

DISTRICT COURT, BOULDER COUNTY, COLORADO

Court Address: 1777 6<sup>TH</sup> Street, Boulder  
Colorado 80302  
303-441-3750

Petitioner:

THE CITY OF BOULDER, a Colorado Home Rule City,

v.

Respondents:

PUBLIC SERVICE COMPANY OF COLORADO, a  
Colorado Corporation, d/b/a XCEL ENERGY;  
MORGAN GUARANTY TRUST COMPANY OF NEW  
YORK; and PAUL WEISSMANN, in his official capacity as  
Treasurer of Boulder County.

*Attorneys for Respondent, Public Service Company of  
Colorado, a Colorado Corporation*

John R. Sperber, Atty. Reg. No. 22073

Sarah M. Kellner, Atty. Reg. No. 38111

FAEGRE BAKER DANIELS LLP

1144 Fifteenth Street, Suite 3400

Denver, Colorado 80202

Telephone: (303) 607-3500

Fax: (303) 607-3600

Email: jack.sperber@faegrebd.com

[sarah.kellner@faegrebd.com](mailto:sarah.kellner@faegrebd.com)

**COURT USE ONLY**

Case Number: 19 CV 30637

Division: 5

**RESPONDENT'S REPLY IN SUPPORT OF MOTION FOR ATTORNEY FEES**

This dispute, in which Boulder sought to condemn PSCo's electric distribution facilities worth hundreds of millions of dollars, constitutes the largest eminent domain matter in the history of the state. The City abused its condemnation power when it decided—for a second time—to prematurely file that action before receiving PUC authorization to do so. Colorado's statutes provide a remedy for landowners who are subjected to the improper use of condemnation authority—they are entitled to recover all their reasonable attorney's fees and costs incurred in connection with the lawsuit, not just the motion to dismiss as Boulder argues. The City attempts to avoid this consequence by imposing nonexistent limitations on the relevant eminent domain statute and by proposing steep reductions in both the number of hours expended by PSCo's attorneys and the hourly rates that PSCo paid them. Incredibly, the City argues that only \$49,565 is recoverable—less than *one quarter* of the fees sought by PSCo—even though PSCo's claimed fees are already only a fraction of the \$677,000 in fees PSCo incurred as a direct result of the City's condemnation action. The City proposes that the number of hours used in the lodestar calculation be reduced from 430.6 to 151.9; approximately a 65% reduction in the claimed hours and only 11% of the total hours spent. *See* Supp. Sperber Aff., ¶9g. The City also advocates for massive cuts to the standard, market-based rates charged by PSCo's legal team—most by at least 35%, and some as high as 66%—even though the rates are already reduced by 15% for PSCo.

The City's claimed legal standards applicable to PSCo's fee motion are unfounded. All of the hours the City seeks to exclude from the lodestar amount were reasonably incurred, adequately supported, and recoverable under C.R.S. § 38-1-122(1). The hourly rates charged by PSCo's counsel are also reasonable in light of the prevailing market and magnitude of this case. The Court should reject these sharp, unfounded cuts and award PSCo all of the \$210,748.15 requested,

together with an additional \$33,938.80 in fees and \$5,965.40 in costs incurred in pursuing these fees over the City's objection<sup>1</sup> and such other fees and costs as may be incurred moving forward, including those necessary to prepare for and participate in the hearing requested by the City.

### **I. THE CORRECT LEGAL STANDARD**

Contrary to the City's argument, the statute under which PSCo seeks an award of its fees and costs does not require the Court to apply "close scrutiny" to the application or to limit fees to only those incurred in dismissing the action. Under C.R.S. § 38-1-122(1), "[i]f the court finds that a petitioner is not authorized by law to acquire real property or interests therein sought in a condemnation proceeding, it shall award reasonable attorney fees, in addition to any other costs assessed, to the property owner who participated in the proceedings." Neither the language of the statute nor the case law interpreting it support the City's proposed limitations.

The City cites *Praseuth v. Rubbermaid, Inc.*, 406 F.3d 1245 (10th Cir. 2005) to claim an application for attorney's fees under C.R.S. § 38-1-122(1) "must be scrutinized more closely and carefully than a request for attorney fees pursuant to a private fee agreement." Resp. at 2. But *Praseuth* involved a claim between two private parties under the *federal* Americans with Disabilities Act. 406 F.3d at 1257. It has no application in this state-law eminent domain action.

No Colorado court has held that attorney fee applications or awards made under C.R.S. § 38-1-122(1) are subject to "close scrutiny." Rather, Colorado's eminent domain statutes, including C.R.S. § 38-1-122(1), must be strictly construed against the government and liberally construed in favor of property owners. See *Platte River Pwr. Auth. v. Nelson*, 775 P.2d 82, 83 (Colo. App. 1989) (applying such construction to C.R.S. § 38-1-122(1)). This is because "a property owner should

---

<sup>1</sup> For more detailed information on this request, see Supplemental Affidavit of John Sperber, ¶18.

not be required to incur costs when the condemning authority does not proceed properly.” *Id.*; *see also City of Colorado Springs v. Andersen Mahon Enters., LLP*, 251 P.3d 536, 538 (Colo. App. 2010). Subjecting PSCo’s application to “close scrutiny” would be inconsistent with the plain purpose of C.R.S. § 38-1-122(1) to ensure that landowners are not saddled with unjust cost or expense when the government abuses its condemnation authority.

The City’s attempt to limit PSCo’s recovery to fees that were “reasonably necessary to obtain dismissal” fails for the same reason—no such limitation exists under the statute. *Resp.*, 4. The cases cited by Boulder—*E-470 Public Highway Auth. v. Revenig*, 140 P.3d 227 (Colo. App. 2006) and *Town of Telluride v. San Miguel Valley Corp.*, 197 P.3d 261 (Colo. App. 2008)—concerned different statutes that mandate an award of attorney’s fees if a landowner obtains a just compensation award equal to more than 130% of the condemnor’s last written offer. *See* C.R.S. § 38-1-122(1.5); C.R.S. § 43-4-506(1)(h)(II)(B). Under those statutes, the focus is upon whether the requested fees were reasonably incurred as part of obtaining a successful valuation award.

Subsection (1), on the other hand, serves a different purpose and focuses upon reimbursing the property owner for all expenses incurred as a result of an improper condemnation case. This is true for other Colorado statutes focused on reimbursing parties subjected to improper actions as well, such as C.R.S. § 13-17-201. *See Dubray v. Intertribal Bison Co-op.*, 192 P.3d 604, 607 (Colo. App. 2008) (defendants’ recovery upon dismissal of tort action was not limited solely to fees incurred in preparing motion to dismiss). Injecting the limitations proposed by the City into C.R.S. § 38-1-122(1) would be contrary to its purpose.

## **II. THE NUMBER OF HOURS SPENT WAS REASONABLE**

Although PSCo only seeks recovery of a small fraction of its total attorney’s fees and costs

incurred as a result of the City's improper filing, the City nonetheless argues that the lodestar amount should be reduced even further by 186.9 hours because time spent on various tasks was not "reasonably necessary to obtain dismissal." *See* Ex. A to Resp. (100 hours recoverable of 150.5 hours spent on "Attorney matters re: Motion to Dismiss, protective order, other"; 0 hours recoverable of 105.2 spent on "Answer and case management"; 25 hours recoverable of 50.4 hours spent on "Motion for Attorney Fees"; and 0 hours of 5.8 hours expended on "Indirectly related to this case"). The City's position is predicated upon the incorrect legal standard dispelled above, but also is based on arguments that this was a simple case. Resp., 4, 7-8. The Court should reject the City's reductions and apply all of the actual time PSCo seeks towards its lodestar calculation.

The City's argument that this should be viewed as a simple case defies credibility given the amount in controversy, the level of contentiousness between the parties, and the complexity and novelty of the legal and factual issues raised by the City's condemnation. *See* Letter from Darrell G. Waas, 2-5, attached as **Exhibit 6**; Supp. Sperber Aff., ¶¶9a-l. This dispute constitutes the largest eminent domain matter in the history of the state. *Id.*

And even when considered individually, each of the pleadings filed in the litigation involved complex legal and factual issues. PSCo's Motion to Dismiss was hotly contested by Boulder, and the Court's order granting it is currently the subject of a C.A.R. 50 Petition filed by Boulder seeking Colorado Supreme Court review. Supp. Sperber Aff., ¶¶9b-h. To argue that PSCo's attorneys should have just dusted off a five-year old brief—without accounting for changes in the procedural posture of the dispute, the development of new facts in the interim, involvement of third parties, developments in the law, or the City's aggressive litigation strategy—and then

simply sat back and waited to see how and when the Court might rule on that motion is unrealistic and inconsistent with PSCo's and its counsel's obligations under the law.

The Motion for Protective Order required the analysis of various PUC confidentiality orders and regulations, as well as extensive review and comparison of documents subject to that order and those filed in the condemnation case. *Id.* at ¶9d. The City refused to agree with PSCo's proposal to seek necessary PUC approvals instead of an improper protective order, only to withdraw the motion and amend its Petition after receiving PSCo's response. Now, faced with liability for its litigation choices, the City claims that these issues are simple and straightforward. If the City truly thought its condemnation petition was so easily assailable, or that its Motion for Protective Order was groundless, then it should not have filed them in the first place.

The City also argues that it was unnecessary for PSCo to file an Answer and Cross-Petition or to pursue early case management conferences and a hearing to address its other legal challenges, apparently because it was unnecessary for PSCo to take any other actions to preserve its claims and defenses in the litigation. *E.g.*, *Ex. L, Wilson Aff.*, ¶¶ 25–29. But Colorado law is unclear regarding the timing and manner in which defenses and other claims must be preserved in eminent domain actions. *See Town of Silverthorne v. Lutz*, 370 P.3d 368, 372 (Colo. App. 2016); *Supp. Sperber Aff.*, ¶9d. And in earlier related municipalization litigation, Boulder claimed that PSCo had waived challenges by not raising them earlier, requiring years in the appellate courts to resolve. *Id.* at ¶9g. It was therefore reasonable for PSCo to preserve all such challenges. *Id.*

In short, this case enmeshed PSCo in contentious, complex civil litigation and required PSCo to respond accordingly. *Id.* at ¶¶9a–1. Boulder has established that it will fight PSCo on every issue, including contesting this Motion by arguing that this is a simple case and maintaining

that the scope of its taking was agreed upon.<sup>2</sup> Boulder's protests merely demonstrate that the factual issues involved in this dispute are complicated and the subject of substantial disagreement.

Finally, the City criticizes PSCo's staffing decisions, even though the City itself employed a large team consisting of at least 8-10 legal professionals, including two outside law firms and several lawyers from the City Attorney's office. *Id.* at ¶9k.<sup>3</sup> FaegreBD staffed this case in an intentional and responsible manner. Each team member performed work that was appropriate to his or her relative experience, education, and knowledge, and the case was staffed in a manner to ensure that there was no duplication of work among team members. *Id.* at ¶¶9h-j. The examples provided by the City as alleged inefficiencies are paraphrased interpretations of time entries to incorrectly suggest that multiple attorneys performed the same task, that associates were editing partner work, or that numerous people spent extensive time on the same pleadings. *Resp.*, 7-8. All of this is inaccurate. *Supp. Sperber Aff.*, ¶9i. And to the extent there might have been any inefficiency in the work performed by FaegreBD attorneys, it has already been accounted for through the exercise of billing judgment, which resulted in roughly 10 percent of FaegreBD's work not being charged to PSCo.

---

<sup>2</sup> The City claims this through its engineer, Steve Catanach's, affidavit. In addition, Mr. Catanach appears to offer an opinion on the reasonableness of the attorney's fees spent by PSCo. Mr. Catanach is not qualified to offer such an opinion, and his affidavit must be disregarded to the extent it purports to do so. He also voices a concern that PSCo may bill the City for FaegreBD's work under a separate Cost Agreement requiring reimbursement of certain PSCo legal costs related to the PUC proceedings. But none of the fees claimed relate to work at the PUC, and none of them are recoverable under the terms of the Cost Agreement. *Supp. Sperber Aff.*, ¶17.

<sup>3</sup> Despite initially promising to informally provide responses to PSCo discovery requests about its own litigation efforts, the City has provided only limited information about the time and nature of work done by its outside counsel and no information about the City Attorney's involvement; claiming in part that this would divulge attorney-client privileged communication and would be burdensome. PSCo reserves the right to supplement this Reply once that information becomes available, either voluntarily or by Court order, or to raise this issue at the evidentiary hearing.

The time spent litigating this Motion is also reasonable given the amount in dispute, the positions Boulder is now taking, and the significance of the issues to the broader dispute the parties are enmeshed in. *See* Ex. 6, Waas Letter, 5; Supp. Sperber Aff., ¶9g.<sup>4</sup> Since this case was dismissed, the City has filed yet a third condemnation action to acquire PSCo's assets. If PSCo succeeds in obtaining an award of just compensation that is greater than 130% of the City's last written offer in the third condemnation action or if that case is also dismissed, PSCo will be entitled to seek its fees and costs again. The total fees PSCo may ultimately incur in that dispute will likely involve millions of dollars, as evidenced by just the \$676,689.61 in fees incurred from January through September, 2019. The Court's rulings here may therefore play an important role in establishing the reasonableness of PSCo's overall legal expenses for future motions in ongoing litigation. Against this backdrop, PSCo's time spent on this motion was appropriate and necessary.

### **III. SUFFICIENT INFORMATION SUPPORTS PSCO'S APPLICATION**

The City also claims that PSCo did not meet its burden of proof regarding its fee request. First, the City claims that because some of PSCo's time entries have redacted information, none of the \$48,026.70 in fees related to such entries should be reimbursed. But a redacted entry is not synonymous with a vague entry. Only attorney-client communications and attorney work product has been redacted. All entries properly show the general nature of the task performed, who performed it, the applicable hourly rate, and the number of hours expended. *See American Water Development, Inc. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994) ("Counsel is not required to

---

<sup>4</sup> Contrary to Mr. Wilson's position, the award should also include fees incurred in pursuing the application for attorney's fees and costs. Other Colorado courts have awarded so-called "fees on fees" after dismissal of an action. *E.g., Schmidt Const. Co. v. Becker-Johnson Corp.*, 817 P.2d 625 (Colo. 1991) (upholding award of attorney fees and costs that included additional fees and costs incurred for attorney fee hearing after complaint dismissed as groundless and frivolous).

record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures.” (quotation marks and citation omitted)). In addition, all of the redacted time entries relate to work that was incurred in connection with the improperly filed condemnation petition, not other PUC proceedings or work that might be of use in future litigation. *See* Supp. Sperber Aff., ¶17.

Boulder’s Exhibit F is misleading because it divorces the redacted entries from the context of other entries made around the same time. When read in context with the docket and other related entries, these entries provide sufficient information for the Court to evaluate reasonableness. *See* Ex. 6, Waas Letter, 4–5. Indeed, the nature of the tasks performed can be gleaned from the redacted entries as they stand. And the total time spent on various categories of tasks, such as client communications and privileged legal research, was reasonable. *See* Supp. Sperber Aff., ¶¶10–12.<sup>5</sup>

Finally, the City says that, because the retention letter between PSCo and FaegreBD does not mention hourly rates or discounts, it is “facially incomplete.” Resp., 12. The City claims that it needs additional information to “test the veracity” of PSCo’s arguments, implying that the letter or undersigned counsel is somehow untruthful about the terms of its representation. But the retention letter that PSCo has provided to the City is in fact the only applicable agreement that exists. *See* Supp. Sperber Aff., ¶¶13–14. Moreover, while a fee agreement may constitute

---

<sup>5</sup> If the Court needs additional detail regarding the substance of any redacted entries, PSCo will readily submit its unredacted invoices for *in camera* review. *See Team Sys. Int’l, LLC v. Haozous*, 706 F. App’x 463, 466 (10th Cir. 2017) (“[C]ourts have reviewed unredacted billing records and time sheets *in camera* to protect privilege in making attorney fee awards.”). PSCo should not have to waive its attorney-client privilege to seek an award of fees, and it is ironic that the City refuses to produce its own detailed time efforts on this basis even as it argues PSCo must do so to be reimbursed. *See supra*, 6 n. 3.

evidence of the reasonableness of an hourly rate, it is not required to support a fee application. *See Nesbitt. v. Scott*, 2019 COA 154, 2019 WL 5076228, at \*3-5 (Colo. App. Oct. 19, 2019).

#### **IV. THE HOURLY RATES PAID BY PSCO ARE REASONABLE**

The City argues that the standard rates of FaegreBD’s attorneys should be reduced anywhere between 35% and 48%.<sup>6</sup> *See* Resp., 14; Supp. Sperber Aff., ¶4. An analysis of prevailing rates among eminent domain attorneys in Colorado who work at large to mid-size law firms shows that the rates charged by FaegreBD are reasonable. *See id.* at ¶¶5–7; *see also* Ex. 6, Waas Letter, 2–4. As explained above, a large legal team is necessary to staff a case of this complexity and magnitude, and only a handful of firms in Colorado have the deep bench necessary to pull together such a team. *See id.* Many of the attorneys listed in the City’s Response practice at much smaller firms than FaegreBD—some are even solo practitioners working from a home office. These smaller firms could not handle a condemnation action of this magnitude alone, and many primarily represent condemnors and operate under very different rate structures. Supp. Sperber Aff., ¶¶5–7.

The relevant point of comparison needs to be attorneys who work at large firms comparable to FaegreBD. *See Bick v. City of N.Y.*, 1998 WL 190283, at \*27 (S.D.N.Y. Apr. 21, 1998) (when comparing market rates, court “must take into account the size of the law firm. Thus, if the movant is represented by a small or medium-sized firm, the appropriate rates are those typically charged by such firms, whereas a movant may obtain a higher hourly rate if represented by a large law firm, since such firms typically charge more per hour to cover a higher overhead.”). The cases

---

<sup>6</sup> The only exception to this is for attorney Katie Gray (requesting an 18% reduction). The City also advocates for a 66% reduction in Pam Hollen’s paralegal rate because she performed supposedly “clerical” work. A close inspection of the services she provided shows she performed work commensurate with her role as the principal para-professional. *See* Ex. 6, Waas Letter, 5.

cited by the City support this basic principle; in both cases, the courts simply determined that “big law” rates were inappropriate points of comparison when determining the rates of public interest attorneys, small boutique firms, and pro bono counsel. *Citizens for Responsibility & Ethics in Wash. v. United States DOJ*, 142 F. Supp 3d 1, 7 (D.D.C. 2015); *Heller v. D.C.*, 832 F. Supp. 2d 32, 44 (D.D.C. 2011). The same is true in reverse—the rates of condemnor lawyers practicing in boutiques says nothing about FaegreBD’s rates. But FaegreBD’s rates are well within the range of similar firms practicing in Denver. *See* Ex. 6, Waas Letter, 2–4; Supp. Sperber Aff., ¶¶5–7.

The best evidence of whether fees are reasonable is whether the marketplace is willing to pay them. *See, e.g., Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp.*, 73 F.3d 150, 153 (7th Cir. 1996) (“Courts award fees at the market rate, and the best evidence of the market value of legal services is what people pay for it. Indeed, this is not ‘evidence’ about market value; it is market value.”). FaegreBD’s standard rates are routinely paid by clients for eminent domain work—and those rates are 15% higher than the rates charged to PSCo and claimed here. *See* Supp. Sperber Aff., ¶3. And other courts have held that the rates charged by the FaegreBD attorneys involved are reasonable. *See id.* ¶8. The Court should reject the sharp cuts proposed by the City and apply the actual rates charged to and paid by PSCo.

## CONCLUSION

For the foregoing reasons, PSCo requests that the Court grant the relief requested herein.

Respectfully submitted January 10, 2020.

**FAEGRE BAKER DANIELS LLP**

*/s/ John R. Sperber*

---

John R. Sperber, Atty. Reg. No. 22073  
Sarah M. Kellner, Atty. Reg. No. 38111

*Attorneys for Respondent  
Public Service Company of Colorado*

**CERTIFICATE OF SERVICE**

The undersigned certifies that on January 10, 2020, a copy of the foregoing **RESPONDENT’S REPLY IN SUPPORT OF MOTION FOR ATTORNEY FEES** was served on all counsel of record by the methods listed below:

*Attorneys for Petitioner, City of Boulder:*

Office of the Boulder City Attorney  
Thomas A. Carr  
Kathleen E. Haddock  
P.O. Box 791  
Boulder, CO 80306  
[carrt@bouldercolorado.gov](mailto:carrt@bouldercolorado.gov)  
[haddockk@bouldercolorado.gov](mailto:haddockk@bouldercolorado.gov)

- First Class Mail
- Hand Delivery
- Overnight Delivery
- CCES
- E-Mail

Hamre, Rodriguez, Ostrander & Dingess, PC  
Donald M. Ostrander  
Richard F. Rodriguez  
3600 S. Yosemite Street, Suite 500  
Denver, CO 80237  
[dostrander@hrodslaw.com](mailto:dostrander@hrodslaw.com)  
[rrodriguez@hrodslaw.com](mailto:rrodriguez@hrodslaw.com)

- First Class Mail
- Hand Delivery
- Overnight Delivery
- CCES
- E-Mail

*Attorney for Defendant, Paul Weissmann, in his official capacity as Treasurer of Boulder County*

Olivia D. Lucas  
Boulder County Attorney  
P.O. Box 471  
Boulder, CO 80306  
[olucas@bouldercounty.org](mailto:olucas@bouldercounty.org)

- First Class Mail
- Hand Delivery
- Overnight Delivery
- CCES
- E-Mail

*/s/Lisa Riggerbach* \_\_\_\_\_  
Legal Administrative Assistant