

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

DOCKET NO. 13D-0498E

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

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**CITY OF BOULDER'S APPLICATION FOR REHEARING, REARGUMENT, OR  
RECONSIDERATION OF DECISION NO. C13-1350**

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The City of Boulder ("Boulder") submits this Application for Rehearing, Reargument, or Reconsideration of Decision No. C13-1350 (this "Application"), in accordance with C.R.S. § 40-6-114 and Rule 1506 of the Commission's Rules of Practice and Procedure, 4 C.C.R. 723-1. The Commission issued Decision No. C13-1350 on October 29, 2013 and applications for rehearing, reargument, or reconsideration must be filed by November 18, 2013. Boulder respectfully requests that the Commission reconsider those parts of Decision No. C13-1350 (the "Decision") that rule that (i) the Commission will determine what plant, equipment, and facilities Boulder may acquire by condemnation and (ii) this determination by the Commission must be completed before Boulder may initiate a condemnation action.

**I. INTRODUCTION**

This proceeding was initiated by Public Service Company of Colorado ("Public Service"), which requested five declaratory orders, all of which related to Boulder's potential acquisition of Public Service's Certificate of Public Convenience and Necessity ("CPCN") for

the right to serve unincorporated areas adjacent to the city.<sup>1</sup> Boulder agreed that the first three orders were either statements of fact or well-established principles of law in Colorado. The final two requests concerned issues related to the doctrine of regulated monopoly.

Public Service did not seek declaratory rulings concerning acquisition of facilities. Instead, Public Service categorically stated that the question of which facilities Boulder may acquire is a matter “to be determined in a condemnation action:”

*Public Service is not seeking any orders from this Commission regarding what facilities Boulder may acquire in furtherance of the creation of a municipal utility. What facilities Boulder has the legal authority to acquire and at what cost are matters to be determined in a condemnation action if Boulder and Public Service do not reach agreement on those matters.*<sup>2</sup>

Despite this recognition of the condemnation court’s jurisdiction on the part of the petitioner, the Commission’s Decision went beyond the relief sought by Public Service when it ruled, *sua sponte*:

*If Boulder seeks to condemn facilities, wherever located, that Public Service currently uses, at least in part, to serve customers located outside of Boulder’s city limits, this Commission must have the ability to investigate and determine how the facilities should be assigned, divided, or jointly used .... Thus, a Commission proceeding addressing these facilities should precede a condemnation action to allow the district court to rule on the public need and value of facilities that the Commission determines may be the subject of transfer to Boulder.*<sup>3</sup>

This language indicates the Commission, not Boulder, will determine which facilities may be the subject of condemnation. *See also* Decision at ¶ 18, noting that the Decision addresses “which property interests and facilities could be used to provide service and thus may be part of a condemnation action”.

The Commission then ordered as follows:

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<sup>1</sup> Public Service’s Verified Petition for Declaratory Orders at pp. 1-2.

<sup>2</sup> Public Service’s Verified Petition at ¶ 26 (emphasis added).

<sup>3</sup> Decision at ¶ 28 (emphasis added).

Commission proceedings addressing the transfer of Public Service's CPCN or other plant, equipment, and facilities used to provide service to customers located in unincorporated Boulder County are to be completed before Boulder initiates a condemnation action for such property.<sup>4</sup>

As a home rule city, Boulder has both constitutional and statutory powers, including the constitutional authority to condemn electric facilities and everything necessary therefor. The determination of which property and facilities is necessary for Boulder's public purpose, lies squarely within the purview of the Boulder City Council. If Boulder determines that condemnation of property and facilities located outside the city is necessary for that public purpose, it has the constitutional right to condemn that property and those facilities.

The transfer of a CPCN, which is a property right subject to condemnation, cannot take place without the Commission's approval. Boulder has suggested in many different Commission proceedings that it wishes to work with the Commission - and with Public Service - to ensure safe, reliable, cost-effective service for both Boulder ratepayers and ratepayers outside the city. Boulder expects that over the course of the time it takes to complete the acquisition of the Public Service system that serves Boulder, precisely what property and facilities will be included in that acquisition will change as a result of negotiations and discovery and that separation plans, transition plans and transfer applications will be revised accordingly. Boulder anticipates working closely with Commission staff to prepare and refine these plans and applications.

While Boulder recognizes the authority of the Commission over service provided by a municipal electric utility to customers located outside the jurisdictional boundaries of the municipality, Boulder respectfully submits that the Decision misapprehended certain points of law, as discussed below, and requests that the Commission reconsider its Decision.

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<sup>4</sup> Decision at pp. 15-16, ¶ 4.

## II. ARGUMENT<sup>5</sup>

### A. Boulder Has Certain Constitutional and Statutory Powers.

The Colorado Constitution granted every home rule city, including Boulder, the power to condemn and operate public utilities, and “everything required therefore,” both “within or without its territorial limits.”<sup>6</sup> Colorado statutes also grant all Colorado municipalities the right to condemn “electric light and power works and distribution systems.”<sup>7</sup>

In Colorado, every municipal franchise granted to a utility company (including the franchise granted to Public Service by Boulder) is, by statute, conditioned on the right of the municipality to acquire the company’s electric works and systems by condemnation upon expiration of the franchise term.<sup>8</sup>

In the 1800’s, a Colorado statute (the predecessor to § 31-15-707) granted all municipalities the right to acquire electric facilities by condemnation. In 1926, the Colorado Supreme Court held that all municipalities have the right to acquire the electric utility as soon as twenty years after the granting of the franchise, with the municipality to determine the particular facilities necessary.

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<sup>5</sup> Rather than repeat here the arguments raised in earlier briefing, Boulder incorporates the arguments addressed in its Response and Reply briefs as is fully set forth herein.

<sup>6</sup> Colo. Const. art. XX, §§ 1 and 6. *See also City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 534-35, 575 P.2d 382, 388-899 (1978) (discussing home rule city’s constitutionally-granted power to condemn “within or without its territorial limits,” to acquire utilities “and everything required therefore”) (emphasis in original). *See also Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 168-69 (Colo. 2008) (construing constitutional and statutory provisions together).

<sup>7</sup> C.R.S. §§ 31-15-707(1)(a)(I), (1)(a)(II), and (1)(e).

<sup>8</sup> C.R.S. § 31-15-707(1)(a)(II). *See also Public Service Co. v. City of Loveland*, 79 Colo. 216, 245 P. 493 (1926) (applying the predecessor to § 31-15-707 and upholding municipality’s right to acquire Public Service’s facilities by condemnation pursuant to this statute, as well as municipality’s right to determine which facilities would be acquired).

Applying the same statute (the predecessor to § 31-15-707), the Supreme Court further concluded that municipalities may condemn property outside the city's corporate limits.<sup>9</sup>

Similarly, article XX of the Colorado Constitution, grants home rule cities, such as the City of Boulder, the power to acquire electric works within or without the city. In *Town of Telluride v. San Miguel Valley Corp.* summarized eminent domain powers as follows:

In sum, we reiterate that the eminent domain power granted to home rule municipalities in article XX is not limited to the purposes enumerated in section 1, nor is the eminent domain power circumscribed when exercised extraterritorially. Rather, article XX grants home rule municipalities the power to condemn property, within or outside of territorial limits, for any lawful, public, local, and municipal purpose.”<sup>10</sup>

In order to meet its energy future goals and create the utility of the future, Boulder seeks to exercise its constitutional and statutory rights to acquire the facilities needed to serve Boulder residents. Those facilities primarily serve Boulder residents, though perhaps incidentally serving customers in nearby areas outside city limits in some instances. Under its constitutional and statutory powers, it is for Boulder to determine which facilities it will seek to acquire. In ruling that the Commission will determine which facilities “may be the subject of transfer”<sup>11</sup> and that the Commission must make this determination “before Boulder initiates a condemnation action,”<sup>12</sup> the Commission’s Decision violates Boulder’s constitutional and statutory rights to acquire by condemnation the utility facilities it deems necessary for the use of its citizens.

Once Boulder determines that it may form a retail electric utility in compliance with its Charter requirements and it, in fact, does so, Boulder will file all applicable applications for

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<sup>9</sup> 79 Colo. 216, 230-31, 245 P. 493, 499-500.

<sup>10</sup> 185 P.3d 161, 166 (Colo. 2008). *See also Colorado Cent. Power Co. v. City of Englewood*, 89 F.2d 233, 235 (10th Cir. Colo. 1937) (holding that, under Colorado law, city “may condemn property of a utility company in use as a part of the system which serves consumers within the city ....”).

<sup>11</sup> Decision at ¶ 28,

<sup>12</sup> Decision at pp. 15-16, ¶ 4

transfer. Boulder has also indicated to the Commission that it will work with the Commission on important issues of achieving a cost-effective transition that maintains the safety and reliability of the electric system and reduces any impacts on other ratepayers. However, the Commission's approval of an application for transfer is not the same as the Commission's deciding what property rights may be transferred and when the transfer may occur.

**B. This Commission Cannot Perform the Municipal Function of Determining Which Electric Facilities Will Be Sought by Boulder by Eminent Domain.**

Under longstanding Colorado law, municipalities determine what property they will take by eminent domain.<sup>13</sup> Moreover, municipalities have “the right to handle their own electric lighting systems.”<sup>14</sup> The operation of an electric utility by a municipality is the performance of a municipal function specifically authorized by statute.<sup>15</sup> So, too, is the acquisition of electric facilities by condemnation.<sup>16</sup>

Article V, § 35 of the Colorado Constitution provides “The general assembly shall not delegate to any special commission ... any power to make, supervise or interfere with any municipal improvement, money, property or effects, ... or *perform any municipal function whatever*.”<sup>17</sup> This Commission is such a “special commission.”<sup>18</sup>

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<sup>13</sup> See, e.g., *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 535, 575 P.2d 382, 389 (1978) (holding that a municipality's determination of necessity for property “is an essential part of the power of eminent domain” and is “not reviewable” absent a showing of fraud or bad faith); *Lavelle v. Town of Julesburg*, 49 Colo. 290, 294, 112 P. 774, 776 (1911) (holding that, regarding the scope of taking for a utility system, it is “the province of the town authorities to determine what property shall be taken and condemned”), *overruled on other grounds by La Plata Electric Ass'n, Inc. v. Cummins*, 728 P.2d 696 (Colo. 1986).

<sup>14</sup> *Public Service Co. v. City of Loveland*, 79 Colo. 216, 225-26, 245 P. 493, 498 (1926).

<sup>15</sup> *Public Service Co. v. City of Loveland*, 79 Colo. 216, 226, 245 P. 493, 498 (1926); *Town of Holyoke v. Smith*, 75 Colo. 286, 292, 226 P. 158, 160 (1924). See also C.R.S. § 31-15-707(1)(e).

<sup>16</sup> *Public Service Co. v. City of Loveland*, 79 Colo. 216, 226, 245 P. 493, 498 (1926) (the acquisition of Public Service's electric facilities was “within the discretion of the municipality”); see further at 79 Colo. 216, 229, 245 P. 493, 499 (it is within “the province of the town authorities to determine what property shall be taken”).

<sup>17</sup> Colo. Const. Article V, § 35 (emphasis added).

As noted, a municipality's determination to acquire electric utility property by eminent domain is a "municipal function." Hence, this Commission lacks the authority or jurisdiction to determine which facilities Boulder may seek to acquire by condemnation. In *People ex rel. Public Utilities Comm'n v. City of Loveland*<sup>19</sup>, the Colorado Supreme Court, applying Article V, § 35 of the Colorado Constitution, rejected an attempt by the Commission to enjoin the City of Loveland, a statutory city, from constructing an electric plant without first obtaining a certificate of authority from the Commission.

Both the Colorado Constitution and Colorado statutes clearly provide that the determination of what property to acquire in order to create a municipal electric utility is a municipal function.<sup>20</sup> Because a CPCN is a property right,<sup>21</sup> whether a CPCN will be included in a city's petition in condemnation is likewise a matter within the purview of the city to determine.

### **C. A City's Right of Eminent Domain Must Not Be Abridged.**

The Colorado Constitution provides:

*The right of eminent domain shall never be abridged nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals ....*<sup>22</sup>

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<sup>18</sup> *City of Lamar v. Town of Wiley*, 80 Colo. 18, 248 P. 1009 (1926).

<sup>19</sup> 76 Colo. 188, 230 P. 399 (1924).

<sup>20</sup> *Public Service Co. v. City of Loveland*, 79 Colo. 216, 226, 245 P. 493, 498 (1926) (the acquisition of Public Service's electric facilities was "within the discretion of the municipality"); see further at 79 Colo. 216, 229, 245 P. 493, 499 (it is within "the province of the town authorities to determine what property shall be taken").

<sup>21</sup> *Public Service Co. v. Public Utilities Comm'n*, 765 P.2d 1015, 1021 (Colo. 1988).

<sup>22</sup> Colo. Const. art. XV, § 8 (emphasis added).

Notably, Article XX, § 6 of the Colorado Constitution vested in home rule cities such as Boulder “every power” which the general assembly “could have conferred.”<sup>23</sup> In the *City of Loveland* case,<sup>24</sup> the Colorado Supreme Court applied Article XV, § 8 in support of its ruling that the City of Loveland had the right to condemn Public Service’s electric utility facilities. Ultimately, the Supreme Court held that “A large discretion is necessarily vested in [the city], in determining what property to take and how much is necessary.”<sup>25</sup> In addition, in determining which property the city could condemn outside city limits, the Supreme Court ruled that the city could take into account the “dictates of common business prudence.”<sup>26</sup>

In ruling that the Commission will determine which facilities “may be the subject of transfer,”<sup>27</sup> and that the Commission must make this determination “before Boulder initiates a condemnation action,”<sup>28</sup> the Commission’s Decision abridges Boulder’s right of eminent domain in violation of Article XV, § 8. Boulder respectfully suggests that the proper order of proceedings is the city’s initial filing of the eminent domain proceeding in district court, followed by its filing of appropriate applications with the Commission to address issues affecting out-of-city customers..<sup>29</sup>

#### **D. Condemnation Proceedings May Not Be Enjoined.**

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<sup>23</sup> *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 168 (Colo. 2008).

<sup>24</sup> *Public Service Co. v. City of Loveland*, 79 Colo. 216, 221, 245 P. 493, 496 (1926).

<sup>25</sup> *Id.* at 79 Colo. 216, 231, 245 P. 493, 500.

<sup>26</sup> *Id.* at 79 Colo. 216, 229, 245 P. 493, 499.

<sup>27</sup> Decision at ¶ 28.

<sup>28</sup> Decision at pp. 15-16, ¶ 4.

<sup>29</sup> For a proceeding involving the approval of an involuntary transfer, see *In The Matter of the Joint Application of Mill Creek Water Sales And Distribution, LLC, Through Its Receiver, and Grizzly Peak Water Sales and Distribution, LLC for Approval of the Transfer of PUC Certificates Of Public Convenience And Necessity and Related Assets and for Waiver of Certain Commission Rules*, Docket 10A-168E. For a proceeding involving condemnation and temporary PUC orders followed by permanent order from the Commission related to the transfer of a CPCN, see *City and County of Denver v. Public Utilities Commission*, 507 P.2d 871, 873.

Colorado law has long held that eminent domain proceedings may not be enjoined; instead, any defenses and objections to the condemnation must be brought in the eminent domain case.<sup>30</sup> Even constitutional objections must be raised in the eminent domain proceedings.<sup>31</sup> In ruling that this Commission will determine which facilities “may be the subject of transfer” and that the Commission must make this determination “before Boulder initiates a condemnation action,” the Commission’s Decision could be read as seeking to enjoin Boulder from filing a condemnation proceeding. This Commission lacks the authority and jurisdiction to enjoin a condemnation proceeding.

**E. Delaying a Condemnation Proceeding Will Seriously Prejudice Boulder’s Rights.**

The Commission’s Decision contemplates a delay in filing a Petition in Condemnation while the Commission investigates and determines which property interests and facilities could be used to provide service to Boulder residents. Delay will seriously harm Boulder’s interests and violate Boulder’s constitutional and statutory rights to acquire and operate its own electric utility.

Boulder has been working towards reducing its carbon footprint since adopting the Kyoto Protocol as its goal in 2002. The voters adopted and extended a Climate Action Plan Tax imposed on themselves to fund work to achieve tht goal. Recognizing that the goal could not be met without changing its energy resource mix, in 2011, Boulder voters approved an increase in an existing utility occupation tax for the purpose of funding the consultants and reports necessary to explore municipalization as one method for achieving the community’s energy objectives.

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<sup>30</sup> *E.g., Brotman v. East Lake Creek Ranch, LLP*, 31 P.3d 886, 891 (Colo. 2001); *Town of Glendale v. City & County of Denver*, 137 Colo. 188, 193, 322 P.2d 1053, 1056 (1958).

<sup>31</sup> *Auraria Businessmen Against Confiscation, Inc. v. Denver Urban Renewal Authority*, 183 Colo. 441, 445, 517 P.2d 845, 847 (1974) (“Constitutional objections to the eminent domain proceedings should be raised in those proceedings and be determined by the court *in limine* and not by way of a collateral injunction proceeding.”).

That tax is for five years, ending in December 2016. At the same election, the voters authorized the city to create a city-run electric utility, if certain requirements could be met.

In July 2013, the Boulder City Council accepted verification from a third-party independent expert that the city had shown that it could municipalize within the charter requirements approved by the voters in 2011. In August 2013, the City Council authorized acquisition, including condemnation if necessary, of Public Service's facilities at an appropriate time after Jan. 1, 2014. At the election on November 5 of this year, the voters approved by a 2-1 margin acquisition of the Public Service system if the acquisition cost did not exceed \$214 million and defeated by a similar margin an initiative that would have required future voter approval of all utility debt.

The next step to implement the voters' direction is to acquire Public Service's property. The only way to know if the acquisition price does not exceed \$214 million is to receive the jury verdict that occurs at the end of a condemnation case. Without proceeding with the condemnation, the city is prevented from executing the direction of its voters and elected officials. Further delay in taking the next steps puts the city in limbo with respect to municipalization, puts the city at an unfair disadvantage in being able to acquire the information it needs to make an informed decision, and delays proceedings beyond the time the voters have approved the tax to pay for the costs of the proceedings.

**F. Boulder Has No Plan to Seek Immediate Possession if it Files a Condemnation Case.**

The part of the Decision that rules the Commission, not Boulder, will determine which facilities may be the subject of condemnation relies on one case, which is inapposite, *Colorado*

*& Southern Railway Co. v. District Court.*<sup>32</sup> That case involved a statute that *explicitly* granted this Commission the “power to determine, order, and prescribe ... the particular point of crossing” where one railroad would cross another railroad’s tracks.<sup>33</sup> The Commission had the sole power to determine “what property the railroad requires” only because the statute *explicitly* granted the power to determine the location of railroad crossings to the Commission.<sup>34</sup> Here, there is no such statute. No statute grants this Commission the power to determine, order, and prescribe which property a municipality may seek to condemn in order to create a municipal utility.

Further, nothing in the *Colorado & Southern* case implies that the Commission has the power to decide which property a municipality, let alone a home rule city like Boulder, will include in its Petition in Condemnation. The railroad case cited by the Commission is also distinguishable because it did not involve acquisition by the constitutionally-granted home rule power of eminent domain.

Finally, the posture of the *Colorado & Southern* case is distinguishable, as well. As noted by the Supreme Court, the “[r]elief requested is immediate possession.”<sup>35</sup> The condemnor, a railroad company, not only filed a condemnation case to acquire an easement to cross over another railroad company’s tracks, but also sought “immediate possession” of that easement. In contrast, Boulder has no plan to seek immediate possession of the facilities at issue in the

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<sup>32</sup> *Colorado & Southern Railway Co. v. District Court*, 177 Colo. 162, 493 P.2d 657 (1972).

<sup>33</sup> *Id.* at 177 Colo. 162, 165, 493 P.2d 657, 658.

<sup>34</sup> *See* 177 Colo. 162, 166, 493 P.2d 657, 659)

<sup>35</sup> 177 Colo. 162, 164, 493 P.2d 657, 658.

Commission’s Decision, the “facilities, wherever located, that Public Service currently uses, at least in part, to serve customers located outside of Boulder’s city limits.”<sup>36</sup>

The eminent domain statutes allow, but do not require, the acquiring agency to seek immediate possession.<sup>37</sup> The acquiring agency may simply wait until the completion of the eminent domain proceedings to acquire possession. At this juncture, Boulder plans to do precisely that.

The eminent domain case may well take 1½ - 2 years to complete. Boulder plans to take possession and control of these Public Service facilities at the conclusion of that proceeding. During the likely 1½ - 2 years that it takes to complete an eminent domain proceeding, there will be ample time for the parties to develop separation and transition plans, working with, and coordinating with, the Commission to ensure Public Service customers in unincorporated Boulder County enjoy uninterrupted, safe and reliable service. Boulder looks forward to working closely with the Commission.

**G. The Commission’s Decision Overlooks the Disclosure, Discovery, and Petition Amendment Aspects of Eminent Domain Proceedings.**

The Colorado Rules of Civil Procedure apply to eminent domain proceedings.<sup>38</sup> Hence, discovery, through written interrogatories, requests for production of documents, and depositions, is allowed, and disclosure of information is required, in eminent domain cases. C.R.S. § 38-1-121(3) expressly recognizes “the discovery rights of parties to eminent domain proceedings.”

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<sup>36</sup> Decision at ¶ 28.

<sup>37</sup> See C.R.S. § 38-1-105(6).

<sup>38</sup> *Aldrich v. Dist. Ct.*, 714 P.2d 1321, 1323 (Colo. 1986).

Here, the uncontradicted facts in the record reflect that “Xcel [i.e., Public Service] did not make any of its records available.”<sup>39</sup> It may well be that, as disclosure and discovery proceed in the eminent domain case, Boulder will use the information acquired in that process to refine the scope of the taking.

The eminent domain statutes, specifically C.R.S. § 38-1-104, expressly provide for amendment to the petition in condemnation where necessary: “Amendment to the petition or to any paper or record in the case may be permitted whenever necessary to a fair trial.” This statutory provision has been liberally construed to allow amendments to the pleadings, particularly the petition in condemnation.<sup>40</sup>

It is not unusual for a petition in condemnation to be amended as the acquiring agency acquires information in the disclosure and discovery process and uses that information to change the scope of the taking. In some instances, the petition in condemnation may be amended several times as the property owner provides information and expert reports and takes a position on various issues in the case.

By requiring that Commission proceedings “are to be completed before Boulder initiates a condemnation action,”<sup>41</sup> the Commission’s Decision denies Boulder its right to take discovery in the eminent domain case. That discovery may further clarify the scope of the taking.

### **III. CONCLUSION**

Boulder has no objection to, and in fact is eager to work with Commission staff to prepare the various plans necessary to make Boulder’s acquisition of the Public Service system

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<sup>39</sup> ¶ 21 of Ghidossi Affidavit, attached at Exhibit 2 to Boulder’s Response to Public Service’s Verified Petition for Declaratory Orders.

<sup>40</sup> See, e.g., *Cucharas Sanitation & Water Dist. v. Mounsey*, 805 P.2d 1177, 1180 (Colo. App. 1990).

<sup>41</sup> Decision at pp. 15-16, ¶ 4.

that serves Boulder as cost-effective as possible and to ensure that the electric system, both inside and outside Boulder, is at least as safe and reliable as the current Public Service system. However, Boulder has the constitutional and statutory right to determine which assets it will acquire and the timing of any condemnation action that may be filed.

For the reasons discussed in this Application, Boulder respectfully requests that the Commission delete from its Decision those parts of its Decision that rule (i) the Commission will determine what plant, equipment, and facilities Boulder may acquire by condemnation and that (ii) this determination must be completed before Boulder may initiate a condemnation action.

DATED this 18<sup>th</sup> day of November 2013.

Respectfully submitted,

CITY OF BOULDER

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