

Firm Overview

Duncan & Allen is an energy and natural resources law firm located in Washington, D.C. All ten of our attorneys focus primarily on representing the needs of consumer-owned, municipal and cooperative electric utilities, regulatory agencies and public entities. We provide legal services nearly exclusively in the related fields of energy, utility, and natural resources law throughout the United States and around the world. We invite you to visit our website to learn more about our firm and attorneys at: <http://www.duncanallen.com>.

Over the past 41 years, Duncan & Allen has represented and counseled clients concerning municipal electric utility formation on many occasions. Not only have we prepared numerous feasibility studies during that period, we have represented four political subdivisions that with our counseling have gone on to establish full municipal systems (Electrical District No. 3 – Pinal County, Arizona; Kanab, Utah; Clyde, Ohio; and Elbow Lake, Minnesota). To the best of our knowledge, Duncan & Allen is the only law firm that can make these claims. Importantly, our Municipalization Team is made up of lawyers who were the lead attorneys in successful municipalizations.

Each of the four new municipal electric utilities established with Duncan & Allen's assistance and advice was unique. One involved condemnation of an existing distribution system, as Boulder is considering. Another involved construction of new transmission interconnections and a completely new distribution system. A third involved the deployment of infrastructure investment sufficiently ahead of similar efforts by the incumbent investor-owned utility to persuade state regulators that competition by the incumbent would be, in a practical sense at least, imprudent. Finally, one went all the way to the Supreme Court in a landmark case holding that electric utilities are subject to the federal antitrust laws. Each involved litigation. No two litigated proceedings involved the same issues.

In addition to completing four municipalizations in four different states, we have assisted other communities in developing and implementing electric municipalization strategies that resulted in benefits to the community without the creation of a municipal electric utility (Palm Springs, California; Archbold, Brook Park, Minerva and Rittman, Ohio; Evanston, Illinois; Wichita, Kansas; and Falls Church, Virginia).

Because of our successful experience in establishing municipal electric utilities, and our understanding of how the municipalization process can be used to achieve larger goals such as local control and value-based planning, we believe we are uniquely situated to assist Boulder in achieving, through municipalization, its energy objectives of stable and reliable electric service at competitive rates, reduction of GHG emissions and toxic pollutants, democratization of local

decision-making and ownership, stimulation of local economic growth and innovation, and energy equity and literacy.

FERC Experience

From its inception Duncan & Allen has specialized in energy issues on behalf of consumer-owned, non-profit utilities (*i.e.*, municipally and cooperatively owned utilities). This “specialty,” however, encompasses a broad spectrum of law and policy. It includes, for example, the negotiation and drafting of contracts (power supply, transmission access, interconnection, service agreements with customers, franchise agreements, etc.), municipal finance, litigation and appeals, and regulatory proceedings before the FERC, other federal agencies, and various state regulatory commissions.

We are typically involved in somewhere between eight and twenty “major” FERC proceedings in any given year, depending largely on the impact of FERC’s regulatory agenda in any given year on the interests of our clients. Our involvement in contested proceedings before the FERC has included rate cases for wholesale power sales, transmission service, ancillary services and complaint proceedings seeking interconnection, fuel clause adjustments, and transmission access. With respect to the latter – transmission access – we are very familiar with the FERC’s landmark Order No. 888, requiring FERC-jurisdictional utilities (and others, through the reciprocity obligation) to provide non-discriminatory, open access transmission service to eligible utilities on terms and conditions comparable to what the transmitting utilities provide themselves, in order to foster wholesale power supply and ancillary services markets. Not only are we familiar with that order and its progeny, but we also helped mold its final shape, through positions taken in earlier litigation and through our comments when the rule was first formulated. The founding partner of Duncan & Allen, Donald Allen, has written and published the industry’s seminal text on Order No. 888, titled 888 Annotated: A User’s Guide to the Federal Energy Regulatory Commission’s Open Access Tariff.

Of particular relevance to Boulder, not only have we assisted clients in the establishment of new municipal utilities, but we have also helped them gain access to wholesale power suppliers, both before and after the issuance of Order No. 888. We have successfully assisted these new utilities in obtaining transmission access without paying stranded costs to their former retail suppliers. Additionally, assisting clients in achieving and maintaining compliance with electric reliability standards promulgated by the North American Electric Reliability Corporation (“NERC”) in its role as the FERC-approved Electric Reliability Organization under Section 215 of the Federal Power Act (16 U.S.C. § 824o), and approved by FERC, has been a significant practice area for Duncan & Allen since Section 215 was enacted as part of the Energy Policy Act of 2005. Our recent work involving compliance with NERC standards includes: (1) representing a client in a landmark reliability standard penalty case which affirmed the ability of utilities to shed load in order to contain outages without incurring aggravated penalties as a result, (2) assisting various clients in their preparation for and participation in NERC reliability audits, and (3) negotiating agreements for the effective delegation of tasks required for compliance with particular standards or groups of standards.

We have counseled a number of clients who have used our advice successfully to avoid claims for “stranded costs.” Similarly, we have been able to avoid litigation of disputed valuations of utility infrastructure in connection with a municipalization. This is because our preferred approaches to these problems do not typically involve litigation. One alternative is to negotiate values where feasible (most recently in the case of Electrical District No. 3). Informed negotiation of such values requires the same detailed understanding of an investor-owned utility’s systems of accounts and systems of continuing property records in order to verify values for property, plant and equipment as is required for litigation, as well as comparable forensic skills.

Another alternative we have recommended is that clients obviate any question of “stranded cost” liability by, for example, constructing replacement facilities or seeking alternative transmission interconnections (as, for example, in the case of Clyde, Ohio, where the City was able to construct both nine-miles of 69 kV transmission lines and a duplicate 12.47 kV distribution system, and still enjoy savings of 25 percent compared to the rates of the incumbent utility, Toledo Edison). We have litigated utility infrastructure valuation in several contexts other than facility acquisition.

We are experienced in the formulation, negotiation and, where necessary, litigation of requests for mandatory transmission service under Section 211 (and now Section 211A) of the Federal Power Act. We understand the rate implications of mandatory transmission service down to the level of distribution voltage because we have arranged, managed and fought for it on behalf of clients on several occasions. We have managed the FERC-directed generation interconnection process under FERC Order Nos. 2003 and 2006 for renewable generators on many occasions, and understand transmission issues from that perspective as well. It appears to us from our preliminary reviews of the electric transmission topography surrounding Boulder, and of the proposed Localization Portfolio Standard under consideration by the City, that these skills are likely to prove critical as the City moves forward through the economic and technical challenges of decarbonizing its power supply while maintaining supply economics for its consumers.

Finally, we spend virtually all of our time facing adversaries many times our size. It is not unusual for Duncan & Allen attorneys to take on both the largest utilities in the country, and the largest and most prestigious law firms in the country, in order to protect the interests of our clients. For example, we are currently engaged on behalf of the Cities of New Bern and Rocky Mount, North Carolina in fighting the proposed, \$26 billion merger of Duke Energy Corp. and Progress Energy, Inc., which seeks to create the largest electric utility in the country.

Duncan & Allen Municipalization Team

A list of the members of the Duncan & Allen Municipalization Team, along with a brief description of their relevant work, is as follows:



Paul Breakman (Partner and Project Contact)

Paul is the former President of the Charitable Foundation of the Energy Bar Association, which has allowed him to develop valuable relationships with FERC Commissioners, FERC Administrative Law Judges and numerous FERC Staff. Paul was part of the Duncan & Allen Municipalization Team, together with Abby Briggerman and led by John Coyle, which advised “[The Little Utility That Could](#)” (Electrical District No. 3 - Pinal County, Arizona) in its FERC litigation over operational control of ED3’s system from the Arizona Public Service Co.

[Resume](#)

John Coyle (Partner)

John advised Electrical District No. 3 - Pinal County, Arizona (“ED3”) in FERC litigation over operational control of ED3’s system and rates for transmission service; negotiating the purchase price for the Arizona Public Service Co. assets, interconnection agreements and agreements delegating responsibility for NERC reliability standard compliance; meeting regulatory conditions for approval of the transfer of assets and customers, and realignment of service territories; and negotiating transmission rights of way and rights of use with a tribal utility authority embedded in ED3’s territory. In October 2011, ED3 closed its \$115 million permanent financing with an “A” rating from Standard & Poor’s. John also represented the City of Clyde, Ohio, in various litigated proceedings related its establishment of a municipal utility.



[Resume](#)

Gregg Ottinger (Partner)

Gregg assisted the City of Clyde, Ohio in determining the legal feasibility of establishing a municipal electric system and then making that municipal utility a reality. He assisted in a public education process and referendum in which the citizens of Clyde voted by a 3-to-1 margin to establish a municipal electric system. Toledo Edison refused to sell its facilities to Clyde, and filed complaints against Clyde at the Public Utilities Commission of Ohio and in state court, all of which Clyde defended successfully; all complaints against the city were ultimately dismissed. Clyde financed and constructed a new distribution system to compete with the existing Toledo Edison system. Clyde’s system was more reliable due to multiple feeds to a new power supplier. With Gregg’s counseling in the successful municipalization efforts, Clyde lowered the electric rates to all its customers by 25%.



[Resume](#)

John Williams (Managing Partner)

John represented and guided the City of Kanab, Utah through a successful electric municipalization that included the acquisition of Utah Power & Light's ("UP&L's") distribution system within the city limits by condemnation. Duncan & Allen provided strategic advice and representation in evaluating the feasibility of municipalization, soliciting and negotiating power supply, transmission, and distribution O&M services, multiple state court case litigation, financing and negotiation of the asset acquisition. Kanab avoided any federally regulated power supply, transmission access and stranded cost issues. John also represented Palm Springs in its Muni-Lite experiment and advised the Oneida Indian Nation of New York on a municipalization strategy. Both achieved significant benefits without creating municipal systems. John is currently one of two Vice Chairs of the Power Law Committee of the International Bar Association.



[Resume](#)



Abby Briggerman (Associate)

Abby was a member of the team representing Electrical District No. 3 - Pinal County, Arizona ("ED3") in its successful municipalization efforts. She played a key role in putting into place a permanent revenue requirements formula rate for the transmission service ED3 provides to Arizona Public Service Co. customers served through ED3 facilities. She is the primary senior associate responsible for litigating on behalf of the Firm's clients before the FERC and various courts.

[Resume](#)

Partnering with the City and Boulder Community

We represent the interests of consumers and consumer-owned utilities. There is no more profound expression of the collective will of utility consumers than the formation and implementation of their own electric utility. Participating as counsel in that process is an uncommon privilege. Seeing the process through to the actual establishment of a fully operational municipal utility is a rare and exhilarating experience. Boulder's level of preparation and organization provide it, in our view, with unusual prospects for success and will enable Boulder to serve as a model for other cities in the formulation and execution of their climate and energy policies. In addition, the critical component of Boulder's proposed municipalization -- decarbonizing power supply -- brings to the process the opportunity to participate in the formation of the electric utility of the future.

The impetus toward local control and the desire to bring the electric utility business model of the future into being will confront obstacles that we believe our skills and experience are well suited to overcoming. We look forward to approaching this engagement effectively and efficiently. Experience has taught us that the only way to accomplish that objective is by listening and learning first, in order to gain the most thorough possible appreciation of our client's objectives and of the arenas in which they must be attained. Municipal utility formation can only work if the alternative provided by municipal enterprise is understood broadly in the community to be served as "better" -- more efficient, more reliable, more responsive, more economical -- than the enterprise that it seeks to supplant. We look forward to working with Boulder because we believe that you can do what you have set out to do, and it would be our privilege to be of use to your efforts.

Additional Information

In addition to the experience of the Duncan & Allen Municipalization Team, our Founding Partner, Don Allen, will assist the Team on an advisory basis. Don served as counsel to Elbow Lake, Minnesota as it formed its own municipal electric system. In that successful municipalization effort, the Otter Tail Power Company attempted to thwart the creation of a new municipal utility in Elbow Lake by refusing to transmit power from the Bureau of Reclamation (now the Western Area Power Administration) to the city. When Otter Tail physically removed its distribution system and refused to provide back-up interconnection service for the town's generators, and even threatened to take down the back-up interconnection with the town, Don further assisted the city in obtaining an emergency order from the FERC's predecessor agency (the Federal Power Commission) requiring Otter Tail to maintain the interconnection.

When Otter Tail continued to refuse to transmit Bureau power to Elbow Lake, the Justice Department, with Elbow Lake's support, brought an action against the company, alleging that the company's refusal violated the anti-trust laws of the United States. The company responded to that allegation by claiming that, as a regulated utility, its actions were not subject to the antitrust laws. With the help of the U.S. Justice Department, Elbow Lake's complaint culminated in a landmark U.S. Supreme Court case, *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), which held that regulated utilities were indeed subject to state and federal antitrust laws and for the first time could be required to open their transmission lines and wheel power for other suppliers. This early landmark case led to the open access transmission regime, which is the bedrock of today's electric system in the United States.

We thank the Boulder community for taking the time to consider our qualifications. Not only does Duncan & Allen have a long and successful track record of municipalizations, the members of the Municipalization Team each have direct and leading roles in such municipalizations. We welcome any questions from the community at the February 2, 2012 presentations.