasonable expectation test is met.”¹⁸

Several baseline aspects of FERC’s stranded cost rule underscore the Application’s failure to raise a justiciable issue based on ripeness considerations.¹⁹ First, in order for stranded costs to arise, a retail-turned-wholesale customer must use transmission service furnished by its former retail supplier under a FERC-approved open access transmission tariff.²⁰ Second, FERC has explained that “by the use of the term ‘stranded costs,’ the Commission throughout Order No. 888 was referring to generation-based stranded costs: that is, the costs associated with generating units built to serve customers, which costs may become stranded if, as a result of open access, these customers left the utility’s system to take power service from a competing power supplier.”²¹ Third, FERC has held that “[t]o the extent that [a former incumbent supplier] will continue to use its generation assets to serve [a departing retail-turned-wholesale customer], none of its investment in its generation assets will be stranded for purposes of Order Nos. 888 and 888-A and the Commission’s stranded cost regulations.”²² Finally, in the event that stranded cost litigation were actually to proceed, FERC has stated that capacity deficiency and load growth should be considered when determining mitigation of the incumbent provider’s stranded costs,

¹⁷ FERC Stats. & Regs. ¶ 31,036 at p. 31,789.

¹⁸ *Id.* at p. 31,831.

¹⁹ 18 C.F.R. § 35.26.

²⁰ “The creation of a new wholesale entity to purchase power on behalf of retail customers would not, by itself, trigger stranded costs.” Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at p. 30,349-30,350.

²¹ *AES Somerset LLC v. Niagara Mohawk Power Corp.*, 105 FERC ¶ 61,337 at P 45 (2003), *reh’g denied*, 110 FERC ¶ 61,032 (2005), *aff’d sub nom. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006).

²² *City of South Daytona*, 137 FERC ¶ 61,183 at P 42 (2011).

but FERC generally requires a determination by the state regulatory agency that it is appropriate for the utility to use the released capacity to serve the load growth.²³

Boulder has made no decisions regarding any of the foregoing questions that are within its control. Boulder has not determined the identity of its future transmission provider at this time, and it has not determined whether or to what extent PSCo may serve as Boulder's future wholesale supplier. Obviously, Boulder has also not made any determination concerning whether or to what extent it might assume PSCo's responsibilities under some or all of the programs at issue in this docket.

One further point may merit consideration by the Commission. Boulder is not in a position to know whether or to what extent any of the retail customers participating in PSCo's distributed generation programs are, or are eligible to be, treated as qualifying small power producers under the Public Utility Regulatory Policies Act.²⁴ FERC has primary jurisdiction over the relationship between small power producers and utilities that purchase their output.

The Courts. If Boulder were to seek to acquire the PSCo electric distribution system and if its required good faith negotiations with PSCo for the acquisition of that system were not successful, Boulder would file an eminent domain action in state district court pursuant to C.R.S. § 38-1-101 *et seq.* In that action, if the court determined that Boulder's acquisition of the electric distribution system was for a public purpose, that there was a need and necessity for the city to acquire the property described in the action and that the city had conducted good faith negotiations with Xcel, then the amount of just compensation due to the property owner would

²³ See, Order No. 888-B, 81 FERC ¶ 61,248 at 62,105-62,106; *City of Alma, Michigan*, Opinion No. 452, 96 FERC ¶ 61,163 at 61,721-61,722 (2001); *City of Las Cruces, New Mexico v. El Paso Electric Co.*, Opinion No. 438, 87 FERC ¶ 61,201 at 61,760-61,761 (1999).

²⁴ 26 U.S.C. § 2601 *et seq.*

be determined by a commission or a jury of freeholders. A disputed decision by the state district court could lead to appeals through state appellate courts.

The Colorado Public Utilities Commission. There is no clear guidance in state law or the Commission's regulations regarding the Commission's role in the acquisition of a regulated investor-owned utility's electric distribution system.

Federal law provides some guidance. It is the case that at some point the Commission may be requested to determine the specific amount of capacity and associated energy released by Boulder's departure that would be available for load growth elsewhere.^{25/26}

The Commission may also desire at some point to determine the proper distribution, as between PSCO shareholders and PSCo ratepayers, of the proceeds of (1) a voluntary sale or an eminent domain action, and (2) a FERC award of stranded generation costs.

Paragraph 14, Question c:

What are the potential effective dates for the relief sought by Public Service? Can the Commission order the proposed changes to take effect on the date the Company filed the Application? Will the changes instead take effect upon the date of the issuance of a final decision in this proceeding? Will the changes be deferred until some future milestone in Boulder's municipalization process?

Boulder's Response:

While it would be prudent for PSCo to begin to plan for Boulder's departure from its system as it has no reasonable expectation of continuing to serve its Boulder customers, the

²⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order 888, FERC Stats. & Regs. ¶ 31,036 (1996) (Order No. 888), *order on reh'g*, Order No. 888-A FERC ¶ 31048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1997), 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom New York v. FERC*, 535 U.S. 1 (2002).

²⁶ 96 FERC P 61,163, Util L. Rep. P 14,364, 2001 WL 864,316 (F.E.R.C.), *Commission Opinions, Orders and Notices, City of Alma, Michigan*, 61,721, FN 91.

precise date of that departure is unknown at this point. The Application concerns programs that are funded by all PSCo ratepayers and that are available on a first-come, first-serve basis to all PSCo customers within its service territory. The Application seeks to change those rules, but only with regard to customers located within the city of Boulder. The Application does not seek to permit recovery of DSMCA funds based on the level of contribution from any other grouping of customers or customer classes. This is clear discrimination against PSCo's current Boulder customers.

In its Application, PSCo seeks "such waivers of Commission rules and modifications of past Commission orders as may be necessary for us to implement these changes." Such applicable rules include Rules 3658(e) and (f), Rules 3656(f) and (g) and Rules 3658(f)(VII)(A) and (B). PSCo seeks to change these rules only with regard to its customers located in the city of Boulder.

Because the Colorado General Assembly has delegated its authority to regulate monopoly utilities in the state, the rules of the Commission have the force of law. The U.S. Constitution prohibits both bills of attainder and *ex post facto* laws. U.S. CONST. art I § 9, cl. 3. The Application, singling out as it does one group of customers that as of the date of application are not different from other customers, arguably rises to the level of a bill of attainder. If the Commission were to make its order concerning the Application effective as of the date of filing, the order would arguably constitute *ex post facto* legislation.

From a practical perspective, making the order effective at any time before the date the order is issued is unmanageable. PSCo has not requested retrospective application of the Commission's decision and has continued to allow its Boulder customers to participate fully in its Solar*Rewards and DSM program. The Windsource Long-Term Contract has not been

approved and may, in fact, not be approved by the Commission before a decision is reached in this docket. If the revisions to the Rules sought in the Application were to become effective at any time prior to the issuance of the order in this docket, there would then be a question regarding whether repayment of rebates to those customers, who likely relied on the rebates in determining whether to go forward with their projects, would be required.

If the Commission were to find that the Application is not premature, but rather is ripe for decision, the Commission's order could take effect no sooner than the date the order was issued.

Boulder recommends that, given that there would likely be a transition period between the time bond issuance is approved by City Council and the actual beginning of municipal operations, that transition period may be the most appropriate time to consider the participation by what, at that point, will be soon-to-be former PSCo customers.

Paragraph 15:

Further, the Commission is unaware of Boulder's expectations and projected milestones for its municipalization efforts. We therefore direct Boulder to provide the Commission with an explanation regarding its plan, including when and how it intends to initiate the condemnation of the Company's electric system within Boulder and how it expects to establish a municipal electric utility.

Boulder's Response:

There are two processes that could be involved in Boulder's acquisition of PSCo's electric distribution system, a state eminent domain action and a FERC stranded cost proceeding. Because PSCo may raise arguments that are currently unanticipated in each of these litigation proceedings, the estimates of time provided in these Comments could be extended considerably.

Eminent Domain Action. To commence an eminent domain action in state district court, a condemning authority is required to identify with specificity the property it wishes to acquire, value that property and enter into good faith negotiations with the owner of the property to agree on the fair market value of the property sought to be acquired. Thus, before it determines whether or how to condemn any portion of the PSCo electric distribution system, Boulder plans to complete a number of tasks or activities, including, without limitation, the following: (1) analyze and assess PSCo's assets that are within or adjacent to the city's boundaries; (2) determine which of PSCo's assets Boulder might need to acquire as part of establishing a municipal electric utility; (3) obtain and review title work and other real property records to determine PSCo's or others' ownership or interests in the assets that might be acquired by Boulder; (4) obtain input or analyses from consultants, including appraisers, regarding the value of any assets to be acquired and any impacts any potential condemnation will or might have on any portion of the PSCo electric distribution system that would not be acquired by Boulder; (5) prepare one or more offer letters to PSCo regarding Boulder's estimate of the amount of just compensation to which PSCo would be entitled; (6) engage in good faith efforts to negotiate a voluntary acquisition by Boulder of any PSCo assets to be acquired by Boulder; and (7) draft necessary legal paperwork in the event that good faith negotiations are unsuccessful or prove futile.

To speed along the process of asset identification, Boulder asked PSCo several months ago to voluntarily produce the following documents: (1) any continuing property records that identify PSCo's assets; (2) PSCo's system maps; (3) any as-built construction plans that show the assets; (4) any appraisals or other documentations related to the PSCo's valuation of the assets; (5) any documents related to how Xcel Energy valued the assets when it acquired them

from PSCo; (5) any documents PSCo has submitted to the Boulder County Assessor's Office regarding the assets; (6) any title work PSCo has that indicates its ownership in fee or by easement of property related to its electric distribution system within and immediately adjoining the city; (7) any data related to the gross and net income for the electric distribution system with the city or as near as PSCo can approximate using the city as a geographic reference; and (8) any PSCo records related to any statement assessment of the assets. PSCo has recently informed Boulder that it "is still considering the City's request to produce the requested documents."

Boulder anticipates that, the above process will likely take approximately six to nine months after receiving the PSCo documents that Boulder has requested. The process may, of course, take longer without PSCo's cooperation.

Once Boulder is able to compile the information it needs to determine the value of the electric distribution system, it will evaluate how the valuation number affects a potential initial rate structure to determine whether it would be able to form a municipal electric utility and acquire PSCo's electric distribution system and still meet the conditions placed on the authorization to establish the municipal electric utility by the Boulder Home Rule Charter.

If the Boulder City Council decides to proceed with municipalization in a manner that requires PSCo assets, Boulder would attempt to do so by negotiations between Boulder and PSCo. If those negotiations are not successful and the City Council decides ultimately to seek to acquire assets from PSCo by condemnation, Boulder would file an eminent domain action in state district court pursuant to C.R.S. § 38-1-101 *et seq.* In that action, if the court determines that Boulder's acquisition of the electric distribution system was for a public purpose, that there is a need and necessity for Boulder to acquire the property described in the action, and that Boulder conducted good faith negotiations with PSCo, the amount of just compensation due to

PSCo would be determined by a commission or a jury of freeholders. Boulder anticipates the trial on just compensation would occur approximately nine months to one year after the filing of a condemnation petition.

Once Boulder has a final award in condemnation, it will again evaluate how that figure affects a potential initial rate structure. If rate parity is still possible, it would go forward with acquisition. If rate parity is not possible, the acquisition of PSCo's electric distribution system would terminate for failure to meet a condition of the authorization to form a municipal electric utility.

Further complicating the situation, Boulder's decision regarding whether and when to attempt to acquire a portion of PSCo's electric distribution system likely will require that Boulder initiate or participate in several proceedings before FERC. Boulder is in the process of exploring the timing and necessity of any other proceedings that may be necessary for municipalization and how any such proceedings may impact the timing of any condemnation proceedings.

FERC Stranded Cost Proceeding. A FERC proceeding to determine whether and to what extent a Boulder municipalization would result in "stranded costs" might or might not run concurrently with an eminent domain action, depending on variables that cannot currently be predicted. Either Boulder or PSCo could initiate such a proceeding under FERC's regulations. 18 C.F.R. § 35.26. The timeframe for a stranded cost action is difficult to predict, however, because of the limited number of such proceedings before the FERC in the 15 years since Rule 888 was adopted. The Alma, Michigan case, for example, took 59 months. If the stranded cost award were to be appealed by either party, the appeal could add another 18 months to 2 years.

Once Boulder has a final stranded cost award, it would once again evaluate how that figure affects a potential initial rate structure. If so, the acquisition could go forward. If rate parity is not possible, the acquisition of PSCo's electric distribution system would terminate for failure to meet a condition of the authorization to form a municipal electric utility.

Finally, Boulder would prepare the bond issue and collect information regarding possible interest rates. With that interest rate in hand, Boulder would once again evaluate how that interest rate affects a potential initial rate structure. If rate parity is still possible, it could go forward with acquisition. If rate parity is not possible, the acquisition of PSCo's electric distribution system would terminate for failure to meet a condition of the authorization to form a municipal electric utility. This activity would likely be initiated at some point during the FERC stranded cost proceeding, but could not be completed until both the eminent domain and stranded cost actions, including appeals, were completed.

Boulder estimates that the total length of time to reach a decision as to its ability to move forward with the acquisition of the PSCo electric distribution system will be anywhere from 1 year (if Boulder determines that it cannot move forward based on its appraisal of PSCo assets) to 7 years (if the FERC action and appeals of that award were to take 7 years).

One additional timeframe to consider is the transition period between a final court/agency award and the actual "cut-over date," i.e., the date that Boulder residents and businesses would start taking their electric energy from a municipal utility. Based on timeframes generally included in PSCo franchise agreements, that transition period would likely be a period of between 9 months and 2 years.

Paragraph 16:

Although the requests for intervention indicated various concerns with the Application, in order to help us understand the likely scope of this proceeding, we direct the parties to provide in their comments a list of the key policy and legal issues raised by the Application.

Boulder's Response:

Beyond the threshold ripeness issue, Boulder questions PSCo's attempt to limit any customer's participation in a program to which all its customers contribute. The proposed DSM revision, for example, begs the question whether the same sort of limitation based on contribution should be applied across the board? If commercial customers consume 80% of the electricity and presumably contribute 80% of the total contributions to both the RESA and the DSMCA, should commercial customers receive 80% of the benefits of these programs? Should each individual customer be permitted to receive no more than its total contributions over the length of the program minus any previous benefits received? Such a shift would represent a sea change in the administration of these programs.

Paragraph 17, Question a:

Is written pre-filed testimony of witnesses necessary for this proceeding or will written pleadings instead provide an adequate record upon which the Commission can address the merits of the Application?

Boulder's Response:

The Commission should determine that the Application is not ripe, given the lack of final action by Boulder to acquire the PSCo electric distribution system. If the Commission were to determine otherwise, written pre-filed testimony will be necessary for this proceeding. PSCo has provided very little detail regarding its proposal for revisions to the DSM program nor has it

provided a copy of the revised Solar*Rewards contracts. Significant additional information would be needed for a fair hearing on PSCo's conceptual proposals.

Paragraph 17, Question b:

If the record in this proceeding contains only pleadings from the parties, should the Commission expect to schedule oral argument?

Boulder's Response:

Boulder would be comfortable with the Commission making a decision on the ripeness issue without oral argument. If, however, the Commission were to decide that the matter is ripe for decision, Boulder would request a full evidentiary hearing with all parties permitted to conduct cross-examination of witnesses, as in other dockets.

Paragraph 17, Question c:

Are discovery procedures needed for this case?

Boulder's Response:

Again, Boulder believes that the Application is premature and not ripe for decision given the lack of final government action regarding the acquisition of PSCo's electric distribution system. If, however, the Commission were to decide that the matter is ripe for decision, Boulder requests that a full evidentiary hearing be held and that discovery be permitted with regard to written pre-filed testimony.

Paragraph 17, Question d:

How do other ongoing proceedings related to this Docket, including Docket Nos. 11A-833E concerning the company's Windsource program and 11A-418E concerning the Company's 2012 and 2013 Renewable Energy Standard compliance plan? Is there a necessary sequence for decisions to be made across dockets?

Boulder's Response:

In Footnote 1 on page 7 of its Verified Application in the Limon II docket (Docket No. 11A-689E) filed on August 15, 2011, PSCo stated that the Windsource Long-Term Contract program would only be available to PSCo's Boulder customers "only if Boulder does not vote in November to form a municipal utility." Consequently, when on October 13, 2011, PSCo filed its application for revisions to the Windsource program, including conceptual approval of the Windsource Long-Term Contract, Boulder has sought to have the question of participation in the Windsource Long-Term Contract program by PSCo's commercial and industrial customers located in Boulder resolved in Docket No. 11A-833E. Boulder contends that Docket No. 11A-833E is the appropriate docket in which such a decision should be made, given that the terms and conditions of the Windsource Long-Term Contract were discussed at length in that docket. In that docket, Boulder argued that given that PSCo's proposal for the Windsource Long-Term Contract permitted customers to leave the program if they *desired to no longer be a part of the program* with only the forfeiture of funds in the customer's Reward Fund, and PSCo's anticipated interest in the program, there was no valid reason to not permit Boulder commercial and industrial businesses to make for themselves the decision regarding the risks of participation in the program.

If the Commission were to find that the Application is ripe for decision, Boulder would request that the decision on Boulder customer's participation in the Windsource Long-Term Contract be made in that docket prior to any decision in the instant docket. That decision is now scheduled to be issued on or before September 24, 2012. *See* Decision No. R12-0510-I, Interim Order of Administrative Law Judge Mana L. Jennings-Fader, dated May 14, 2012.

Docket No. 11A-418E concerns the Company's 2012 and 2013 Renewable Energy Standard compliance plan. One aspect of the plan concerns the rebates and REC payments available to PSCo customers in the Solar*Rewards program. If the Commission were to decide that the Application is ripe for decision, it would be important for the Commission to know how incentives under the Solar*Rewards program will be structured prior to making any decision regarding different treatment for PSCo's Boulder customers.

Paragraph 17, Question e:

In light of responses to the above questions, what procedural schedule is appropriate for this Docket?

Boulder's Response:

Because no final government action has been taken regarding Boulder's acquisition of the PSCo electric distribution system, the Application is several years premature. However, if the Commission were to decide that the issues raised by the Application were ripe for decision, then a full evidentiary hearing in the matter is imperative for a full and fair hearing of these issues. The procedural schedule would include a prehearing conference to set dates for the filing of written direct, answer, rebuttal, and cross-answer testimony and for an evidentiary hearing in this docket. As in other dockets, discovery related to written pre-filed testimony would be necessary and should be allowed.

CONCLUSION

The Application is premature and the issues raised therein are not ripe for decision. No decision has been made, or can be made, by the Boulder City Council with regard to Boulder's acquisition of PSCo's electric distribution system within the city until more information is known about: the constituent parts of that system and their value; a purchase price or

condemnation award; a stranded cost award, if any; and the bond rate available at the time of bond issuance. Most importantly, there must be a decision by the Boulder City Council that it wishes to proceed with the formation of a municipal electric utility in a manner that requires the acquisition of the PSCo electric distribution system.

WHEREFORE, Boulder respectfully submits its Comments in Response to Commission Questions and requests that the Commission find the Application is not ripe for adjudication.

DATED this 18th day of May 2012.

Respectfully submitted,

CITY OF BOULDER

/s/ Debra S. Kalish

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EXHIBIT I

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Article XIII: Light and Power Utility

Sec. 178. Creation, purpose and intent. [top](#)

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

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

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

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

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

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

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

(5) Environmental Stewardship: Preserving and protecting our natural environment goes well beyond producing clean energy. The utility will be a good environmental steward by working to reduce the environmental impact of its operations, including working to reduce the demand for electricity. Energy and power that is produced in an environmentally responsible manner requires that the city balance environmental factors as an integral component of planning, design, construction, and operational decisions.

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

Sec. 179. Definitions. [19 top](#)

Unless the context specifically indicates otherwise, the following words and phrases shall have the following meanings as used in this article:

(a) "Electric Utility Activity" includes, but is not limited to, the provision of electric power to customers within its service area.

(b) "Electric Utility Enterprise" means the electric utility business now or hereafter owned by the city, which business receives under ten percent (10%) of its annual revenues in grants from all Colorado state and local governments combined and which is authorized to issue its own revenue bonds pursuant to this article or other applicable law.

(c) "Electric Utility Facilities" means all real and personal property utilized by the city in connection with the generation, transmission, provision, distribution and conservation of energy, electricity, light and power for the city, now or hereafter owned or operated by the city.

(d) "Grant" means any direct cash subsidy or other direct contribution of money from the state or any local government in Colorado which is not required to be repaid. "Grant" does not include:

(1) any indirect benefit conferred upon the electric utility enterprise from the state or any local government in Colorado;

(2) any revenues resulting from rates, fees, assessments, or other charges imposed by the electric utility enterprise for the provision of goods or services by such enterprise; or

(3) any federal funds, regardless of whether such federal funds pass through the state or any local government in Colorado prior to receipt by the electric utility enterprise. (Added by Ord. No. 7804 (2011), § 2, adopted by electorate on November 1, 2011.)

Sec. 180. Powers of the electric utility enterprise. [top](#)

In addition to any of the powers it may have by virtue of any of the applicable provisions of state law, this Charter, and the Code, the electric utility enterprise shall have the power under this article:

- (a) to acquire by gift, purchase, lease, or exercise of the right of eminent domain, to construct, to reconstruct, to improve, to better and to extend electric utility facilities, wholly within or wholly without or partially within and partially without the territorial boundaries of the city, and to acquire in the name of the city by gift, purchase, or the exercise of the right of eminent domain lands, easements, and rights in land in connection therewith;
- (b) to operate and maintain electric utility facilities for its or the city's own use and for the use of public and private consumers and users within and without the territorial boundaries of the city;
- (c) to accept federal funds under any federal law in force to aid in financing the cost of engineering, architectural, environmental, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other action preliminary to the construction, operation or remediation of electric utility facilities;
- (d) to accept federal funds under any federal law in force for the construction, operation or remediation of electric utility facilities;
- (e) to prescribe, revise, and collect in advance or otherwise, from any consumer served by a electric utility activity, rates, fees, and charges or any combination thereof for the services furnished by, or the direct or indirect connection with, the electric utility facilities; and in anticipation of the collection of revenues of such electric utility facilities, to issue revenue bonds to finance in whole or in part the cost of acquisition, construction, reconstruction, improvement, betterment, or extension of the electric utility facilities; and to issue temporary bonds until permanent bonds and any coupons appertaining thereto have been printed and exchanged for the temporary bonds;
- (f) to pledge to the punctual payment of said bonds and interest thereon all or any part of the revenues of the electric utility facilities;
- (g) to make all contracts, execute all instruments, and do all things necessary or convenient in the exercise of the powers granted in this section or elsewhere in state law, the Charter, or the Code, or in the performance of its covenants or duties, or in order to secure the payment of its bonds if no encumbrance, mortgage, or other pledge of property, excluding any pledged revenues, of the electric utility enterprise or city is recreated thereby, and if no property, other than money, of the electric utility enterprise or city is liable to be forfeited or taken in payment of said bonds, and if no debt on the credit of the electric utility enterprise or city is thereby incurred in any manner for any purpose;
- (h) to issue refunding bonds pursuant to this article or other applicable law to refund, pay, or discharge all or any part of its outstanding revenue bonds issued under this article or under any other law, including any interest thereon in arrears or about to become due, or for the purpose of reducing interest costs, effecting a change in any particular year or years in the principal and interest payable thereon or effecting other economies, or modifying or eliminating restrictive contractual limitations appertaining to the issuance of additional bonds or to any electric utility facilities; and
- (i) to begin operations of the municipal utility at such time as the city council may by ordinance provide. (Added by Ord. No. 7804 (2011), § 2, adopted by electorate on November 1, 2011.)

Sec. 181. Revenue bonds. [top†](#)

(a) In accordance with and through the provisions of this section, the electric utility enterprise, through its governing body, is authorized to issue bonds or other obligations payable solely from the revenues derived or to be derived from the functions, services, benefits or facilities of such enterprise or from any other available funds of such enterprise. Such bonds or other obligations shall be authorized by ordinance, adopted by the governing body of the electric utility enterprise in the same manner as other ordinances of the city. Such bonds or other obligations may be issued without voter approval, notwithstanding the provisions of Section 2(d) of the charter, provided that, during the fiscal year of the city preceding the year in which the bonds or other obligations are authorized, the electric utility enterprise received under ten percent (10%) of its annual revenue in grants or, during the current fiscal year of the city, it is reasonably anticipated that such enterprise will receive under ten percent (10%) of its revenue in grants.

(b) The terms, conditions, and details of said bonds, or other obligations, and the procedures related thereto shall be set forth in the ordinance authorizing said bonds or other obligations and said bonds, or other obligations may be sold in accordance with the provisions of the charter. Each bond, note, or other obligation issued under this section shall recite in substance that said bond, note, or other obligation, including the interest thereon, is payable from the revenues and other available funds of the electric utility enterprise pledged for the payment thereof. Notwithstanding any other provision of law to the contrary, such bonds, or other obligations may be issued to mature at such times as are authorized by the charter, shall bear interest at such rates, and shall be sold at or above the principal amount thereof, all as shall be determined by the governing body of the electric utility enterprise. Notwithstanding anything in this section to the contrary, in the case of short-term notes or other obligations maturing not later than one year after the date of issuance thereof, the governing body of the electric utility enterprise may authorize enterprise officials to fix principal amounts, maturity dates, interest rates, and purchase prices of any particular issue of such short-term notes or obligations, subject to such limitations as to maximum term, maximum principal amount outstanding, and maximum net effective interest rates as the governing body of the electric utility enterprise shall prescribe. Refunding bonds of the electric utility enterprise shall be issued as provided in Part 1 of Article 56 of Title 11, C.R.S. The powers provided in this section to issue bonds, or other obligations are in addition and supplemental to, and not in substitution for, the powers conferred by any other law, and the powers provided in this section shall not modify, limit, or affect the powers conferred by any other law either directly or indirectly. Bonds, notes, or other obligations may be issued pursuant to this section without regard to the provisions of any other law. Insofar as the provisions of this section are inconsistent with the provisions of any other law, the provisions of this section shall control with regard to any bonds lawfully issued pursuant to this section.

(c) Any pledge of revenue or other funds of the electric utility enterprise shall be subject to any limitation on future pledges thereof contained in any ordinance of the governing body of the electric utility enterprise or of the city authorizing the issuance of any outstanding bonds or other obligations of the electric utility enterprise or the city payable from the same source or sources. Bonds or other obligations, separately issued by the city and the electric utility enterprise, but secured by the same revenues or other funds shall be treated as having the same obligor and as being payable in whole or in part from the same source or sources. (Added by Ord. No. 7804 (2011), § 2, adopted by electorate on November 1, 2011.)

Sec. 182. Utility service standards. [top†](#)

(a) Customer Benefit: The utility shall conduct its business and affairs for the benefit of its customers and the city.

property taxes that would have been paid if a similarly situated private utility would have been required to pay property taxes to the other governmental entity or for up to the value of a service rendered.

(j) Preferences Prohibited: The utility shall not make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage as to rates, charges, service, or facilities, or in any other respect.

(k) Advantages Prohibited: The utility shall not establish or maintain any unreasonable differences or undue preferences as to rates, charges, service, facilities, or any respect as between any class of services. The utility may create a fund to provide assistance to low-income customers for energy efficiency or generation improvements or utility bill payments. When considering whether to approve such a fund, and give a preference or advantage to low-income utility customers, the utility shall take into account the potential impact of and cost-shifting to, utility customers other than the low-income utility customers. (Added by Ord. No. 7804 (2011), § 2, adopted by electorate on November 1, 2011.)

Sec. 183. Creation of an electric utilities department and general powers. [top↑](#)

(a) Electric Utilities Department: There shall be an electric utilities department, which shall be responsible for all planning, generation, transmission, and distribution of energy, electricity and power for the city, and such other responsibilities as the city council or city manager may assign.

(b) General Powers:

The electric utilities department shall have the authority to:

(1) Generate and deliver energy and exercise all the powers of the city including those granted by the Constitution and by the law of the state of Colorado and by the charter in regard to purchasing, condemning and purchasing, acquiring, constructing, leasing, extending and adding to, maintaining, conducting, and operating an electric utilities system for all uses and purposes, and everything necessary, pertaining or incidental thereto, including authority to dispose of real or personal property not useful for or required in the electric utilities operation.

(2) Purchase, generate, transmit, distribute, and sell electric energy.

(3) Make and execute contracts, take and give instruments of conveyance, and do all other things necessary or incidental to the powers granted in this charter.

(4) Carry out the operations, supervision, and regulation of the utility related to the lawful operation of the utility as directed by the city council.

(5) Make recommendations to the electric utilities board or the city council on matters required by the city charter.

(6) Enter into contracts and agreements with any public or private corporation or any individual, both inside and outside the boundaries of the city and state:

(A) for the joint use of property belonging either to the city or to the other contracting party or jointly to both parties; and

(B) for the joint acquisition of real and personal property, rights and franchises, and the joint financing, construction, and operation of plants, buildings,

transmission lines, and other facilities. (Added by Ord. No. 7804 (2011), § 2, adopted by electorate on November 1, 2011.)

Sec. 184. Functions of the electric utilities director. [top†](#)

Under the direction, supervision, and control of the city manager, there shall be a director of the electric utilities department who shall be qualified by special training and experience in the field of electric utilities and municipal engineering. The director shall be the regular technical and policy advisor of the electric utilities board and shall have administrative direction of the electric utilities department. The director may be designated as the secretary of the electric utilities board and authorized to perform other necessary functions. (Added by Ord. No. 7804 (2011), § 2, adopted by electorate on November 1, 2011.)

Sec. 185. Creation of the electric utilities board. [19, 20 top†](#)

(a) Board Created: There shall be an electric utilities board consisting of nine members not all of the same gender. The members of the board shall not hold any other office in the city, and shall serve without pay.

(b) Board qualifications: Board members shall be selected from the registered electors of the city or from the owners or employees of a business or governmental entity that is a customer of the electric utility, provided, however, that a majority of the board shall be registered electors of the city. Board members shall be well known for their ability, probity, public spirit, and particular fitness to serve on the electric utilities board. At least three board members shall be owners or employees of a business or governmental entity that is a customer of the electric utility.

(c) Board Appointments: The city council shall appoint members of the board.

(d) Terms of Office: The term of each member shall be five years; provided, however, that in appointing the original members of the board, the city council and city manager shall continue the terms of the current members or shall stagger the initial terms so that at least one board member's term expires in each year.

(e) Removal: The city council may remove any board member for cause.

(f) Vacancies: In the event that a board member's term ends by resignation, vacation of seat or removal from service on the board, the board member shall be replaced by the city council.

(g) Creation of Electric Utilities Board: The electric utilities board shall be created at the time of the creation of the electric utility enterprise. Until such time as the board is created, the city council shall be responsible for fulfilling the responsibilities of the electric utilities board. (Added by Ord. No. 7804 (2011), § 2, adopted by electorate on November 1, 2011.)

Sec. 186. Organization and procedure of the board. [top†](#)

(a) Chair and Secretary: The board shall choose a chair and a secretary from among its members. The director of electric utilities may be designated as secretary by the board.

(b) Regular and Special Meetings: The board shall have regular meetings once a month. Special meetings may be called at any time by the city manager, the chair, or four members of the board upon the giving of at least 24 hours notice of said special meeting to the board members.

(c) Quorum: Five members of the board shall constitute a quorum. An affirmative vote of a majority of the members present shall be necessary to authorize any action by the board, except as otherwise expressly provided herein.

(d) Record of Meetings: The board shall keep minutes and records of its meetings, recommendations, and decisions.

(e) Rules of Order: Except as otherwise expressly provided herein, the board shall have power to make rules for the conduct of its business. (Added by Ord. No. 7804 (2011), § 2, adopted by electorate on November 1, 2011.)

Sec. 187. Functions of the board. [top†](#)

The electric utilities board shall not perform any administrative functions unless expressly provided in this charter. The duties and functions of the electric utilities board shall be:

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

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

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

(d) Meeting Rules. To adopt bylaws governing its meeting and agenda procedures and other pertinent matters.

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

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

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

(h) Other Duties. To perform such other duties and functions and have such other powers as may be provided by ordinance. (Added by Ord. No. 7804 (2011), § 2, adopted by electorate on November 1, 2011.)

¹⁹ On November 1, 2011, voters approved amending the Charter to change "qualified electors" to "registered electors" under Ordinance 7801.

²⁰ Further amended by Ordinance 7838 (2012).

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 2012, in 12A- 155E, COMMENTS OF THE CITY OF BOULDER IN RESPONSE TO THE COMMISSION'S QUESTIONS were filed with the Colorado Public Utilities Commission, and emailed (with NO hard copy to follow) as a courtesy to the following:

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/s/ Laurel Hamilton