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Boulder, Colorado 80302  
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**Petitioner:**

THE CITY OF BOULDER, a home rule City and a  
Colorado Municipal Corporation

v.

**Respondents:**

COLORADO PUBLIC UTILITIES COMMISSION; et al

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**CITY OF BOULDER'S REPLY BRIEF**

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The City of Boulder (the “City”), through counsel, respectfully submits this Reply Brief, addressing the Answer Briefs filed by the Colorado Public Utilities Commission and Commissioners Epel, Patton, and Vaad (collectively the “Commission” or the “PUC”); Public Service Company of Colorado (the “Company”); and the Colorado Office of Consumer Counsel (the “OCC”).

### INTRODUCTION

*I therefore lay down the following principle: That where a community--a city or county or a district--is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable basic right, as one of its functions of Government, one of its functions of home rule, to set up, after a fair referendum to its voters has been had, its own governmentally owned and operated service.*

*...It is perfectly clear...that no community which is sure that it is now being served well, and at reasonable rates by a private utility company, will seek to build or operate its own plant. But on the other hand the very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility something like this: a "birch rod" in the cupboard to be taken out and used only when the "child" gets beyond the point where a mere scolding does no good.*

Franklin Delano Roosevelt, The Portland Speech, September 21, 1932.<sup>1</sup>

In this September 1932 campaign speech, Franklin D. Roosevelt recognized that the right of communities to own and operate their own utilities acted to ensure that the needs of the community were met by their private utility providers. More than a century ago, this right of

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<sup>1</sup> <http://newdeal.feri.org/speeches/1932a.htm>

home rule cities, to own and operate their own electric utilities, was written into the Colorado Constitution. The City simply seeks to exercise that right.

The focus of the City's appeal is on its constitutionally-granted power to acquire the property and facilities necessary to create its own electric utility. To protect that power, the City has filed this appeal challenging three declarations by the Commission: (1) the Commission, not the City, has the right to decide which assets the City may acquire through the City's power of eminent domain; (2) proceedings before the Commission must conclude before the City may even begin a condemnation case; and (3) the district court does not have subject matter jurisdiction until the Commission has issued its decisions. If left unchallenged, the Commission's Decisions could impair the City's right to the property and assets necessary to create a municipal electric utility. The City is not interested in injuring the remaining ratepayers in the state. The City's sole purpose is to provide its citizens with that which they have voted repeatedly to support – a clean, locally run and reliable electrical system.

## **I. SUMMARY OF ARGUMENT**

The Answer Briefs brush aside a century of jurisprudence granting broad condemnation powers to Colorado cities. The City has the express constitutional right to acquire through condemnation property and facilities, both inside and outside the City, to create a municipal electric utility. It is noteworthy that the Answer Briefs focus almost entirely on service to out of city customers and not on acquisition of facilities. The City has conceded that the PUC has authority to regulate service to out of city customers. The focus of this appeal is not service, but rather the City's right to acquire electrical facilities both inside and outside of the city. The Colorado courts have upheld the power to condemn even when those electric facilities are part of

an integrated grid. An essential part of the condemnation power is the power of a home rule city to determine which property to acquire by condemnation, a point the Answer Briefs fail to address. Indeed, the Answer Briefs cite no constitutional, statutory, or case authority allowing the Commission to dictate which property a home rule city may acquire by condemnation.

In *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008), the Colorado Supreme Court recognized these broad, express powers and provided that no statute can preclude a home rule city's right to condemn property for a public purpose. The court recognized that regulation of a home rule city's power of eminent domain might be permissible. Here, however, the Commission seeks not just to regulate, but to prohibit the City from exercising this express constitutional right.

The Commission has no authority to determine what property the City may condemn or when it may file a petition in condemnation. Nor does it have the authority to preclude a district court from taking jurisdiction over a condemnation action. The Commission does have authority to regulate service and rates provided by a municipal utility to customers outside the municipality's boundaries. However, the regulation of service and rates is significantly different from a determination of what can be condemned and when.

The Company would have this Court decide, without any statutory or case law support, that it may construct duplicate facilities to replace the facilities acquired by the City through condemnation. Not only is there no legal support for the Company's position, there is also no evidence in the record below regarding the nature of those facilities. To the extent such an argument has merit, it can be addressed in the appropriate forum on a fully-developed record.

The City recognizes the importance of safety, reliability and rate impacts. However, those concerns neither justify nor require interference with the City's constitution-based power of eminent domain nor the Commission's intervention at this time. Those issues can and will be addressed in separate proceedings regarding post-acquisition activities.

## **II. THE ISSUES AND RECORD ON APPEAL**

### **A. The Issues.**

The issues on appeal are whether the Commission, through the Commission's Decisions, has regularly pursued its authority or has violated the constitutional rights of the City with respect to the City's exercise of its power of eminent domain by (1) ruling that the Commission has the exclusive authority to decide in the first instance **which property rights and facilities** the City may acquire by eminent domain, (2) ruling that Commission proceedings **must be completed** prior to initiation of the City's condemnation case, and (3) ruling that the Commission, not the condemnation court, has the power to determine the court's subject matter jurisdiction over the City's eminent domain proceeding.

### **B. The Record on Appeal.**

The City agrees the Commission entered only legal rulings. However, the uncontested facts, actually in the record regarding the City's planned acquisition, provide context for those rulings.

By statute, this Court's review of the Commission's Decisions is limited to the facts in the record. C.R.S. § 40-6-115(1) ("No new or additional evidence may be introduced in the district court, but the cause shall be heard on the record of the commission as certified by it.").

The Commission incorrectly states (Answer Brief at pp. 26-27) the City is inserting “new facts” on appeal. The facts alleged to be new concern the City’s planned acquisition.

Boulder’s Opening Brief contains a description of the City’s planned acquisition. This description was taken from a document submitted to the Commission *by the Company*. Opening Brief at pp. 2-4, citing *e.g.*, CD0034 (attachment to Company’s PUC filing). That document consists of a July 2013 memorandum to City Council describing the acquisitions and an accompanying map of the acquisition area. CD0034, attached hereto as **Exhibit 1**.

The July 2013 memorandum reflects that (a) the City seeks to acquire the electric system that has served the City, (b) 97% of the estimated electric load served by the system is inside city limits, (c) the Boulder system also serves customers outside the city who constitute only about 3% of the electric load, and (d) the Boulder system is isolated to a significant extent, because it is surrounded by over 17,000 acres of open space owned by the City or subject to conservation easements. CD0034. No party took issue with the discussion of the planned acquisition in the July 2013 memorandum.

### **III. STANDARD OF REVIEW**

The Answer Briefs all acknowledge this Court must review the Commission’s legal rulings *de novo*.

The Company and the Commission argue this Court must defer to the Commission’s interpretation of utility statutes. However, the General Assembly has mandated that where, as here, a party claims a violation of its constitutional rights, “the district court shall exercise an *independent judgment* on the law ....” C.R.S. § 40-6-115(2) (emphasis added).

Ultimately, the question here is one of constitutional law, an area in which the parties have cited no cases affording deference to the Commission. Moreover, as the Commission acknowledges, “a statute may not deny a constitutional right.” Commission’s Answer Brief at p. 22. *A fortiori*, the Commission’s statutory interpretation may not deny a constitutional right.

**IV. THE CITY HAS THE AUTHORITY TO ACQUIRE BY CONDEMNATION PROPERTY AND FACILITIES, BOTH INSIDE AND OUTSIDE THE CITY, TO CREATE A MUNICIPAL ELECTRICAL UTILITY**

**A. Article XX Expressly Grants Home Rule Cities Authority to Acquire Property and Facilities, Including the Right to Decide Which Assets to Acquire.**

The Colorado Constitution expressly grants home rule cities, such as Boulder, the power, “within or without [their] territorial limits ... to condemn and ... operate ... light plants, power plants, ... and any other public utilities ... and everything required therefore ....” Colo. Const. art. XX, §§ 1 and 6. The Answer Briefs cite no case holding the Commission can prevent a home rule city from exercising its express constitutional powers to acquire electric facilities and assets, both inside and outside the city, by condemnation.

Deciding which assets to acquire is an essential part of the power of eminent domain. The Colorado Supreme Court has unequivocally held that determining which property to acquire by condemnation is “an essential part of the power of eminent domain.” *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382, 389 (Colo. 1978). The Answer Briefs do not disagree with, or even address, this holding.

In *Farmers Reservoir*, the Colorado Supreme Court further held that the statute allowing a commission to decide which property a home rule city needed to condemn violated the city’s express constitutional rights:

The provisions of the 1975 Act relating to the appointment, action and effect of a commission to determine the issue of necessity of exercising eminent domain are unconstitutional as applied to Thornton as a home rule municipality. These provisions are in conflict with the express grant of eminent domain powers to home rule cities by Colo. Const. Art. XX, Sec. 1.

*Id.* at 388.

The power to determine which property to acquire by eminent domain, an essential part of home rule cities' sovereign powers, must remain with the City. *See Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 737, 744, 746 (Colo. 2007) (the power of eminent domain is “an essential attribute of sovereignty,” and “the discretion to exercise the power of eminent domain in the public interest must remain with the body to which it was delegated”). The Answer Briefs fail to address this analysis from the *Wheat Ridge* case.

The Commission's Answer Brief (at p. 27) also says Boulder “speculates” there is a “need” for Boulder to acquire the system that incidentally serves some customers outside city limits. In fact, the Boulder City Council, as the elected representatives of the citizens of Boulder, made a legislative decision that there is a “need and necessity,” for the benefit of the public health, welfare, and safety, to acquire the electric system that is “used and useful” in providing electric service to the City. Acquisition Ordinance at Paragraphs F-K, CD0041. In making its decision, City Council had before it the determination of the City's consulting engineers that the planned acquisition will allow the City to directly access power from the City-owned Boulder Canyon Hydroelectric Power Plant, better manage the flow of power throughout the grid serving the City, and minimize City power outages. CD0034, Bates p. 000439.

The purpose of Article XX of the Colorado Constitution is “to give as large a measure of home rule in local and municipal affairs as could be granted under a Republican form of

government ....” *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 165 (Colo. 2008) (quoting *Fishel v. City & County of Denver*, 108 P.2d 236, 240 (Colo. 1940)). Yet, here the Commission brushes aside a legislative determination of need by a home rule city as nothing more than mere “speculation.”

Contrary to the *Farmer’s Reservoir* decision, the Commission has concluded it can decide for the City what the City needs – *i.e.*, that the Commission will decide which parts of the Boulder system the City can acquire and which parts of the system the City cannot acquire. This conclusion ignores both the Colorado Constitution and Colorado case law and cannot be allowed to stand.

**B. The *Town of Telluride* Opinion Recognizes the Broad Power of Home Rule Cities.**

1. No Statute Can Preclude the City’s Express Constitutional Right to Acquire Electric Facilities and Assets by Condemnation.

Article XX expressly grants to home rule cities the power to acquire by condemnation electric utilities and everything required therefor. In *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008), the court observed Article XX also vests in home rule cities implied powers, specifically “full power to exercise the right of eminent domain in the effectuation of any lawful, public, local and municipal purpose.” *Telluride*, 185 P.3d at 165; *see also id.* at 164-66 (addressing a century of case law according home rule cities broad implied powers of eminent domain). The *Telluride* case also acknowledged a century of Colorado jurisprudence upholding the power of home rule cities to condemn property outside their boundaries.

The court further held that a statute cannot “deny home rule powers specifically granted by the constitution.” *Telluride*, 185 P.3d at 169. The *Telluride* Court quoted with approval the *Farmers Reservoir* opinion, which held “[t]he General Assembly has no power to enact any law that denies a right specifically granted by the Colorado Constitution.” *Id.*, quoting *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382, 389 (Colo. 1978). Moreover, “no analysis of competing state and local interests is necessary where a statute purports to take away home rule powers granted by the constitution.” *Telluride*, 185 P.3d at 169. Not surprisingly, the Commission acknowledges, “a statute may not deny a constitutional right.” Commission’s Answer Brief at p. 22.

2. The Commission Claims More Than the Power to Regulate.

Dictum in footnote 8 of the *Telluride* opinion suggests mere “regulation” of a home rule city’s power of eminent domain might be permissible. *Telluride*, 185 P.3d 161, 170, n.8. Relying on that footnote, the Commission argues that allowing the Commission to decide which property a home rule city may condemn amounts to mere “regulation” of Article XX condemnation powers. Commission’s Answer Brief at p. 23.

A similar assertion was part of a dissenting opinion in *Farmers Reservoir*. Justice Erickson’s dissent asserted that a statute granting power to an entity other than the home rule city to determine which property to acquire was a mere “regulation” of the power of eminent domain. *Farmers Reservoir*, 575 P.2d 382, 393 (Erickson, J., dissenting). Obviously, the five Justices in the majority in *Farmers Reservoir* disagreed.

The Commission claims it is empowered to do more than just regulate. Indeed, the Commission asserts it can “prohibit” the City from acquiring the electric system that has served

the City, either through the statute that allows the Commission to “prohibit” an “extension” of one utility into another utility, § 40-5-101, or through the Commission’s powers under Article XXV. Commission’s Answer Brief at pp. 17, 22-23, and 30. As discussed below, neither § 40-5-101 nor Article XXV grant the Commission such authority to dictate a home rule city’s condemnation acquisition. The Commission’s Decisions purport to prohibit the City from filing and prosecuting a Petition in Condemnation. Plainly, the Commission seeks not merely to regulate but to prohibit the City’s exercise of its constitutionally granted eminent domain powers. As first concluded by the U.S. Supreme Court, the power of regulation has its limits:

... [I]t is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation.

*Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886).

The Colorado Supreme Court provided examples of what the Court considered to be appropriate regulation. Footnote 8 of the *Telluride* case cited two cases: *City of Commerce City v. State*, 40 P.3d 1273 (Colo. 2002) and *City & County of Denver v. Bd. of County Comm'rs*, 782 P.2d 753 (Colo. 1989). In *City of Commerce*, the General Assembly imposed procedures for the use of photo radar technology in traffic enforcement, but did not prohibit the use of photo radar technology. The statutes constituted regulation because the legislature put in place minimum standards applicable to issuing tickets for photo radar violations.

The second case, *City & County of Denver v. Bd. of County Comm'rs*, 782 P.2d 753 (Colo. 1989), addressed land use permitting. The court clarified that while the statute at issue gave local jurisdictions the right to regulate the development of water facilities, it did not permit their prohibition. *Id.* at 762. Further, the Land Use Act, addressed in the case, specifically

expresses the intent of the General Assembly that the Act not interfere with the exercise of eminent domain powers. C.R.S. § 24-65.1-105 (2) (“Nothing in this article shall be construed as enhancing or diminishing the rights and procedures with respect to the power of a public utility to acquire property and rights-of-way by eminent domain to serve public need in the most economical and expedient manner.”).

**C. The Condemning Entity Has the Right and Responsibility to Determine What Property Is to Be Acquired**

1. Supreme Court Precedent Specifically Grants Cities the Power to Determine Which Property to Acquire for Municipal Electric Systems.

In *Public Service Co. v. City of Loveland*, 245 P. 493, 498 (Colo. 1926) (*Loveland II*), the Supreme Court held that municipalities have the right to select which property to condemn to serve the city because, among other reasons, municipalities have the right to handle their own electric lighting systems.

Remarkably, the Commission asserts (Answer Brief at p. 23) that its Decisions comply with *Loveland II* “because they do not require Boulder to select a particular facility for condemnation.” In fact, under the Commission’s Decisions, the Commission will dictate every facility that can be acquired by Boulder, if the facility even incidentally serves any customers outside Boulder or is deemed part of the “integrated” electric system (which every facility is, according to the Commission’s analysis).

The Commission argues (Answer Brief at p. 9) its Decisions do not address “Boulder’s ability to serve within the city.” To the contrary, the Decisions give the Commission the power, for example, to prevent Boulder from acquiring *any* of the substations that serve Boulder. *See*

also Commission's Answer Brief at p. 5 (asserting all of the substations "serve, at least in part, customers located outside the city").

Recognizing that "[a] large discretion is necessarily vested [in the city] in determining what property to take and how much is necessary," 245 P. at 500, the *Loveland II* Court upheld Loveland's condemnation of particular facilities. The Commission's approach not only ignores this "large discretion" accorded to municipalities when establishing their own electric utilities, it would transfer that authority to the Commission itself.

The Company's Answer Brief contains only a fleeting reference to *Loveland II*. Answer Brief at p. 26. By its silence on the point, the Company effectively agrees *Loveland II* holds municipalities have the right to select which electric utility property is needed for a municipal electric system.

2. Colorado Case Law Allows Cities to Acquire the Electric System Serving the City Even When that System is Part of an Integrated Grid.

The Company argues electric systems have evolved from "local steam plants" to an "integrated electric network." Company's Answer Brief at p. 30. However, the integration of electric systems is nothing new.

In *Public Service Co. v. City of Loveland*, 245 P. 493 (Colo. 1926) (*Loveland II*), commencing in 1903 a local steam plant was constructed to serve the City of Loveland. *Id.* at 495-96. However, prior to the 1926 *Loveland II* opinion, this local steam plant was dismantled and the city's system became part of Public Service Company's central system covering multiple cities and towns:

[T]he steam generating plant was dismantled and the Loveland distributing system was then connected with a large central plant of Public Service Company located near the town of Lafayette, which central plant supplies

other cities and towns and other customers of the company in the state. Thereupon the Loveland distributing system became a part of the central plant of the company ....

*Id.* at 495-96.

Plainly, the City of Loveland system was an integral part of the larger Public Service Company system in Colorado, and “[t]his continued until the company was dispossessed by the condemnation proceedings brought by the city.” *Id.* at 496. The Colorado Supreme Court approved the condemnation of all the facilities sought by the city, stating:

When the company dismantled the old steam generating plant at Loveland and connected its distributing system in the city with the central power station of the company, the Loveland part of it did not thereby lose its identity as a separate electric light plant and it remained subject to condemnation by the municipality originally granting the franchise.

*Id.* at 498.

Under *Loveland II*, the fact that an electric system serving a municipality is part of an integrated grid does not immunize that system from acquisition by condemnation.

3. The Determination of the Property to Be Acquired By Condemnation Includes Determining Whether or Not to Acquire the Certificate of Public Convenience and Necessity (“CPCN”)

A CPCN represents the right to provide retail electric service to customers within a particular geographic area. A CPCN is a property right. *See* C.R.S. § 40-5-105 (“the assets of any public utility, including any certificate of public convenience and necessity may be sold, assigned, or leased as any other property....”). As such, that property right is subject to condemnation. While the Commission’s Answer Brief (at p. 19) asserts that Boulder has not provided specific case authority holding that it can condemn a CPCN in particular, nothing in the Commission’s Decisions holds that Boulder lacks such condemnation power.

In its Opening Brief, the City advised that it intended to acquire a portion of the Company's CPCN for the right to serve customers located outside the City. However, when the City filed its Petition in Condemnation (the "Petition") with the Boulder District Court on July 17, 2014 (Case No. 2014 CV 030890), no portion of the Company's CPCN was included in the list of property and facilities to be acquired.

The Petition reflects the fact that while the City has the right to condemn the CPCN, the City's preference is to not serve customers located outside the City's boundaries. However, for a variety of reasons, including the way the system was designed, it is necessary for the City to acquire the same facilities regardless of whether the City serves customers outside the City's boundaries or not. The uncontested facts before the Commission, set forth in a document submitted to the Commission by the Company, reflect that the City seeks to acquire the electric system that has served the City for many years and, because of its configuration, also happens to serve a relatively small number of out-of-city customers (who account for only about 3% of the electric load on the system).

**D. The Cases Cited in the Answer Briefs, Including *Colorado & Southern Railway*, Do Not Address a Home Rule Municipality's Acquisition of the Electric System Serving the City.**

The Answer Briefs fail to cite a single case granting the Commission authority to determine which property and facilities a home rule city may acquire by condemnation.

In *Colorado & Southern Railway Co. v. District Court*, 493 P.2d 657 (Colo. 1972), one private corporate railroad, with only limited statutory power to condemn, sought the right to cross another railroad's track. A statute granted the Commission authority to determine the location where that crossing would occur. Yet, the Commission and the Company believe the

*Colorado & Southern Railway* opinion reduced home rule cities' express constitutional powers to acquire an existing electric utility system to the level of a private railroad company acting without constitutional powers of acquisition.

Because the private railroad company had no constitutional powers to exercise, the courts had no need to interpret competing constitutional powers in a way that avoids a conflict. *See Zaner v. City of Brighton*, 917 P.2d 280, 286 (Colo. 1996). In contrast, here a home rule city is involved, and the courts have an obligation to avoid "disturbing home rule power any more than necessary." *City of Fort Morgan v. Colorado Public Utilities Comm'n*, 159 P.3d 87, 95 (Colo. 2007).

The case at bar is factually distinguishable from the *Colorado & Southern Railway* case. Here, unlike the railroad case, the question is not where to locate a new facility. The electric system already exists, and the City is expressly authorized to take that system by condemnation. A change in ownership of an existing electric facility does not alter the safety of the electric system the way the improper location of a railroad crossing would alter the safety of the railroad.

In a subsequent railroad case, *Buck v. District Court*, 608 P.2d 350 (Colo. 1980), a railroad company sought to acquire property alongside its tracks to build dust levees for safety reasons. The landowners resisted the condemnation on the ground that the Commission must determine such safety issues before condemnation. The Supreme Court ruled pre-approval by the Commission was not a prerequisite to filing the petition in condemnation. In *Buck*, the court held:

...[P]etitioners contend that approval of the proposal for construction of dust levees must be secured by the railroad from the Colorado Public Utilities Commission as a condition precedent to the institution of this condemnation action. They rely on section

40-4-106, C.R.S.1973. We do not agree. It is clear that such approval is not required as a prerequisite to the condemnation of lands required for the proposed construction. Cf. *Miller v. Public Service Co. of Colorado*, 129 Colo. 513, 272 P.2d 283 (1954), with *Colorado and Southern Railway Company v. District Court*, 177 Colo. 162, 493 P.2d 657 (1972).

608 P.2d at 352.

The Commission relies also on *Public Service Co. of Colorado v. Trigen-Nations Energy Co., L.L.P.*, 982 P.2d 316 (Colo. 1999) for the proposition that the Commission has power over Boulder's facilities "acquisitions." That case did not address a home rule city's acquisitions by eminent domain. Rather, *Trigen-Nations* was a tariff case that did not involve any home rule city, let alone a condemnation acquisition by a home rule city.

The Company relies on other cases having nothing to do with condemnation acquisitions by home rule cities. *E.g.*, *People ex rel. Public Utilities Comm'n v. Mountain States Tel. & Tel. Co.*, 243 P.2d 397 (Colo. 1952) (dealing with setting rates for telephone service); *Denver & R. G. W. R. Co. v. City & County of Denver*, 673 P.2d 354 (Colo. 1983) (dealing with a city's assertion of implied powers over charges for construction of railroad viaducts).

**E. The Company Was on Notice When It Developed Its Electric System That the Utility Franchise Statute Grants to Municipalities the Power to Acquire Their Electric Systems.**

Statutes in effect since the 1800s provide that every municipal franchise granted to a utility company is conditioned on the municipality's right to acquire the electric works and systems by condemnation. C.R.S. § 31-15-707(1)(a)(II). In *City of Thornton v. Public Utilities Commission*, 402 P.2d 194 (Colo. 1965), the Supreme Court enforced Thornton's right to purchase the existing utility system that provided water and sewer service to the city, reversing a Commission order that declared the sale invalid. Because by statute "it was mandatory to

include in the franchise granted to [the utility company] by Thornton the proviso that the municipality could acquire the public utility by purchase, [the utility company] was duty bound to sell ....” *Id.* at 198.

Here, the Company has held a franchise to furnish electricity to the City, CD File 001, Bates p. 000002, ¶ 1, and by statute that franchise was entered pursuant to the same mandatory provision. In *Public Service Co. v. City of Loveland*, 245 P. 493, 497-98 (Colo. 1926) (*Loveland II*), the Supreme Court upheld Loveland’s condemnation of the electric system that had served Loveland under a franchise, basing its ruling in part on the fact that the utility company had built the system with full knowledge of the mandatory provisions of the franchise statute.

The Company’s only rejoinder here is to suggest (Answer Brief at p. 25) that, because the 20-year term of its most recent franchise with Boulder has expired, the provisions of the utility franchise statute (§ 31-15-707) no longer apply. The statute contains no such language. Here, as in *Loveland II*, the Company built the Boulder system with full knowledge of the utility franchise statute, which reflects the legislature’s intent that cities have the express right to acquire by condemnation the electric system serving the city.

**V. THE COMMISSION HAS NO AUTHORITY TO DETERMINE WHAT PROPERTY THE CITY MAY CONDEMN OR WHEN IT MAY FILE A PETITION IN CONDEMNATION**

The Commission lacks the authority under the Constitution, statutes, or case law to dictate which property a home rule city can acquire by condemnation. Indeed, the Answer Briefs fail to cite a single authority granting the Commission power to decide which property a home rule city can acquire by condemnation. Boulder has that power, and the condemnation court has jurisdiction.

**A. Article XXV Says Nothing About Acquisition by Condemnation.**

The wording of Article XXV of the Colorado Constitution does not address eminent domain acquisitions by home rule cities, let alone grant the Commission power over such acquisitions. The first paragraph of Article XXV allows the State to regulate public utilities, such as the Company, inside home rule municipalities. Colo. Const. art. XXV. The second paragraph of Article XXV vests this power in the Commission, provided that nothing in Article XXV shall affect the power of municipalities to exercise reasonable police and licensing powers, nor their power to grant franchises; “and provided, further, that nothing herein shall be construed to apply to municipally owned utilities.” *Id.*

In sum, the express language of Article XXV says nothing about granting the Commission power over home rule cities’ acquisition of property by condemnation. Nothing in the language of Article XXV suggests the Article XX condemnation power of home rule cities is extinguished by Article XXV.

**B. The Commission Has Previously Concluded That § 40-5-105 Does Not Apply to Condemnation.**

The keystone of the Commission’s assertion of authority over Boulder’s acquisition of utility assets is its purported authority under § 40-5-105 to approve the transfer of utility assets. The Commission and the Company rely on *Mountain States Tel. & Tel. Co. v. Public Utilities Comm’n*, 763 P.2d 1020 (Colo. 1988) for the proposition that a utility must obtain Commission approval of an asset sale. The *Mountain States* case had nothing to do with a home rule city’s acquisition by condemnation. The case, which was not cited in the Commission’s Decisions being challenged on appeal, dealt with an ordinary sale from one private business entity to another.

The Supreme Court's discussion of the Commission's powers over such an ordinary sale of utility property from one business entity to another says nothing about the very different posture here, where a home rule city seeks to exercise its express constitutional powers to acquire property by condemnation.

Moreover, the *Mountain States* case relied on § 40-5-105, which provides utility property may be sold only upon "authorization" by the Commission. While the Commission's Answer Brief relies upon *Mountain States* and § 40-5-105, the Commission neglects to mention the Commission ruled recently (and, notably, after the 1988 *Mountain States* opinion) that § 40-5-105 does not apply to condemnation acquisitions:

[A]lthough no Colorado cases address the issue of whether voluntary sales of public utility assets and involuntary sales pursuant to eminent domain are different methods by which a municipality may acquire public utility assets, the rationale used by the courts from other jurisdictions to resolve this issue is persuasive. We note that §40-5-105(1), C.R.S, does not explicitly mention involuntary sales pursuant to eminent domain laws. In *United Water New Mexico, Inc., v. New Mexico Pub. Util. Comm'n*, 121 N.M. 272, 910 P.2d 906, 910 (1996), the Supreme Court of New Mexico ruled that a New Mexico statute similar to §40-5-105(1), C.R.S., applied only to voluntary sales by a public utility. That statute provided that '[w]ith the prior express authorization of the commission ...any public utility may sell, lease, rent, purchase, or acquire any public utility plant or property...' The court noted that the statute referred only to affirmative, voluntary acts undertaken by a utility. *Id.* By contrast, a forced condemnation of utility property by a municipality is not a voluntary, affirmative act of that utility. *Id.* The court concluded that the statute did not apply to a condemnation action. *See also, Decatur County Rural Elec. Membership Corp. v. Pub. Serv. Co. of Indiana*, 307 N.E.2d 96, 104 (Ind. App. 1974) (holding that a statute requiring approval of purchases by the state utility commission dealt only with voluntary sales or leases); *Pub. Utils. Comm'n v. City of Fresno*, 254 Cal.App.2d 76, 82-83 (1967) *Pub. Utils. Comm'n v. City of Fresno*, 254 Cal.App.2d 76, 82-83 (1967) (finding a statute preventing a utility from selling its systems without approval of the state commission did not govern involuntary condemnation actions brought by a city).

*In Re Public Service Co. of Colorado*, 2010 WestLaw 1424306, p. \*15, ¶ 146 (Colo. PUC Mar. 29, 2010).

In fact, during that proceeding before the Commission, the Company took the position that transfers under §40-5-105 and condemnation were separate and distinct: “Public Service argues that voluntary sales of public utility facilities pursuant to § 40-5-105(1), C.R.S., and involuntary sales in the context of eminent domain are two different methods by which municipalities may acquire street lighting facilities.” *Id.* at p. 13, ¶ 138. Even if this conclusion several years ago by the Commission is not binding on the Commission, the logic is nonetheless persuasive. *See also* Commission’s Answer Brief at p. 22 (“a statute may not deny a constitutional right”).

**C. Section 40-5-101 Applies Only to Extension and Construction. It Says Nothing About Acquisition.**

The Commission argues (Answer Brief at pp. 17-18) it has jurisdiction under C.R.S. § 40-5-101(1)(b), because the City is “extending” its system outside city limits. To the contrary, Boulder is not **extending** a system, but rather **acquiring** the system that already exists and currently serves Boulder.

Additionally, the Commission’s jurisdiction under § 40-5-101(1)(b) arises “**upon complaint** of the public utility claiming to be injuriously affected.” Upon the filing of a complaint of one public utility that the construction or extension of a line, plant or system of a second public utility interferes with or is about to interfere with the operation of the line, plant or system of the complaining utility, the Commission may, after hearing, prohibit the construction or extension or prescribe just and reasonable terms and conditions for the location of the lines, plants or systems affected.

**D. There is No Process in the Public Utilities Law or the Commission's Rules for Pre-Approval of Facility Acquisition by Condemnation.**

The Commission's Decisions cite two statutes in the Public Utilities Law (C.R.S. Title 40), §§ 40-5-101(1)(b) and 40-5-105(1), which the Commission asserts provides the basis for its review of the City's acquisition by condemnation of facilities and property. These statutes, however, do not include a process for pre-approval of the facilities to be acquired. As discussed above, Section 40-5-101(1)(b) gives the Commission authority to hear a claim by one utility against another for interference with the operation of the line, plant or system of the complaining utility. Section 40-5-105(1) involves the approval of a proposed transfer of facilities. Commission Rule 3104 details the information that must be included in an application for a transfer of assets. 4 C.C.R. 723-3. Among the information and documentation to be provided are "copies of any agreement for merger, sales agreement, or contract of sale pertinent to the transaction which is the subject of the application."

It is a virtual impossibility for the City to provide this information unless an agreement is reached with the Company. In its Opening Brief, the City explained that it is this element of the Commission's Decisions that are subjecting the City to more stringent regulation than the Commission applies to investor-owned utilities that have no comparable constitutional stature or authority. Those utilities are permitted to work through the details of the transfer and to develop a written agreement that includes the details of the transfer that will be effective once approved by the Commission. The Commission does not require, nor is there any Commission rule that provides for, the submittal of an application before the parties have agreed to the terms of a planned transfer. This may explain the Commission's previous decision that Section 40-5-105(1) applies only to voluntary transfers.

**VI. REGULATION OF SERVICE AND RATES IS DIFFERENT FROM INTERFERENCE WITH ACQUISITION.**

Boulder’s Opening Brief (at p. 19) observed that the “sole statement” in *City of Loveland v. Public Utilities Commission*, 580 P.2d 381, 383 (Colo. 1978) (*Loveland IV*) about “acquisition” was “[t]he PUC may not interfere with municipal decisions about purchasing, selling or building public utilities facilities.”

In a puzzling argument, the Commission asserts Boulder did not accurately portray this quotation. In fact, the *Loveland IV* Court ruled as follows:

It is clear from our case law ... that the PUC may not constitutionally regulate utilities operated by a municipality within its boundaries. ***The PUC may not interfere with municipal decisions about purchasing, selling or building public utilities facilities.*** Nor may the PUC set rates within municipal boundaries in cities which are served by municipally-owned facilities.

However, our cases have permitted the PUC to regulate municipally-owned public utilities to the extent of their operations outside city boundaries. In the *City of Lamar* case, we specifically held that ***the PUC has jurisdiction over services*** provided by municipal utilities to customers outside city boundaries.

*Loveland IV*, 580 P.2d 381, 383 (emphasis added, citations omitted).

As the full quotation shows, a distinction exists between acquisition and service – the Commission may not interfere with municipal acquisition decisions, but has jurisdiction over services provided by municipal utilities to customers outside city boundaries. *See also id.* at 385 (“We believe it is essential that the PUC be allowed to regulate the public utility ***services*** provided by municipalities outside their boundaries.) (emphasis added).

Ultimately, the Commission acknowledges (Answer Brief at p. 25) that *Loveland IV* supports Commission jurisdiction over “extraterritorial services.”

The City seeks an order from this Court regarding the City's power to acquire by eminent domain the property identified by the Boulder City Council as necessary to create a municipal electric utility. The cases cited in the Answer Briefs regarding service to out of city customers do not provide guidance regarding the City's power to acquire property.

Apart from *Loveland IV*, discussed above, the Answer Briefs cite *City of Lamar v. Town of Wiley*, 248 P. 1009 (Colo. 1926); *Public Utilities Comm'n v. City of Loveland*, 289 P. 1090 (Colo. 1930) (*Loveland III*); and *City & County of Denver v. Public Utilities Comm'n*, 507 P.2d 871 (Colo. 1973). All deal with cities providing service to customers outside city boundaries.

In *City of Lamar v. Town of Wiley*, 248 P. 1009, 1011 (Colo. 1926), the critical language states “a municipally owned public utility, *as to service furnished* consumers beyond its territorial jurisdiction, should be as already stated, subject to the same regulation to which a privately owned public utility must conform in similar circumstances.”

The *Loveland III* opinion notes the Commission had entered “an order directing the city to cease and desist from *servicing customers*” after Loveland extended facilities outside of its boundaries for the purpose of serving customers within the disputed territory. *Loveland III*, 289 P. 1090, 1091 (Colo. 1930) (emphasis added). It was from this order that Loveland appealed. As noted, Boulder is not building any new facilities to serve customers outside its boundaries. *Loveland III* addressed issues of service. This appeal concerns acquisition, not service.

Similarly, in *City & County of Denver v. Public Utilities Comm'n*, 507 P.2d 871 (Colo. 1973) (*Denver Tramway*), the Supreme Court observed that the “sole issue” on appeal was whether the Commission had jurisdiction over the “service and rates” of the mass transit system outside city boundaries. *Id.* at 871. Nothing in the case precludes a home rule city from

condemning utilities outside city limits without Commission approval. Notably, in *Denver Tramway*, the Commission conceded Denver's constitutional authority to *acquire* the transportation system. CD0064, Bates p. 001068. The condemnation proceeding was completed without any Commission involvement.

Boulder agrees that provision of "services" to non-resident customers is subject to Commission jurisdiction. However, this appeal concerns the City's right to acquire property and facilities, not service to customers outside the City.

**VII. BASED ON INFORMATION LEARNED IN THE CONDEMNATION PROCEEDING, THE CITY MAY MODIFY ITS DETERMINATION ABOUT WHICH PROPERTY TO ACQUIRE.**

The City has made a determination of which property to acquire for its municipal electric utility, but may seek to modify the acquisition based on information obtained during the condemnation case. The ability to amend its decisions regarding acquisition is part of the power to determine which property to acquire.

The Company suggests there will be no additional information available to the City in the condemnation case because the Rules of Procedure supposedly do not apply and discovery and amendment of pleadings supposedly does not occur in condemnation cases.

Quoting an 1885 opinion (issued half a century before the Colorado Rules of Civil Procedure came into existence), the Company suggests eminent domain cases follow different rules from ordinary civil actions. Company's Answer Brief at p. 19 & n.57. To the contrary, the Colorado Rules of Civil Procedure apply to eminent domain proceedings. *Aldrich v. Dist. Ct.*, 714 P.2d 1321, 1323 (Colo. 1986).

The Company's Answer Brief also contains a series of remarkable statements suggesting (Answer Brief at pp. 18) that "typical constructs," such as discovery to flesh out facts, and amendment of claims, are not applicable in eminent domain. The Company provides no authority for its assertions regarding discovery, while citing authority that demonstrates eminent domain claims are indeed subject to amendment. C.R.S. § 38-1-104 (allowing amendment "whenever necessary to a fair trial and final determination of the questions involved").

**VIII. THERE IS NO SUPPORT FOR THE COMPANY'S ARGUMENT THAT A UTILITY MAY CONSTRUCT DUPLICATE FACILITIES TO CONTINUE TO SERVE ITS CUSTOMERS**

The Company argues that Colorado statutes and the doctrine of regulated monopoly do not prohibit a utility from constructing facilities to serve its own customers even if those facilities duplicate the facilities of another public utility. Company Answer Brief, pp. 28-29. Yet the Company cites no statutes and no case law that support that position. In fact, the ensuing argument does not touch on that issue.

The Company states, incorrectly and without citation, that the City argued it cannot be required to pay for **reconnection** facilities. This may have been a typographical error on the Company's part, but it concerns one of the major points of the City's Opening Brief and deserves clarification. Citing C.R.S. § 40-5-101, Boulder did argue that (1) "[n]o Colorado statute or case grants a utility company the right to construct duplicate facilities after participating in a sale of its facilities and CPCN" and (2) "if the Company's CPCN is acquired by Boulder, the Company would no longer have a right to serve the relevant customers, which renders it unable, by law and definition, to serve those customers...." That fact, the City argued, would "extinguish any need

or entitlement on the part of the Company to construct **replacement** facilities.” The Company’s Answer Brief did not refute these statements.

The case that the Company does cite in support of its argument that “the utility asserting the claim must have a pre-existing and lawful right to serve,” *Rocky Mountain Natural Gas Co., Inc. v. Public Utilities Commission*, 617 P.2d 1175 (Colo. 1980), involved a geographic area in which no gas company had a pre-existing right to serve; there was no “existing utility” in that case. The Company cites *Public Serv. Co. v. Public Utils. Comm’n*, 485 P.2d 123 (1971), apparently to support its claim that the duplication of facilities or services cannot be used to oust an existing utility, however, that case says nothing of the sort. The Company’s claim that the doctrine of regulated monopoly cannot be used to oust an existing utility is generally true, but is off point. The City would not be relying on the doctrine of regulated monopoly, but rather its Article XX powers, to condemn the Company’s facilities. The fact remains that if the City acquires the facilities used to serve customers located outside the City, the doctrine of regulated monopoly would prohibit the Company’s construction of facilities to replace the condemned facilities since those customers could still be served by the Company over the City’s lines.

#### **IX. ARGUMENTS ABOUT COMPENSABLE DAMAGES RESULTING FROM THE CONDEMNATION ARE FOR THE CONDEMNATION COURT TO RESOLVE**

The Company suggests the Commission is entitled to negate Boulder’s constitutional eminent domain authority in order to prevent Boulder from avoiding payment of “reconnection” costs. Answer Brief at pp. 20-21. The Company is vague as to what the Company believes those “reconnection” costs are, though it appears these costs consist of “separation costs.” Answer Brief at p. 21.

If in fact the Company is referring to separation costs (*i.e.*, for installation of meters and interconnection equipment), the City will be paying those costs as part of its project. *See* July 2013 memorandum, CD0034, Bates pp. 000438-39. If the Company is referring to some unspecified costs other than separation costs, the Company will have an opportunity to argue to the condemnation court that such costs are compensable damages in the condemnation case. If the Company has costs that are compensable damages, then the Company's concern that the damages award will be "insufficient" (*see* Answer Brief at pp. 20-21) is misplaced. As the Company acknowledges, it is "a fundamental principle of condemnation law that damages to the remainder are the responsibility of the condemning authority." *Id.* at p. 21.

The Company offers no basis for concluding the condemnation court is not up to the task of ascertaining whether compensable damages to the remainder actually exist. Neither case law nor common sense furnishes a basis for concluding that the City's constitutional rights must be violated to assuage the Company's unfounded concern that the condemnation court cannot discern which damages are compensable and which are not.

#### **X. THE COMMISSION LACKS THE AUTHORITY TO DECIDE THE SCOPE OF THE EMINENT DOMAIN COURT'S JURISDICTION**

Notably, the Company admitted in the Commission proceedings:

[W]hat facilities Boulder may condemn to create a municipal utility to serve its residents and businesses ... is a question which the trial court in the condemnation action has the exclusive jurisdiction to determine ....

CD0032, Bates p. 000424-25, Paragraph 14.

The Company now argues the Commission's Decisions do not address the scope of a condemnation court's power, then, in contradictory fashion, argues the Commission's Decisions preclude the condemnation court from having jurisdiction over the City's acquisition.

Neither the Commission nor the Company cites any authority that the district court does not have subject matter jurisdiction over an eminent domain action until the Commission determines the court has jurisdiction.

The Commission's reliance on *Keystone, Div. of Ralston Purina Co. v. Flynn*, 769 P.2d 484 (Colo. 1989) is misplaced. The *Keystone* case mentions that a tribunal has the power to determine its own jurisdiction, *id.* at 488, n.6, but nothing in *Keystone* grants the Commission the power to bar a court from hearing a case. The Commission seeks to delay a condemnation proceeding with an erroneous ruling that dictates the scope of a condemnation court's jurisdiction.

## **XI. NEW FACTUAL ALLEGATIONS IN THE ANSWER BRIEFS**

Despite the fact that C.R.S. § 40-6-115(1), prohibits consideration of facts outside the record certified by the Commission, the Company now seeks to add new alleged "facts" to counter the July 2013 memorandum it submitted to the Commission, including that the Company has discovered 1,300 customers in Louisville allegedly served by the system Boulder seeks to acquire. Company's Answer Brief at p. 5.

The OCC's Answer Brief (at p. 1 f.n.2) asks this Court to accept an allegation set forth in a Complaint filed in Boulder District Court by the Company – specifically, an allegation concerning the number of out-of-city customers.

Finally, the Commission incorrectly states (Answer Brief at p. 6) the City "plans to acquire eight substations." The planned acquisition impacts nine substations; some substation acquisitions will be total acquisitions and some will be partial. CD0034, Bates pp. 000437-38.

None of these new allegations were ever placed before the Commission and thus cannot be considered by this Court. C.R.S. § 40-6-115(1). Moreover, whether the out-of-city customers total 5,800 or the slightly higher figure now improperly alleged on appeal, the fact set forth in the record is not materially altered: only about 3% of the estimated electric load is outside city limits.

**XII. THE SAFETY, RELIABILITY AND RATE IMPACT CONCERNS ASSERTED BY THE COMMISSION AND INTERVENORS NEITHER JUSTIFY NOR REQUIRE INTERFERENCE WITH THE CITY'S EXERCISE OF ITS CONSTITUTIONAL EMINENT DOMAIN AUTHORITY BECAUSE THOSE CONCERNS CAN AND WILL BE ADDRESSED SEPARATELY**

The Answer Briefs assert concerns about system “separation,” safety and reliability as grounds for the Commission’s claim that it is entitled to superintend these matters *before* the City may exercise its constitutional eminent domain authority (PUC Ans. Br. at 12-29; PSCo Ans. Br. at 20-21, 29-32; OCC Ans. Br. at 10-17). Boulder does not dispute that regulatory agencies are charged with ensuring the safety and reliability of the electric grid. The Commission and intervenors fail to acknowledge that there will be processes, before either the Federal Energy Regulatory Commission (FERC) or the Commission, in which those stated concerns are properly before decision-makers charged with regulatory oversight of the post-acquisition use of the electric system. The Commission’s Decisions, in contrast, seek to constrain the City’s eminent domain acquisition of assets by subjecting the City’s exercise of its constitutional authority to *a priori* review and approval by the Commission. Assuming for the sake of argument that some factual basis could be said to exist for these stated concerns about the use of the property after acquisition, they furnish no justification for prior restraint of the City’s constitutional eminent domain authority.

**A. The Separation/Interconnection of the City's System and the Company's System Are Addressed by Federal Law.**

As the Commission acknowledges in its Answer Brief, the “separation” with which it says it is concerned consists of installing “meters” and “interconnection equipment” that will allow the City’s and the Company’s facilities to interface. Commission’s Answer Brief at p. 6, citing CD0034, Bates p. 000438. With the exception of these meters and interconnection equipment, the electric system will be physically identical in its configuration and operation before and after condemnation; it will merely change ownership. The City has informed the Commission that the City anticipates that these interconnections will be subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (“FERC”) over the City’s provision of transmission service to the Company, which will allow the Company to continue to provide retail electric service to the outside-the-City customers post-acquisition. CD0034, Bates p. 00438 (memo to City Council). *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 695, 697-698 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002) (discussing FERC’s jurisdiction over transmission of electricity, regardless of the voltage at which transmission occurs, and the provision of “reciprocal” transmission service by municipal utilities).

Citing concerns about “uncertainty, chaos and injustice,” the Company engages in hyperbole when it argues that the Company’s “remaining customers must accept the level of reliability that is left over if home rule cities decide where and how to separate the electric systems” or they “must pay for the cost of replacement facilities to maintain their prior level of reliability.” Company’s Answer Brief at p. 31-32. The Company’s stated concerns are without merit. Section 215 of the Federal Power Act grants FERC jurisdiction over the reliability of the

interconnection facilities at issue here to the extent that the operation of those facilities has the ability to affect the Bulk Electric System. *See* Federal Power Act § 215(b)(1), 16 U.S.C. § 824o(b)(1). Pursuant to that statute, FERC has approved reliability standards promulgated by the North American Electric Reliability Corporation (“NERC”).<sup>2</sup> The City fully expects that the interconnections between the City’s system and the Company’s system will be required to meet the national NERC reliability standards.

**B. The Arguments Regarding Ratepayer Impacts Are Beyond the Scope of this Appeal.**

An appellee cannot increase its rights beyond those afforded by the lower tribunal’s judgment. *Farmers Group, Inc. v. Williams*, 805 P.2d 419, 428 (Colo. 1991). Nonetheless, the OCC’s Answer Brief raises questions concerning Boulder’s right to create a municipal electric utility. Boulder’s right to create a municipal electrical utility is not at issue.

The OCC’s Answer Brief (at pp. 6-7) incorrectly suggests this Court needs to address the effect that the City’s creation of a municipal electric utility will have on Colorado ratepayers. The OCC further argues that the Company’s Colorado customers “should not be asked to subsidize the costs associated with Boulder’s efforts to municipalize.” OCC’s Answer Brief at p. 7. The OCC would have the Commission prevent the City from acquiring the electric system that serves the City in violation of the City’s constitutional right to do so. (OCC Answer Brief, pp. 6-7). The Colorado Supreme Court long ago decided the Commission lacks the power to stop any city from forming its own electric utility. *People ex rel. Pub. Utils. Comm’n v. City of Loveland*, 230 P. 399 (Colo. 1924)(*Loveland I*). The fact that taking Boulder customers out of

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<sup>2</sup> *See* <http://www.nerc.com/pa/stand/Pages/ReliabilityStandardsUnitedStates.aspx>.

the Company's service area may have some collateral effect on the retail electric rates of other ratepayers is an issue well beyond the scope of this proceeding.

The OCC quotes *Public Utilities Comm'n v. Home Light & Power Co.*, 428 P.2d 928, 935 (Colo. 1967), for the proposition that there is no basis for requiring the customer to pay for a change of the utility "which is rendering service" when the customer did not request the change. OCC's interpretation of *Home Light* would read Article XX out of the Constitution. The Supreme Court merely ruled in *Home Light* that, when the company "rendering service" in a particular area changed, the customers **in that area** should ordinarily not be charged more. It goes too far to suggest that *Home Light* says anything about an obligation to indemnify every ratepayer in the state who will have the same utility (the Company) both before and after Boulder owns and operates its electric utility.

In a similar vein, the Company essentially asserts that Boulder must indemnify "all of the statewide ratepayers" against any rate increase that might occur when Boulder takes over the system that serves Boulder. Company's Answer Brief, pp. 20-21. The Company cites no law in support of this proposition.

These requests are improper attempts to expand the scope of the appeal.

## CONCLUSION

The City respectfully requests that this Court rule the Commission's declaratory rulings regarding the City's acquisition by condemnation are contrary to law and violate the City's constitutional and statutory rights. The City requests that this Court order that the following points reflect the application of the correct legal principles in this case:

1. The Colorado Constitution authorizes the City Council, not the Commission, to

- determine which property and assets the City may acquire, and the Commission lacks the power to preclude or undo a condemnation acquisition by the City;
2. The Commission does not have the power to prohibit the City from initiating and pursuing a petition in condemnation;
  3. The condemnation court, not the Commission, has the power to determine the court's subject matter jurisdiction over the City's eminent domain proceeding;  
and
  4. The City's acquisition of the Company's Certificate of Public Convenience and Necessity ("CPCN") removes the possibility that the City can be ordered by the Commission to pay for duplication of the Company's facilities.

Respectfully submitted this 23<sup>rd</sup> day of July 2014.

DUNCAN, OSTRANDER & DINGESS, P.C.  
**/s/ DONALD M. OSTRANDER'S DULY SIGNED PHYSICAL  
COPY OF THIS DOCUMENT IS ON FILE AT THE OFFICE OF  
DUNCAN, OSTRANDER & DINGESS, P.C. PURSUANT TO  
CRCP RULE 121, SECTION 1-26(9)**

By:

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**EXHIBIT 1** CD0034 July 2013 Memorandum

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23<sup>rd</sup> day of July 2014, a true and correct copy of the foregoing **CITY OF BOULDER'S REPLY BRIEF** was sent via ICCES Integrated Colorado Courts E-filing System or sent via e-mail or placed in the United States mail, first class, postage prepaid, and properly addressed to the following:

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By: \_\_\_\_\_

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

DATE FILED: July 23, 2014 7:21 PM  
FILING ID: 2F16EB30945E0  
CASE NUMBER: 2014CV30047

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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 )  
AND OTHER COUNTIES )**

**Docket No. 13D-0498E**

**RESPONSE OF PUBLIC SERVICE COMPANY OF COLORADO  
TO NEXUS QUESTION POSED BY COMMISSION AND NOT ADDRESSED IN THE  
PETITION OR MEMORANDUM OF AUTHORITIES**

Attachment 2

City of Boulder's Updated Proposal Concerning Facilities

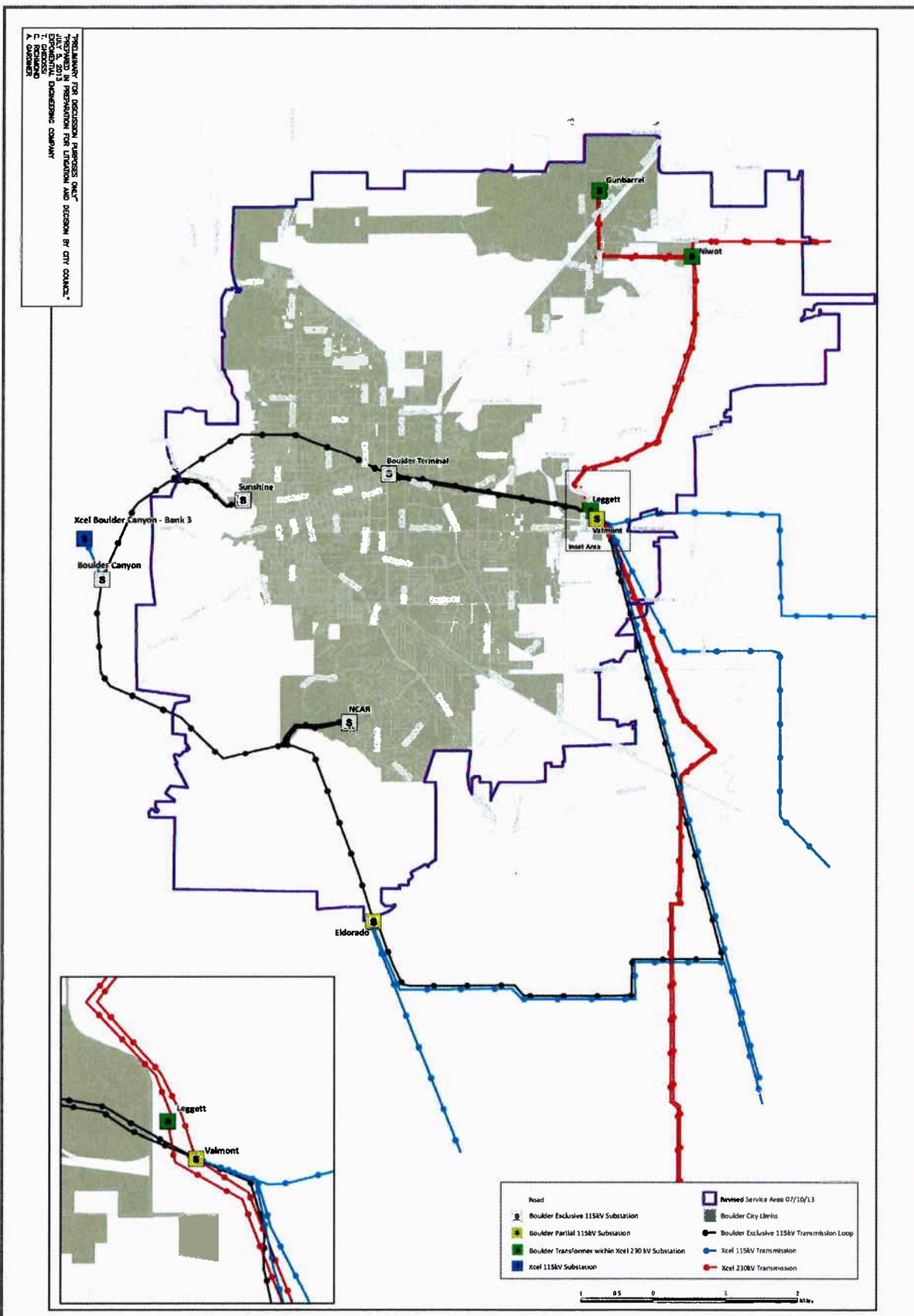
Contents

1. Cover page prepared by Public Service Company providing detail relating to the legend on the City of Boulder's Attachment B-2 to Exhibit B to Boulder's Condemnation Ordinance
2. City of Boulder's Attachment B-2 to Exhibit B to Boulder's Condemnation Ordinance
3. Attachment B to Agenda Memo of July 24, 2013 – containing description of the updated proposals concerning service boundary and facilities

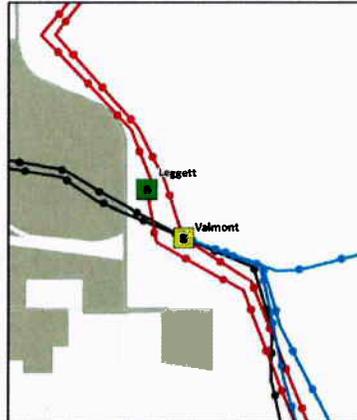
**Public Service Company Prepared Cover Page**

**Detail Relating to Legend on Attachment B-2  
To Exhibit B to Boulder's Condemnation Ordinance**

<b>Legend</b>	<b>Boulder's description</b>	<b>Substations in each category</b>	<b>Location</b>
	Boulder exclusive 115 kV substation	Boulder Terminal Sunshine Boulder Canyon NCAR	Inside city limits Inside city limits Outside city limits Inside city limits
	Boulder partial 115 kV substation	Valmont Eldorado	Outside city limits Outside city limits
	Boulder Transformer within Xcel 230 kV substation	Gunbarrel Niwot Leggett	Inside city limits Outside city limits Outside city limits
	Xcel 115 kV substation	Xcel Boulder Canyon Bank	Outside city limits
	Revised service area 07/10/13		
	Boulder City Limits		
	Boulder's exclusive 115kV Transmission Loop		Inside and outside city limits
	Xcel 115 kV Transmission		Inside and outside city limits
	Xcel 230 kV Transmission		Inside and outside city limits



"PRELIMINARY FOR DECISION PURPOSES ONLY."  
 THIS PLAN IS PREPARED FOR THE CITY OF BOULDER.  
 ENGINEER: [Signature]  
 DATE: [Date]  
 SHEET NO. [Number]  
 OF [Total] SHEETS



Drawing No. **TRAN S 2**  
 Date: 2/26/13  
 Scale: 1" = 1/4"

**Exponential Engineering**  
 3000 North 30th  
 Fort Collins, Colorado 80504  
 Phone: (970) 227-8900  
 Fax: (970) 227-8907

**CITY OF BOULDER  
 PRIVILEGED AND CONFIDENTIAL  
 PRELIMINARY TRANSMISSION SYS  
 SEPARATION CONCEPT**

No.	Revisions	Date	By

**ATTACHMENT B**  
**To Agenda Memo of July 24, 2013**  
**Authorizing Condemnation for New Electric Utility**

To: Members of City Council

From: Jane S. Brautigam, City Manager  
Paul J. Fetherston, Deputy City Manager  
Tom Carr, City Attorney  
Heather Bailey, Executive Director of Energy Strategy and Electric Utility Development  
Kathy Haddock, Senior Assistant City Attorney  
David Driskell, Executive Director of Community Planning and Sustainability  
Kara Mertz, Local Environmental Action Project Manager  
Maureen Rait, Executive Director of Public Works  
Robert Harberg, Principal Engineer, Public Works - Utilities

Date: July 23, 2013

**Subject: Updated Proposed Service Area for Municipalization**

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**EXECUTIVE SUMMARY**

The materials presented for the work session on February 26, 2013 regarding exploration of municipalization included a preliminary boundary of the service territory if the city were to municipalize. This memo updates those maps, depicting the area within which the city would acquire the electrical assets serving customers if the city proceeds to municipalization. The city has modeled that it would serve the customers within the boundaries of this service area, even outside the city limits; however, the final determination of whether or not the city would serve each of those customers has not been made. Ownership of the facilities may be different than the entity providing the end service to the customer.

The direction given to the city's consulting engineer, Exponential Engineering Company, to define the recommended service area was:

1. Serve all properties within the municipal boundaries;
2. Serve city properties with electric needs, where feasible; and
3. Separate the systems at the technically optimum location to maintain reliability for the new electric utility as well as the Xcel system.

The boundaries of the February 26 map were not specific because at that time the engineers had not yet: 1) field-verified facilities and equipment on the ground at each of the potential interconnection points between the proposed Boulder system and the remaining Xcel system, or 2) investigated the portions of the system at the potential service area boundaries.

**Attachment B-1** shows the recommended boundary, mapped after the engineers completed their field verification of the equipment and completed other analyses. While the area within the

recommended boundary is larger than the area shown on February 26, the change in size is primarily due to including properties which the city owns or has a conservation easement over and drawing the boundaries along property lines. The change in service area does not add customers or load beyond the February 26<sup>th</sup> area but clarifies that certain customers would be included based on information determined during the field analysis. There are fewer than ten additional customers clarified to be in the service area in Attachment A than on the area shown February 26.

Much of Boulder is served by a 115kV transmission loop that is depicted as the black line on **Attachment B-2**. Staff recommends that the acquisition for municipalization include this loop. Acquiring the transmission loop will allow the city direct access to the hydro power from the Boulder Hydroelectric Plant and allow the city to better manage the flow and distribution of electricity throughout much of the grid serving Boulder. The transmission loop recommended for acquisition does not include the 230kV transmission lines that run along the east side of the city through the Valmont Switchyard and the Leggett, Niwot and Gunbarrel substations.

## **BACKGROUND**

Because Boulder is surrounded by Open Space and Mountain Parks, the electrical system developed and has been operated in a way that is technically and geographically isolated from surrounding areas. The open space has also created areas around the periphery of the city that will have little or no development of additional electric load in the future. Boulder's development philosophy has concentrated development, and therefore the loads for electric service, in clearly identified areas. Distribution of electricity to the city is via six substations (Boulder Terminal, Leggett, Niwot, Gunbarrel, Sunshine, and NCAR) connected to either a 115kV transmission loop or 230kV transmission lines. While three of the substations have feeders serving areas outside the city limits (Leggett, Niwot and Boulder Terminal), all six substations primarily serve the city.

Exponential Engineering Company, with peer review by Warren Wendling, P.E., and Schneider Electric, applied the city's direction and developed the following criteria in defining the recommended service area:

- Serve all customers within the municipal boundaries;
- Serve city properties with electric needs where feasible;
- Define interconnection points at the municipal system boundaries and at the technically optimum locations to maintain or enhance quality of service, redundancy and capacity;
- Maintain the primary geographic areas that are presently served by the substations;
- Serve contiguous geographic areas;
- Utilize existing points of interconnection with other external substations as currently operated by Xcel;
- Maintain the ability to cross-feed between substations and to use substation capacity to maintain reliable service to customers;
- Establish logical service area boundaries utilizing existing parcel area boundaries;
- Minimize operational and maintenance conflicts;
- Eliminate the need for duplicate facilities.

Description of Attachment B-1 – Proposed service area map.

The area that was outlined in the preliminary service area map for February 26, 2013 is shown as the black scalloped line. The solid purple line that is outside the scalloped area encompasses additional property that is primarily city-owned and served by one of the six substations. That solid purple line is the proposed service area boundary for the municipal utility and follows existing property lines. The boundaries of the service areas of other utilities are shown in the shaded areas on the north, east and west sides of the map. The north coral-colored area shows a portion of the boundaries of the Poudre Valley Rural Electric Association (PVREA) Service Area, the orange shaded area to the west of the city is the United Power–Mountain Service Area, and the light orange area on the east side is the United Power-Plains Service Area. The gray area shows the city boundaries, and the dark and light green areas show city owned property interests. Each of the substations is labeled.

Based on field research and additional technical analysis since February 26, the proposed service area boundary was modified. Generally the modifications are:

- To the south to follow parcel lines to include city owned open space properties with no distribution facilities.
- In the southeast corner, the city-owned properties not included in the service area are because the few improvements in that area are served from Xcel’s Eldorado distribution substation.
- On the northeast side of the map to include city-owned open space properties that have city facilities on the property including one city water tank and one of the city’s primary emergency communications facilities. Those properties are served from the Niwot Substation; field investigation clarified that the feeder running along Lookout Road to the east that feeds the city properties also serves two other customers and then ends.

#### Description of Attachment B-2 – Transmission loop diagram

The purple boundary line depicts the recommended service boundary and the gray shading shows the city municipal boundaries. The 115kV loop serving the city that staff recommends be included in the city’s acquisition is depicted in black and connects through the Valmont Switchyard, to Boulder Terminal Substation, Sunshine Substation, Boulder Canyon Hydro Substation, NCAR Substation, Eldorado Substation, and back to Valmont Switchyard.

The blue lines show the 115kV lines that the city would not acquire that run through the Eldorado Substation and the Valmont Switchyard; and that connects Boulder Canyon Hydroelectric Substation to Xcel Boulder Canyon Substation. The 230kV transmission lines, which the city would also not acquire, are shown in red running north and south on the east side of the city connected through the Gunbarrel, Niwot and Leggett Substations and Valmont Switchyard.

The white boxes with an S at the Sunshine, Boulder Canyon Hydro, NCAR, and Boulder Terminal Substations show the four substations that Boulder would own (Boulder already owns a portion of the Boulder Canyon Hydro Substation). The yellow boxes depict where Boulder would acquire 115kV line terminals including two bays in the Eldorado Substation and five bays in the Valmont Switchyard; as well as access to operate and maintain those facilities. At those locations, the land would remain owned by Xcel, as would the balance of equipment that Boulder is not acquiring. The green boxes at Leggett, Niwot and Gunbarrel Substations depict the locations where the city would acquire Xcel’s 230/13.2kV transformers (including high side

protection and low-side switchgear), and an easement for operating and maintaining those facilities. At those locations, the land would remain owned by Xcel, as would the balance of equipment that Boulder is not acquiring.

#### Description of Interconnections

The city plan includes installing interconnection equipment generally consisting of meters, disconnect switches, protective devices and communications systems to interface with Xcel's system. At the locations where the city would serve as a distribution service provider, FERC would regulate the city's operation of the transformers and interconnection feeders to require the city to maintain quality of service to the feeders that Xcel will still own or operate. This regulation is, in part, to make sure that the reserve capacity Xcel currently has on those transformers is not reduced by the acquisition of the transformers by the city. At the locations where the city would take service at the high side of the 230kV transformers, Xcel would maintain the 230kV bus and connections to the 230kV transmission system. The city would own the switchgear and transformer. That interconnection is also regulated by FERC.

The four interconnection points where the city would wheel power to Xcel over the distribution system at 13.2kV as a distribution service provider under FERC are:

1. US 36 going north from the service territory boundary
2. Along Mineral Road east of the Diagonal (119) feeding north to the town of Niwot
3. Linden Avenue west
4. Lee Hill Road west

The five points where the city would interconnect with Xcel for mutual aid and support as a Distribution Service Provider under FERC are:

1. 75<sup>th</sup> Street south of Valmont Road
2. Arapahoe Avenue east of 63<sup>rd</sup> Street
3. Baseline Road west of 75<sup>th</sup> Street
4. South Boulder Road east of South Cherryvale Road
5. South Broadway Road south of Gillaspie Drive

The six interconnection points where the City would interface to the Xcel transmission network and be classified as a Transmission Service Provider under FERC are as follows:

1. The 115kV bus at Valmont Switchyard – transmission interconnection
2. The 115kV bus at Eldorado Substation – transmission interconnection
3. The 115kV bus at Boulder Canyon Hydro Substation – transmission interconnection to connect to Xcel's Boulder Canyon Distribution Substation
4. The 230kV bus at Leggett Substation – transformer interconnection
5. The 230kV bus at Niwot Substation – transformer interconnection
6. The 230kV bus at Gunbarrel Substation – transformer interconnection

#### **ANALYSIS**

In determining the technically optimal location to define the service territory, the engineers analyzed the existing facilities serving Boulder, including the substations, transmission circuits, the current location of interconnections to feeders originating outside of the service boundaries, feeders inside service area boundaries, and service lines. The separation concept and service boundary have been created to provide benefits to the city and to Xcel and to allow for orderly, reliable, operable, and maintainable interconnections with Xcel to maintain quality of service

matching or exceeding the present system on both sides of the separation. Acquisition of the 115kV transmission loop allows the city to focus greater resources on this portion of the system and reduces Xcel's exposure for this aged equipment.

The delineation of this area does not depict that electric lines will be severed at the boundary, but shows: 1) Where interconnections currently exist as Xcel operates the system, 2) Where interconnections may be relocated several yards to meet the boundary conditions, and/or 3) Where interconnections will be added to maintain service and reliability to the city utility and to Xcel customers outside of the city.

The engineers recommend including the 115kV transmission loop to provide integrated transmission capacity alongside the traditional distribution network which will allow Boulder's local utility to better manage the flow of electricity throughout the service area. The use of transmission facilities reduces electricity line losses associated with moving electric power from the source of generation to the point of delivery. The 115kV transmission loop allows for multiple points of delivery to the distribution system and provides redundancy both within the loop (failure of one segment does not take a substation out of the system) and outside the loop since it is connected to Xcel's transmission system in two locations. Owning and operating the 115kV transmission loop will improve reliability for Boulder's customers by minimizing the outages associated with the distribution system and decreasing the amount of time that it would take to restore power to those that are affected by an outage. It also allows upgrades to specific substations or additions to serve new load without the entire system having to be upgraded or changed.

In addition, it is critical for a local utility to own and control internal transmission capacity to manage local generation, distributed generation, energy storage and management of demand response programs. The loop can be acquired without negatively impacting the service provided by Xcel, and in fact acquisition of the loop benefits to Xcel in several ways, including that the city will be able to focus greater resources on maintaining and upgrading these facilities and reduces Xcel's exposure for this aged equipment or balancing resources within the city.

The allocation of property and customers depicted on the new service area maps are as follows:

Recommended Service Territory	Inside City Municipal Boundaries	Outside City Municipal Boundaries
Land Area owned in fee or conservation easements by City of Boulder (not including street rights of way)	4,512 Acres	17,242 Acres (67 percent of out-of-city service area)
Land Area in BVCP Area II	0	3,190 Acres
Land Area in BVCP Area III	0	22,273 Acres
Percent of Residential Customers	90%	<10%
Percent of Commercial or Industrial Customers	>99%	<1%
Estimated Percent of Electric Load	97%	3%

ATTACHMENT B-1 - Map of proposed Service Area

ATTACHMENT B-2 - Map of 115kV transmission loop to be acquired