DISTRICT COURT, BOULDER COUNTY, COLORADO
1777 6th Street
Boulder, Colorado 80302
303-441-3750

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

v.

Respondents:
COLORADO PUBLIC UTILITIES COMMISSION;
JOSHUA B. EPEL and PAMELA J. PATTON, in their official capacities as members of the Commission;
GLENN A. VAAD, in his official capacity as a member of the Commission and as successor to former Commissioner James K. Tarpey, in his official capacity as a member of the Commission;
PUBLIC SERVICE COMPANY OF COLORADO; and
COLORADO OFFICE OF CONSUMER COUNSEL

▲ **COURT USE ONLY** ▲

Case No. 2014-CV-030047

Division:

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PETITION FOR WRIT OF CERTIORARI OR REVIEW

Pursuant to C.R.S. § 40-6-115, the City of Boulder (the "City"), through counsel, files this Petition for Writ of Certiorari or Review of two decisions of the Colorado Public Utilities Commission (the "Commission" or "PUC") regarding declaratory rulings in Commission Docket No. 13D-0498E (jointly, the "Decisions"): (1) Decision No. C13-1530, the Commission's Decision Issuing Declaratory Orders, which was served by mail on October 29, 2013 ("Initial Decision"); and (2) Decision No. C13-1550, the Commission's Decision Denying City of Boulder's Application for Rehearing, Reargument, or Reconsideration, which was served by mail on December 18, 2013 ("RRR Decision").

I. NATURE OF THE ACTION

1. After Boulder citizens voted in 2011 to authorize the formation of a City-owned and City-run municipal electric utility, at City's Council's direction the City expended substantial time, money and effort evaluating and modeling its options. The results of that analysis, verified by a third-party independent expert, demonstrated that the City could form an electric utility and meet the charter requirements imposed by voters, including increased reliability and comparable rates, and separate the existing system at the optimal location for both the new utility and the remaining customers of the Company. Based on those results and the verification, the Boulder City Council adopted an Ordinance authorizing the City Manager to acquire the property and facilities needed to form a municipal electric utility, including through the use of eminent domain if necessary, as is the City's right under the Colorado constitution and statutes. In the course of issuing declaratory rulings, the Commission *sua sponte* ordered that the City cannot proceed to acquire electric utility property or facilities by an eminent domain action without the prior approval of the Commission.

2. This action seeks review of two Commission decisions entering declaratory rulings that violate the City's constitutional and statutory rights, specifically rulings that negate and frustrate the acquisition of electric utility property and facilities through the exercise of the City's constitutional home rule and statutory powers. As explained below, the Commission exceeded its authority and jurisdiction and acted contrary to law.

II. PARTIES

3. The City is a Colorado home rule city organized and existing under home rule charter pursuant to Article XX of the Colorado Constitution.

4. Respondent the Commission is an agency of the State of Colorado created pursuant to C.R.S. § 40-2-101 with certain regulatory powers vested in it pursuant to Article XXV of the Colorado Constitution.

5. Respondent Joshua B. Epel is named in his official capacity as a member of the Commission. Commissioner Epel participated in Commission Proceeding No. 13D-0498E.

6. Respondent Pamela J. Patton is named in her official capacity as a member of the Commission. Commissioner Patton participated in Commission Proceeding No. 13D-0498E.

7. Respondent Glenn A. Vaad is named in his official capacity as a member of the Commission and as successor to former Commissioner James K. Tarpey. Commissioner Vaad did not participate in Commission Proceeding No. 13D-0498E.

8. Respondent Public Service Company of Colorado ("the Company"), is a corporation and a Colorado public utility. The Company furnishes, sells, and distributes electricity inside the City as well as immediately adjacent to the City in an unincorporated area within the County of Boulder. The Company was a party to and participated in Commission Proceeding No. 13D-0498E. The Company was the Petitioner below, having filed the Petition for Declaratory Orders that led to the Decisions being challenged in this Court. Accordingly, the Company is named as a Respondent pursuant to C.R.S. § 40-6-115(1).

9. Respondent Colorado Office of Consumer Counsel intervened in Commission Proceeding No. 13D-0498E and thereafter participated in the proceeding as a party. Accordingly, the Colorado Office of Consumer Counsel is named as a Respondent pursuant to C.R.S. § 40-6-115(1).

III. JURISDICTION AND VENUE

10. C.R.S. § 40-6-115(1), which provides for judicial review of decisions by the Commission, states: "Within thirty days after a final decision by the commission in any proceeding, any party to the proceeding before the commission may apply to the district court for a writ of certiorari review for the purpose of having the lawfulness of the final decision inquired into and determined." This Court has jurisdiction over this action for the following reasons:

a. The City was a party in the Commission proceeding being challenged by this Petition and is thus a proper party to bring this Petition for Writ of Certiorari or Review under C.R.S. § 40-6-115(1).

b. No party filed an application for rehearing, reargument, or reconsideration regarding the RRR Decision.

c. The City filed this Petition within thirty days of the mailing of the RRR Decision, which is "the final decision by the commission" under C.R.S. § 40-6-115(1).

11. The principal office or place of business maintained by the City is in Boulder County. Therefore, venue is proper in this Court pursuant to C.R.S. § 40-6-115(5), under which venue is proper in the county where the party filing a Petition for Writ of Certiorari or Review resides or maintains its principal office or place of business.

IV. GENERAL ALLEGATIONS

A. The City's Eminent Domain Powers.

12. Pursuant to Article XX, §§ 1 and 6 of the Colorado Constitution, the City has, among other home rule powers, the power to condemn, purchase, acquire, maintain, conduct, and operate public utilities, and everything required therefor, within or without its territorial limits, for the use of the City and its inhabitants.

13. Colorado statutes also grant all Colorado municipalities the right to condemn "electric light and power works and distribution systems." C.R.S. §§ 31-15-707(1)(a)(I), (1)(a)(II), and (1)(e). Also, when given the opportunity to limit extraterritorial acquisitions the legislature excepted utility acquisitions at C.R.S. § 38-1-101(4)(b)(I):

> Effective January 1, 2004, no home rule or statutory municipality shall either acquire by condemnation property located outside of its territorial boundaries nor provide any funding, in whole or in part, for the acquisition by condemnation by any other public or private party of property located outside of its territorial boundaries; except that the requirements of this paragraph (b) shall not apply to condemnation for water works, light plants, power plants, transportation systems, heating plants, any other public utilities or public works, or for any purposes necessary for such uses.

14. The Colorado Constitution further provides: "<u>The right of eminent domain shall never be abridged</u> nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies, and subjecting them to public use, the same as the property of individuals ...." Colo. Const. Article XV, § 8 (emphasis added). Article XX of the Colorado Constitution vests in home rule cities such as Boulder every power which the general assembly could have conferred.

B. The Franchise Agreement.

15. In Colorado, every municipal franchise granted to an electric utility company is, by statute, conditioned on the right of the municipality to acquire the company's electric works and systems by condemnation. C.R.S. § 31-15-707(1)(a)(II).

16. The Company held a franchise to furnish, sell, and distribute electricity within the City for many decades. The most recent agreement by which the City granted a franchise to the Company ("the Franchise Agreement) is reflected in City Ordinance No. 5569, adopted in 1993. The 20-year term of the Franchise Agreement expired in 2010.

17. The Franchise Agreement expressly provides for the City's right to condemn the Company's property interests and the Company's continuing obligation to provide its records regarding such interests.

C. **The City's Determinations as to Creating a Municipal Electric Utility**.

18. On November 1, 2011, voters in the City approved Ballot Measure 2C, which authorizes the formation of a City-owned and City-run municipal electric utility and the issuance of revenue bonds to finance the acquisition. At the same election, Boulder voters approved an increase in an existing utility occupation tax for the purpose of funding municipalization efforts. That tax is for five years, ending in December 2016.

19. After passage of Ballot Measure 2C, the City proceeded to further explore municipalization. The City engaged engineers and other consultants, who, after conducting extensive reviews over a period of many months, provided advice concerning the property interests and assets of the Company that should be acquired based on factors such as maintaining optimum reliability, avoiding duplication of distribution and transmission equipment, and avoiding operational and maintenance conflicts with the Company.

20. Expert evaluation of the Company's electric system that currently provides electric service to the City and its inhabitants indicated the following:

a. The City is surrounded by open space, including 17,242 acres of land either owned in fee simple by the City or subject to City conservation easements and 22,273 acres in the Boulder Valley Comprehensive Area III (much of which is a rural preservation area, where the City and Boulder County intend to preserve existing rural land uses and character). As a result, in providing service pursuant to the Franchise Agreement, the Company has developed an electric system to serve the City that is both technically and geographically isolated to a significant extent from surrounding areas.

b. Due to the technical and geographic isolation of the Company's electric system currently serving the City, the acquisition of the Company's facilities, as planned by the City, would create a municipal utility with an estimated 97% of the electric load inside City limits, and only 3% of the electric load outside the City.

c. The open space around the City has also created areas around the periphery of the City that will have little or no development of additional electric load in the future.

d. The Company distributes electricity to the City via a number of substations, some inside City limits and some outside City limits in areas immediately adjacent to the City. The Company's substations and facilities that provide electric service to the City primarily serve the City and its inhabitants and only incidentally serve a small number of customers outside City limits in areas adjacent to the City.

e. Acquisition of the Company's system serving the City would result in the City owning four substations: three inside City limits (Boulder Terminal, Sunshine, and NCAR); and one outside City limits (Boulder Canyon Hydroelectric, which the City already partially owns). The City would also acquire some facilities at several other Company substations that serve the City. Additionally, the City would acquire other facilities, such as transmission lines serving Boulder.

f. The electric system to be acquired from the Company serves City-owned facilities located outside City limits, such as City water facilities and one of the City's primary emergency communications facilities.

g. Much of the City is also served by a 115 kilovolt ("kV") transmission loop. The City also owns a hydroelectric power plant, located outside City limits in Boulder Canyon, as well as a portion of the Boulder Canyon Hydroelectric substation. The Boulder Canyon Hydroelectric Power Plant is connected to the 115 kV transmission loop running through substations inside the City.

h. Acquisition of the 115 kV transmission loop will allow the City direct access to the hydroelectric power from the City-owned Boulder Canyon Hydroelectric Power Plant, as well as allow the City to better manage the flow and distribution throughout much of the grid serving Boulder. Acquisition of the 115 kV loop will minimize City power outages and decrease the amount of time needed to restore power in the event of an outage. 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.

21. By Ordinance No. 7918 ("the Acquisition Ordinance"), adopted August 20, 2013, the Boulder City Council ("City Council") authorized the City Manager to acquire the property interests and assets of the Company within a specified acquisition area. The acquisition includes the authority to exercise the power of eminent domain by filing a petition in condemnation with

the Court, on or after January 1, 2014, if negotiations to purchase those property interests and assets fail.

22. The Acquisition Ordinance reflects City Council's legislative determination concerning the property interests and assets needed by the City to establish and operate a municipal electric utility.

23. The Acquisition Ordinance further reflects City Council's determinations that the property interests and assets sought to be acquired from the Company are "used and useful" in connection with providing electric service to the City and that acquisition of these property interests and assets is for a public purpose and in furtherance of public uses. Some of those property interests and assets "used and useful" in providing electric service to the City are inside City limits, and some are outside City limits in areas immediately adjacent to the City.

24. On November 5, 2013, voters in the City rejected by a two-to-one margin Ballot Measure 310, a measure funded by the Company, that sought to insert into the City's Charter certain restrictions on creating a municipal electric utility. At the same time the voters approved by approximately the same margin Ordinance No. 7920 which permits acquisition of the Company's electric system, if the bonds for purchase of the existing assets, and for paying stranded costs, if any, in one complete payment, do not exceed $214 million.

25. On January 6, 2014, the City sent the Company a Notice of Intent to Acquire, informing the Company that the City intends to acquire, by eminent domain if necessary, certain equipment, property, and facilities serving the City in accordance with the Acquisition Ordinance.

D. **The Company's Certificate of Public Convenience and Necessity Regarding Service Outside the City**.

26. The Company was previously granted a Certificate of Public Convenience and Necessity ("CPCN") by the Commission with respect to the service of customers in Boulder County, including, as pertinent to this case, customers in areas surrounded by or immediately adjacent to the City in unincorporated Boulder County.

27. The City plans to acquire physical facilities (for example, substation facilities and power lines), both inside and outside City limits, that have been used to provide electric service to the City and its inhabitants and are needed for the City's creation of a municipal utility. Some of those physical facilities also distribute electricity to the Company's customers outside City limits (*i.e.*, in an unincorporated area of Boulder County where the Company holds a CPCN). Acquisition of those physical facilities by eminent domain will leave the Company without an ownership interest in those facilities.

28. The City plans to provide service in areas outside City limits, but immediately adjacent to the City, after acquisition of the Company's physical facilities by eminent domain.

To do so, the City intends to take by eminent domain the Company's CPCN and to seek its own CPCN to serve the customers in those areas, subject to Commission approval as to terms and conditions of service.

E. **The Commission Proceeding**.

29. In May 2013, the Company initiated the Commission proceeding by filing a Petition for Declaratory Orders.

30. In its Petition for Declaratory Orders, the Company sought declaratory rulings from the Commission addressing the right to serve the Company's customers in the areas adjacent to the City that are currently served by the distribution system that serves the City.

31. The parties submitted legal briefs, with some documents attached. No evidentiary hearing was held.

32. On October 29, 2013, the Commission served by mail its Initial Decision. A copy of the Initial Decision is attached as **Exhibit 1** and incorporated by reference.

33. On November 18, 2013, the City timely filed with the Commission an application for rehearing, reargument, or reconsideration. The Commission allowed the Company to file a Response.

34. On December 18, 2013, the Commission served by mail the RRR Decision. A copy of the RRR Decision is attached as **Exhibit 2** and incorporated by reference.

F. **The Initial Decision and RRR Decision**.

35. In its Initial Decision, the Commission entered a ruling to the effect that the Commission will determine which property and facilities the City may acquire by eminent domain.

36. The Company did not seek declaratory rulings concerning acquisition of facilities. Instead, the Company categorically stated in its Petition for Declaratory Orders (at ¶ 26) that "What facilities Boulder has the legal authority to acquire and at what cost are matters to be determined in a condemnation action ...." The Company further stated: "The Petition filed by [the Company] does <u>not</u> ask this Commission to decide what facilities Boulder may condemn to create a municipal utility to serve its residents and businesses. That is a question which the trial court in the condemnation action has the exclusive jurisdiction to determine ...." *See* Company's Response to Nexus Question Posed by Commission at ¶ 14 (underlining in original).

37. The Initial Decision went beyond the relief sought by the Company. The Commission *sua sponte* ruled:

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

Initial Decision at ¶ 28.

38. This language indicates that the Commission, not the City, will determine which facilities may be the subject of condemnation. The Commission reiterated this point at ¶ 18 of the Initial Decision, stating that the Initial Decision addresses "which property interests and facilities could be used to provide service and thus may be part of a condemnation action."

39. The Commission ordered as follows:

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

Id. at pp. 15-16, ¶ 4.

40. The Initial Decision (at p.11, ¶ 25) further notes that, under the doctrine of regulated monopoly, after a utility has been assigned a specific territory by the Commission, no other utility may provide service in that territory unless it is established that the certificated utility is "unable or unwilling" to provide adequate service.

41. The Commission ruled (*id.* at p. 12, ¶ 27) that "Commission proceedings addressing the transfer of [the Company's] CPCN are to precede any actions seeking to condemn [the Company's] CPCN."

42. In its RRR Decision, the Commission denied the City's request for rehearing, reargument, or reconsideration. The RRR Decision (at ¶ 17) reiterated the Commission's ruling that the Commission will decide "which property rights may be acquired" by the City.

43. The Commission concluded (*id.* at p. 9, ¶ 19) that, because the Company operates its network as "an integrated system," the Commission will make the decisions regarding the optimal division, joint use, and replacement of assets and facilities "providing services both inside and outside Boulder city limits."

44. The Commission also reiterated (*id.* at p. 4, ¶ 9) its authority over assets and facilities, "wherever located" [*i.e.*, whether inside or outside City limits], that are used by the Company "at least in part" to provide service to customers outside City limits.

45. Additionally, the Commission indicated (*id.* at p. 12, ¶ 23) it may "prohibit" the City from acquiring and operating facilities outside City limits, which would include facilities that have for many decades primarily served the City and its residents and only incidentally served a small number of the Company's extraterritorial customers.

46. The Commission further ruled (*id.* at p. 2, ¶ 1; pp. 9-10, ¶ 20; and p. 13, ¶ 26) that Colorado district courts lack jurisdiction over eminent domain matters prior to the Commission's approval of the transfer of regulated property.

V. CLAIM FOR RELIEF (Writ of Certiorari or Review Against the Commission and Commissioners Epel, Patton, and Vaad in Their Official Capacities)

47. The City incorporates by reference the allegations contained in all preceding paragraphs as if set forth fully herein.

48. The Initial Decision and RRR Decision violate in a variety of ways the City's constitutional, statutory, contract, and common law rights with respect to the exercise of eminent domain powers, including by: (a) 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, (b) ruling that Commission proceedings must be completed prior to initiation of the City's condemnation case, and (c) misapplying the law to preclude the taking of a CPCN by eminent domain.

49. The Commission lacks the authority or jurisdiction to determine in the first instance which property and facilities the City may acquire by condemnation. Pursuant to Article XX, §§ 1 and 6, C.R.S. § 31-15-707, and longstanding Colorado common law, it is for the City to determine which property interests it needs to acquire by eminent domain and to exercise its eminent domain powers to acquire electric utility systems.

50. The Commission's ruling that Colorado district courts lack jurisdiction over eminent domain matters prior to the Commission's approval of the transfer of regulated property is contrary to law. The Commission lacks jurisdiction, authority, and expertise to determine the scope of the City's eminent domain powers; rather, under Article II, § 15 of the Colorado Constitution, C.R.S. § 38-1-101, et seq., and Colorado common law, the Colorado courts have jurisdiction to determine that question of law. Furthermore, the Decisions attempt to enjoin an eminent domain proceeding prior to its filing, which is contrary to law and in excess of the Commission's authority and jurisdiction.

51. The Commission's expansive rulings to the effect that the Commission will determine which property and facilities the City may acquire by eminent domain violate: (a) the

City's rights under Article XX, §§ 1 and 6 of the Colorado Constitution to condemn, purchase, acquire, maintain, conduct, and operate public utilities "within or without its territorial limits," as well as "everything required therefor," for the use of the City and its inhabitants; (b) the City's rights under C.R.S. § 31-15-707 to acquire "electric light and power works and distribution systems" by condemnation; and (c) the City's contract rights under the Franchise Agreement to acquire by condemnation the electric utility system that has served the City for many years. The Commission's rulings, if allowed to stand, would render the foregoing constitutional and statutory provisions of no force and effect.

52. The Commission's assertion of its authority is overbroad in that, as just one example, it precludes acquisition by the City via eminent domain of even those facilities inside the City that provide service to City residents if those facilities also might be used as a backup for electric service to customers outside the City.

53. The Commission's conclusion that the Company operates its network as "an integrated system," and thus the Commission will make the decisions regarding the division of assets and facilities "providing services both inside and outside Boulder city limits," unlawfully negates the City's constitutional, statutory, and contract rights to acquire by condemnation an electric system that primarily serves the City and its inhabitants (with an estimated 97% of the electric load for the system inside City limits).

54. The Commission's ruling that it may "prohibit" the City from acquiring and operating facilities outside City limits, which would include facilities that have for many decades primarily served the City and its residents and only incidentally served a small number of the Company's extraterritorial customers, unlawfully violates the City's right under Article XX, §§ 1 and 6 of the Colorado Constitution to condemn, acquire, and operate public utilities, and everything required therefor, within or without its territorial limits.

55. Article XXV of the Colorado Constitution granted the Commission certain powers to regulate the facilities, service and rates and charges of public utilities. However, the Commission lacks the jurisdiction, authority, or expertise to determine the scope of a home rule city's constitutional, statutory, and common law eminent domain powers or to deny a municipality's right to exercise its eminent domain powers. The Commission's Decisions failed to harmonize the Commission's constitutional and statutory powers with the constitutional and statutory powers and rights of the City.

56. Article V, § 35 of the Colorado Constitution provides: "The general assembly shall not delegate to any special commission ... any power to make, supervise or interfere with any municipal improvement, money, property or effects, ... or <u>perform any municipal function whatever</u>." (Emphasis added). The Commission is such a "special commission" precluded under the Constitution from exercising "any municipal function whatever." The City's determination to acquire electric utility facilities and property interests by eminent domain is a municipal function. The Commission's Decisions unlawfully usurp municipal functions.

57. The City is not subject to Commission authority or jurisdiction during the acquisition of an electric utility system by eminent domain and prior to formation of a municipal electric utility.

58. The Commission's ruling that the Commission will determine, under the doctrine of regulated monopoly and C.R.S. § 40-5-105, whether the Company's CPCN will be transferred to the City, and that this determination must "precede" any action by the City seeking to acquire the CPCN by condemnation, unlawfully misapplies the law. The Commission unlawfully exceeded its authority in extending the regulated monopoly doctrine and statutory law to preclude condemnation of a CPCN.

59. An existing CPCN is a property right under Colorado law that a municipality may acquire in an eminent domain proceeding, subject to the Commission's imposition of terms and conditions to ensure safety and reliability. The Commission's Decisions have the effect of unlawfully insulating a particular property right, a CPCN, from acquisition by eminent domain.

60. The Decisions are contrary to law and violate the City's constitutional rights (including under Colorado Constitution Article II, § 15; Article V, § 35; Article XV, § 8; and Article XX, §§ 1 and 6) and statutory rights (including under C.R.S. § 31-15-707). The Commission lacks the authority or jurisdiction to enter such rulings.

61. If the Commission's Decisions are upheld, they would unlawfully prejudice the City's efforts and ability to form a municipal utility.

WHEREFORE, the City respectfully requests that:

A. This Court issue a writ of certiorari or review pursuant to C.R.S. § 40-6-115 for the purpose of inquiring into and determining the lawfulness of the Initial Decision and the RRR Decision in Commission Proceeding No. 13D-0498E;

B. Such writ direct the Commission to certify to this Court the complete record of all proceedings in Commission Proceeding No. 13D-0498E within 30 days of the issuance of the Writ pursuant to C.R.S. § 40-6-115(1);

C. This Court establish by subsequent order a schedule for Opening, Answer, and Reply Briefs;

D. This Court rule that the declaratory rulings in the Initial Decision and the RRR Decision are contrary to law, in excess of the Commission's authority and jurisdiction, and violate the City's constitutional rights (including under Colorado Constitution Article II, § 15; Article V, § 35; Article XV, § 8; and Article XX, §§ 1 and 6) and statutory rights (including under C.R.S. § 31-15-707), and that the Commission did not regularly pursue its authority;

E. This Court enter judgment setting aside the declaratory rulings in the Initial Decision and the RRR Decision; and

F. This Court grant such further relief as may be just and equitable, including an award of the City's costs, attorney fees as may be provided by law, and such other and further relief as the Court may deem proper.

Respectfully submitted this 15th day of January, 2014.

DUNCAN, OSTRANDER & DINGESS, P.C.

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Decision No. C13-1350

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13D-0498E

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.

DECISION ISSUING DECLARATORY RULINGS

Mailed Date: October 29, 2013
Adopted Date: October 9, 2013

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Colorado PUC E-Filings System

I. BY THE COMMISSION

A. Statement

1. On May 9, 2013, Public Service Company of Colorado (Public Service) filed a Verified Petition for Declaratory Orders (Petition) pursuant to Rules 1001 and 1304(i) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, and Colorado Rule of Civil Procedure 57. The Petition requests that the Commission enter declaratory rulings relating to actions of the City of Boulder (Boulder) to municipalize and provide electricity services to customers located in unincorporated Boulder County, Colorado.

2. On June 12, 2013, the Commission issued a decision accepting the Petition and providing notice of the Petition to interested persons.[1]

3. The Commission granted Boulder's motion to intervene and noted the intervention by right of the Colorado Office of Consumer Counsel (OCC). The Commission denied the motion to intervene filed by Black Hills/Colorado Electric Utility Company, L.P., and Black Hills/Colorado Gas Utility Company, L.P. (collectively Black Hills); however, the Commission permitted Black Hills to participate as *amicus curiae*. The Commission granted the joint motion to participate as *amicus curiae* filed by the Colorado Rural Electric Association; Delta-Montrose Electric Association, Inc.; Holy Cross Electric Association, Inc.; Poudre Valley Rural Electric Association, Inc.; and United Power, Inc.[2] Through this Decision, the Commission

[1] Order Accepting Petition for Declaratory Order and Issuing Notice; Decision No. C13-0705, issued June 12, 2013.

[2] Interim Decision: (1) Addressing Interventions and Motion to Participate as *Amici Curiae*; (2) Granting Motion for Leave to Reply; and (3) Establishing a Procedural Schedule, Decision No. C13-0875-I, issued July 16, 2013.

denies the motion to intervene filed by the Gunbarrel Energy Future Citizens' Group,[3] but accepts its filing as public comment.

4. The Commission heard this case *en banc*.

5. Pursuant to Commission scheduling orders, the parties and *amici* filed briefs addressing the issues raised by the Petition. In addition, this Decision grants Boulder's request for acceptance of its supplemental authority, filed September 6, 2013, and also grants Public Service's request for leave to reply to the supplemental authority, filed September 13, 2013.

B. Public Service's Requests for Declaratory Orders

6. Public Service's Petition describes Boulder's actions and plans to form a municipal electric utility, condemn Public Service's facilities, and serve customers located not only inside Boulder's city limits, but also outside in unincorporated Boulder County. Public Service asserts that Boulder expects to obtain these extraterritorial customers through condemnation of Public Service's certificate of public convenience and necessity (CPCN) and facilities that serve unincorporated Boulder County.

7. Paragraph 25 of the Petition requests the Commission enter the following five declaratory orders:

1) If a municipal utility seeks to serve customers located outside the city's boundaries, it is subject to the certificate jurisdiction of the Commission;

2) The Commission has already granted to Public Service a certificate of public convenience and necessity covering the territory in Boulder

[3] Because The Gunbarrel Energy Future Citizens' Group as an association must be represented by a licensed attorney to participate formally as a party, and because its filing is not signed by and does not identify a licensed attorney representing the group, the Commission denies its request to intervene as a party. *See* Rules 1201(a) and (b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1; *Denver Bar Association v. Public Utilities Commission*, 391 P.2d 467 (1964).

County, outside the Boulder city boundaries, in which the 5,800 customers[4] are located;

3) Under Colorado law, there can only be one certificated utility per geographic area;

4) The certificate of an existing utility cannot be taken away without due process of law which requires a hearing before this Commission and proof by substantial evidence that the existing certificated public utility is unwilling or unable to serve the certificated area; and

5) The need to construct replacement facilities as a result of actions taken by a challenging utility does not constitute an inability to serve.[5]

Public Service further explains that it "is simply seeking a clarification that it will not lose its right to serve out-of-city customers because Boulder creates a municipal utility and condemns some facilities which currently serve customers both inside and outside the Boulder city limits."[6]

8. Public Service is not requesting declaratory rulings addressing Boulder's authority to form a municipal utility and serve customers located within Boulder city limits, or its ability to acquire through condemnation facilities located outside city limits but used to provide service within the city.[7] Public Service's request for declaratory rulings refers only to its rights to serve the customers located service outside Boulder's territorial boundaries.[8]

C. Positions of the Parties and *Amici.*

9. Public Service argues that the Commission has the authority to regulate a municipal utility operating extraterritorially and to resolve service disputes between a municipality and an existing utility. Public Service also contends that the doctrine of regulated monopoly, which permits only one certificated utility to serve in an area and requires a new

[4] Subsequent filings indicate that the number of customers located in unincorporated Boulder County at approximately 7,000. *See* Public Service Response, dated August 15, 2013, at 2.

[5] Verified Petition, at ¶ 25.

[6] Public Service Reply, at 8.

[7] Public Service Response, dated August 15, 2013, at ¶¶ 11-15.

[8] Verified Petition, at ¶ 26.

carrier to show that the existing carrier is unable or unwilling to provide adequate service, governs Boulder's plans to serve in unincorporated Boulder County. Public Service asserts that a municipality's decision to seek condemnation of an existing utility's CPCN does not override the Commission's exclusive jurisdiction over certification of a municipal utility operating its territorial boundaries. Public Service also argues that the Commission's determination—of whether the CPCN and other extraterritorial assets will be transferred to Boulder—should precede a condemnation action.

10. The OCC and *amici curiae* support Public Service's position. They argue that becoming a municipal utility does not automatically allow Boulder to serve customers located outside of its municipal boundaries, and that the doctrine of regulated monopoly requires a showing that Public Service is unwilling or unable to serve the customers at issue, regardless of whether Boulder's provisioning of service would be more efficient or technically optimal.

11. Boulder states that as a home rule municipality, it has the authority under Article XX of the Colorado Constitution to operate an electric utility and to condemn all necessary facilities and property, whether located inside or outside of its city limits. Boulder asserts that a CPCN to serve a particular area is a property interest subject to condemnation, and the district court hearing a condemnation action has the authority to determine Boulder's need for the CPCN. Boulder argues that its plans to condemn Public Service's CPCN as a property interest distinguish this case from those cited by Public Service recognizing the Commission's authority to regulate municipal utilities extraterritorially and apply the doctrine of regulated monopoly to a new carrier's encroachment into an existing provider's territory. Condemnation of a CPCN would relieve Boulder from the burden of showing that Public Service is unable or unwilling to serve in unincorporated Bolder County. Boulder admits that it must obtain a

certificate from the Commission to serve extraterritorial customers, but argues that the condemnation action would precede the Commission's proceedings for transfer of Public Service's certificate, and that the Commission must act consistently with the orders of the district court condemning the CPCN.

12. Boulder also contends that the public interest standard should apply to the transfer of Public Service's certificate, and that its provision of service in unincorporated Boulder County would be the most efficient, effective, and reliable option. Further, Boulder argues that Public Service's request may not be ripe, because Boulder has not decided finally whether to serve unincorporated Boulder County.

D. Discussion

1. Commission Jurisdiction to Hear this Matter

13. Boulder contends that Articles II and XX of the Colorado constitution authorize home rule cities to condemn property for the creation and operation of a municipal utility, and that the district court has jurisdiction over condemnation matters. Thus, Boulder argues, the district court sitting in condemnation, not the Commission, has the jurisdiction to determine Boulder's ability to obtain Public Service's CPCN to serve unincorporated Boulder County.[9]

14. We disagree. The Commission has the authority to determine the facts upon which its jurisdiction may depend and rule on the scope of its jurisdiction.[10] The Commission's jurisdiction to decide matters has been analogized to that of judicial tribunals: "except in the case of plain usurpation, a court has the jurisdiction to determine its own jurisdiction."[11]

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[9] Boulder Response, dated August 15, 2013, Part I.C., at 7-9.

[10] *Keystone v. Flynn*, 769 P.2d 484, 488 (Colo. 1989).

[11] *Id.*, quoting *United States v. United Mine Workers*, 330 U.S. 258, 292 n. 57 (1947) (in turn *quoting Carter v. United States*, 135 F.2d 858, 861 (5th Cir. 1943)).

The Commission therefore has the authority to hear Public Service's request for declaratory rulings regarding Boulder's attempts to serve unincorporated Boulder County. As shown below, our rulings do not interpret Boulder's constitutional or statutory rights to condemn property; rather, we apply the Commission's authority under Article XXV of the Colorado constitution and the public utilities law as interpreted by the Colorado Supreme Court to rule upon Boulder's municipal utility service in unincorporated Boulder County.

2. Ripeness

15. Boulder argues that Public Service's request for declaratory rulings is not ripe, contending that no final decision has been made on whether its municipal utility will serve customers in unincorporated Boulder County.[12]

16. "Ripeness requires that there be an actual case or controversy between the parties that is sufficiently immediate and real so as to warrant adjudication."[13] "A court may find 'a conflict is ripe for judicial review even in the context of uncertain future facts so long as there is no uncertainty regarding the facts relevant to the dispute and no pending actions that might resolve the issue prior to the court's determination.'"[14] To be ripe, the court's or an agency's decision must have a "practical effect upon an actual and existing **controversy.**"[15]

17. Undisputed facts show that a controversy is sufficiently immediate and that there is no uncertainty regarding the facts relevant to the dispute. The Boulder City Council passed an ordinance authorizing the city to acquire the property of Public Service through negotiation or

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[12] Boulder Reply, dated August 30, 2013, at 3.

[13] *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002); *See also Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo. 2008).

[14] *Metal Management West, Inc. v. State*, 251 P.3d 1164, 1175 (Colo. App. 2010) (quoting *Stell v. Boulder County Dep't of Social Servs.*, 92 P.3d 910, 915, n.6 (Colo. 2004)).

[15] *Board of Directors v. Nat'l Union Fire Ins. Co.*, 105 P.3d 653, 656 (Colo. 2005).

the power of eminent domain. The ordinance authorizes a condemnation action on or after January 1, 2014.[16] Boulder's engineers have advised the city that it should provide service to extraterritorial customers.[17] Boulder sent letters dated February 15, 2013, to customers located in unincorporated Boulder County stating that, if it creates a city utility, then it plans on providing service to residential and business customers located outside the city.[18] This letter states that Boulder has no plans to annex the area outside of Boulder where it seeks to provide service.[19]

18. A Commission ruling will have a practical effect on an actual and existing controversy between Public Service and Boulder. Public Service asserts that the Commission has the authority to apply the breadth of public utilities law to Boulder's attempt to obtain a CPCN to serve customers outside its city boundaries; whereas, Boulder contends that the Commission's rulings upon a transfer of Public Service's CPCN to Boulder must await and be consistent with a court's condemnation orders. We find that a Commission ruling will instruct the parties on the legal standards governing their conduct and disputes regarding Boulder's actions to obtain Public Service' CPCN for unincorporated Boulder County. A Commission ruling also will guide the parties on whether a Commission proceeding should precede a condemnation action and which property interests and facilities could be used to provide service and thus may be part of a condemnation action. Therefore, Public Service's Petition is ripe for Commission determination.

19. Boulder admits that the first three statements listed in paragraph 25 of the Petition for which Public Service seeks declaratory rulings—that a municipal utility serving outside its

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[16] *See* Response of Public Service, dated August 15, 2013, at 2-3.

[17] Boulder Response, at 3-4.

[18] Letter from City of Boulder to unincorporated Boulder County customers, dated February 15, 2013, attached as Exhibit A to Public Service's Verified Petition.

[19] *Id.*

territorial boundaries is subject to the certificate jurisdiction of the Commission, that Public Service had been granted a certificate to serve unincorporated Boulder County, and that there can be only one certificated utility per geographic area—are correct.[20] We therefore proceed with addressing the issues underlying the fourth and fifth statements.

a. The Commission's Regulatory Authority Over a Municipal Utility Serving Outside its Territorial Boundaries.

20. Dating back to the 1920s and extending through interpretations of Commission powers granted by Article XXV, the Colorado Supreme Court repeatedly and consistently has acknowledged the Commission's authority to regulate a municipal utility serving customers located outside its territorial boundaries.[21] This rule is premised upon the customers' ability to vote on municipal matters. If the services offered by a municipality to its citizens within its territory are not satisfactory to a majority of the citizens, they can effect a change, either at a regular election, or by the exercise of the right of recall.[22] In contrast,

> When a municipally owned utility provides utility service outside the municipality, those receiving the service do not have a similar recourse on election day. They have no effective way of avoiding the possible whims and excesses of the municipality in the absence of state regulation by the PUC.[23]

21. The court has elaborated on the Commission's authority over service area disputes between a municipal utility and a certificated public utility. "[T]he Utilities Act unmistakably

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[20] Boulder's Response, filed August 15, 2013, at 4.

[21] *Town of Holyoke v. Smith*, 226 P. 158 (Colo. 1924); *City of Lamar v. Town of Wiley*, 248 P. 1009 (Colo. 1926); *Public Utilities Commission v. City of Loveland*, 289 P. 1090 (Colo. 1930); *City and County of Denver v. Public Utilities Commission*, 507 P.2d 871 (Colo. 1973); *Board of County Commissioners v. Denver Board of Water Commissioners*, 718 P.2d 235 (Colo. 1886); *Poudre Valley Rural Electric Association, Inc. v. City of Loveland*, 807 P.2d 547 (Colo. 1991).

[22] *Town of Holyoke v. Smith*, 226 P. 158, 161 (Colo. 1924); *City of Lamar v. Town of Wiley*, 248 P. 1009, 1010 (Colo. 1926).

[23] *K.C. Electric Association, Inc. v. Public Utilities Commission*, 550 P.2d at 871, 874 (Colo. 1976). *See also City and County of Denver v. Public Utilities Commission*, 507 P.2d at 874; and *City of Loveland v. Public Utilities Commission*, 580 P.2d 381, 385 (Colo. 1978) ("the PUC [is] the only protection for the non-resident customers.")

and clearly invests the Public Utilities Commission with the sole jurisdiction to hear and determine, in the first instance, a controversy of this nature."[24] Further,

> We believe it is essential that the PUC be allowed to regulate the public utility services provided by municipalities outside their boundaries. Not only is the PUC the only protection for the non-resident customers,...but the PUC must also be allowed the power to resolve jurisdictional disputes between municipalities and private utilities companies over who is to serve areas outside municipal boundaries.[25]

22. The court also has defined a municipality's status relative to other utilities when it serves outside its boundaries: "Both upon authority and reason 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."[26]

23. Boulder's plans to condemn Public Service' CPCN to serve unincorporated Boulder County do not affect the Commission's authority over the transfer of the CPCN or the applicable standards. The statute upon which Boulder relies as granting a property interest to a CPCN, § 40-5-105, C.R.S., conditions any sale or assignment of a CPCN upon Commission approval and upon such terms and conditions as the Commission may prescribe.[27] The court rulings quoted above in this Decision—recognizing Commission authority to resolve disputes between municipalities serving outside its boundaries and existing public utilities—also refute

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[24] *Public Utilities Commission v. City of Loveland*, 289 P. 1090, 1093 (Colo. 1930).

[25] *City of Loveland v. Public Utilities Commission*, 580 P.2d 381, 385 (Colo. 1978).

[26] *City and County of Denver v. Public Utilities Commission*, 507 P.2d at 874.

[27] Section 40-5-105, C.R.S., says:

> **Certificate or assets may be sold, assigned, or leased.** (1) The assets of any public utility, including a certificate of public convenience and necessity or rights obtained under any such certificate held, owned, or obtained by any public utility, may be sold, assigned, or leased as any other property, but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe...."

Boulder's argument that the potential of an action in condemnation over utility property diminishes Commission authority.

24. Two Supreme Court cases specifically confirm Commission authority even when a municipality is planning or has completed condemnation actions. In *City and County of Denver v. Public Utilities Commission*,[28] the Supreme Court upheld the Commission's regulatory authority over *Denver's* tramway service outside its boundaries, even after a district court had completed a condemnation action transferring ownership rights to *Denver*. In *Colorado and Southern Railway Co., Inc. v. District Court*,[29] the court ruled that the Commission may exercise its statutory authority to determine where a railroad may cross the tracks of another, even though the utility already had filed an action to condemn an easement for the crossing. These cases demonstrate that, if the public utilities law has granted the Commission regulatory authority over property or service used by a utility to serve outside its territory boundaries, the Commission retains its regulatory authority even though the property or service is the subject of a condemnation action.

25. The doctrine of regulated monopoly governs Boulder's attempt to serve unincorporated Boulder County where Public Service is certificated.[30] "After a utility has been assigned a specific territory, no other utility may provide service in that territory unless it is established that the certificated utility is unable or unwilling to provide adequate service."[31] Evidence that the challenging utility may provide better service or may serve the customers more

[28] *City and County of Denver v. Public Utilities Commission*, 507 P.2d 871 (Colo. 1973).
[29] *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972).
[30] *Public Service Company v. Public Utilities Commission*, 765 P.2d 1015, 1021 (Colo. 1988).
[31] *Id.*

easily cannot be the basis of a finding that the existing utility is unwilling or unable to serve its certificated area.[32]

b. Commission Proceedings Addressing Transfer of Public Service's CPCN and Other Property

26. Boulder's briefing argues that a condemnation action for Public Service's extraterritorial CPCN should precede any Commission proceedings under § 40-5-105, C.R.S., addressing Boulder's request for the CPCN, and that any resulting Commission orders must be consistent with a condemnation court's order awarding ownership to Boulder.[33] Public Service disagrees, asserting that "it is essential that a determination be made, before the condemnation action, regarding who has the right to serve the out-of-city customers. That information affects the separation of the two utilities, reconnection costs, the compensation owed in any condemnation proceeding, and pre-filing good faith negotiations."[34]

27. Transfer of Public Service's CPCN would be required for Boulder to serve customers in unincorporated Boulder County, and the Commission possesses the statutory power to determine under § 40-5-105, C.R.S., and under the doctrine of regulated monopoly, whether Public Service's CPCN is to be transferred to Boulder. Thus, Commission proceedings addressing the transfer of Public Service's CPCN are to precede any actions seeking to condemn Public Service's CPCN.

[32] *Id.*, at 1022; *See also Public Service Company v. Public Utilities Commission*, 485 P.2d 123, 127; *Public Utilities Commission v. Poudre Valley Rural Electric Association*, 480 P.2d 106, 107 (Colo. 1970).

[33] Boulder Response, dated August 15, 2013, at 12-14.

[34] Public Service Reply, dated August 30, 2013, at ¶ 7.

28. Also under the Commission's jurisdiction are other types of property, plant, and equipment used to provide service in unincorporated Boulder County. The Commission exercises its regulatory authority over Public Service's transmission and distribution lines, substations, and other facilities to protect the reliability, safety, and service quality of electricity services provided to unincorporated Boulder County, and to safeguard the integrity of the system statewide. If Boulder seeks to condemn facilities, wherever located, that Public Service currently uses, at least in part, to serve customers located outside of Boulder's city limits, this Commission must have the ability to investigate and determine how the facilities should be assigned, divided, or jointly used to protect the system's effectiveness, reliability, and safety, as well as any other matter affecting the public interest. Thus, a Commission proceeding addressing these facilities should precede a condemnation action to allow the district court to rule on the public need and value of facilities that the Commission determines may be the subject of transfer to Boulder.

29. Case law also supports Public Service's position. In *Colorado & Southern*,[35] a railroad company known as C&W commenced a proceeding in district court to condemn an easement over tracks owned by two other railroads. C&W selected the easement as suitable for the crossing. The two other railroads filed a motion to dismiss the district court action, asserting that C&W first had to secure an order from the Commission as required under the public utilities law that would determine the point at which C&W may cross the tracks or facilities of other railroads. The Supreme Court ruled that the district court did not have jurisdiction over the property easement identified by C&W absent a predetermination by the Commission. Because

[35] *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972).

the Commission has the power to determine the point of crossing, "[i]t follows logically then that the commission -- not the railroad -- determines what property the railroad requires."[36] [37]

E. Conclusion

30. For the reasons stated above, we rule on the fourth and fifth statements listed in paragraph 25 of Public Service's Petition by clarifying that the Commission has regulatory authority over electricity services provisioned by a municipal utility formed by Boulder to customers located in unincorporated Boulder County, and that the doctrine of regulated monopoly as delineated by rulings of the Colorado Supreme Court governs any application filed by Boulder seeking transfer of Public Service's CPCN. The potential that Boulder may file a condemnation action to obtain Public Service's CPCN for unincorporated Boulder County does not affect the Commission's regulatory authority, the doctrine of regulated monopoly, or the standards governing transfer of Public Service's CPCN. Further, Commission proceedings addressing the transfer of Public Service's CPCN or other plant, equipment, and facilities used to provide service to customers located in unincorporated Boulder County are to be completed before Boulder initiates a condemnation action for such property.

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[36] *Id.*, 493 P.2d at 659.

[37] The case cited by Boulder, *Miller v. Public Service Company of Colorado*, 272 P.2d 283 (1954), for the proposition that its condemnation action for Public Service's CPCN should precede a Commission proceeding, is inapposite and has been distinguished by the court in *Colorado & Southern*. The court in *Miller* ruled that a utility was not required to obtain a CPCN from the Commission to construct a facility before the utility filed a condemnation action to acquire the land upon which the facility was to be built. The court reasoned that the construction permitted by the CPCN is an act that occurs after the utility obtains ownership of the land. Further, the court in *Miller* found that: "[t]he so-called certificate is only a permit or license to use and enjoy land that has been condemned; it is not a condition precedent to the right to condemn; ***and has no relationship whatever with the matter of condemnation***." *Miller*, 272 P.2d at 285 (emphasis added). The court in *Colorado and Southern* ruled that the *Miller* result—that a condemnation action may precede the Commission's—did not apply to C&W's condemnation of the easement, because the location of crossing point was essential to determining the property to be condemned and was subject to the Commission's approval authority. *Colorado and Southern*, 493 P.2d at 659. The issue presented in this proceeding mirrors that of *Colorado & Southern*, in which the property at issue in the potential condemnation proceeding, Public Service's extraterritorial CPCN, is the same property over which the Commission has jurisdiction and approval authority.

II. ORDER

A. The Commission Orders That:

1. The request to intervene filed by the Gunbarrel Energy Future Citizens' Group is denied. The filing submitted by the Gunbarrel Energy Future Citizens' Group on August 8, 2013, will be accepted as public comment.

2. The request of the City of Boulder to accept its Supplemental Authority, filed September 6, 2013, is granted. The request of Public Service Company of Colorado (Public Service) for leave to reply to the City of Boulder's Supplemental Authority, filed September 13, 2013, is granted.

3. The Commission grants the request of Public Service to enter as declaratory orders the first, second, and third statements listed in paragraph 25 of Public Service's Verified Petition for Declaratory Orders (Petition).

4. The Commission enters declaratory rulings addressing the fourth and fifth statements listed in paragraph 25 of the Petition by clarifying that the Commission has regulatory authority over electricity services provisioned by a municipal utility formed by the City of Boulder to customers located in unincorporated Boulder County, and that the doctrine of regulated monopoly as delineated by rulings of the Colorado Supreme Court governs any application filed by the City of Boulder seeking transfer of Public Service's certificate of public convenience and necessity (CPCN). The potential that the City of Boulder may file a condemnation action to obtain Public Service's CPCN does not affect the Commission's regulatory authority, the doctrine of regulated monopoly, or the standards governing transfer of Public Service's CPCN. Further, Commission proceedings addressing the transfer of Public Service's CPCN or other plant, equipment, and facilities used to provide service to customers

located in unincorporated Boulder County are to be completed before the City of Boulder initiates a condemnation action for such property.

5. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

6. This Decision is effective on its mailed date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING October 9, 2013.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners

Decision No. C13-1550

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13D-0498E

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.

DECISION DENYING CITY OF BOULDER'S APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: December 18, 2013
Adopted Date: December 11, 2013

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I. STATEMENT

A. Introduction

1. On November 18, 2013, the City of Boulder (Boulder) filed its Application for Rehearing, Reargument, or Reconsideration (RRR) of Commission Decision issued on

Colorado PUC E-Filings System

October 29, 2013 (Decision). Boulder's RRR challenges the Decision's rulings clarifying the Commission's jurisdiction to conduct approval proceedings of the proposed transfer from Public Service Company of Colorado (Public Service) to Boulder of certifications, assets, and facilities used to provide electricity services to customers located outside Boulder's territorial limits in unincorporated Boulder County. Boulder's RRR also opposes the requirement to obtain Commission approval before Boulder commences a condemnation action over regulated property rights. Because Colorado Supreme Court precedent interpreting Article XXV of the state constitution and the public utilities law validates Commission jurisdiction to approve the transfer of regulated property before a condemnation court acquires subject matter jurisdiction over the property, the Commission denies Boulder's RRR.

B. Procedural Background and Positions of the Parties

2. We incorporate the Decision's description of the procedural history of this case, including Public Service's petition for declaratory ruling, intervention by Boulder and the Office of Consumer Counsel, grants of *amicus* status, and the positions of parties and *amici*.[1]

3. The Decision issued declaratory rulings clarifying the Commission's jurisdiction under the state constitution and the public utilities law to regulate Boulder's certification as a municipal utility to provide electricity services to customers located in unincorporated Boulder County. The Decision also declares the Commission has the authority to conduct approval proceedings over Boulder's proposed acquisition of assets and facilities owned and used by Public Service to provide service outside the city. Citing *Colorado and Southern*,[2] the Decision requires Boulder to obtain Commission approval before a condemnation action could commence.

[1] Decision, issued October 29, 2013, at ¶¶ 1-12.

[2] *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972).

4. Boulder's RRR challenges the following ruling from paragraph 28 of the Decision:

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

Boulder requests the deletion of paragraph 28 from the Decision. According to the RRR, selection of facilities for condemnation is a "municipal function," and the Decision impairs Boulder's ability as a home rule city to form a municipal utility and condemn plant and facilities it deems necessary. Boulder also objects to the Decision's application of the *Colorado and Southern* case requiring Commission approval of any acquisition of regulated property rights from Public Service before Boulder files a condemnation action.

5. Boulder's RRR "recognizes the authority of the Commission over service provided by a municipal electric utility to customers located outside the jurisdictional boundaries of the municipality,"[3] and indicates it "will file all applicable applications for transfer."[4] Boulder argues, however, "Commission's approval of an application for transfer is not the same as the Commission's deciding what property rights may be transferred and when the transfer may occur."[5]

6. By leave of the Commission, Public Service filed a response to Boulder's RRR on December 3, 2013. Public Service requests denial of Boulder's RRR and provides argument and

[3] Boulder RRR, at 3.
[4] *Id.*, at 5-6.
[5] *Id.*, at 6.

citations to the state constitution, the public utilities law, and Colorado case law in support of Commission regulatory authority over extraterritorial electricity services.

II. DISCUSSION

A. Scope of Commission Jurisdiction

7. The Decision defines the Commission's jurisdiction over Boulder's municipal utility to encompass certifications, assets, and facilities used to provide electricity to customers located outside Boulder's territorial boundaries. The Decision does not suggest or imply Commission jurisdiction over services Boulder's utility may provide within the city. Paragraph 28 of the Decision, the object of Boulder's RRR, also is limited to facilities and assets used to provide extraterritorial services.

8. Despite these definitions of the scope of Commission authority, Boulder's RRR causes us to question whether it is addressing Commission jurisdiction over municipal services provided inside, or outside, the city. Boulder's RRR on occasion references extraterritorial matters; however, the vast majority of the RRR discusses municipal powers in general terms, and cases cited by the RRR address municipal functions to provide services within the municipality, not outside.

9. The Commission reiterates its assertion of regulatory authority over the certifications, assets, and facilities, wherever located, used by Public Service at least in part to provide electricity service to customers outside Boulder city limits. The Commission does not assert regulatory authority over Boulder's efforts to form a utility or over facilities and plant, wherever located, used only to provide service to customers within Boulder's municipal territory.

B. Commission Jurisdiction and Municipal Functions

10. Boulder argues in its RRR that selection of certifications, facilities, and other property rights for condemnation is a municipal function beyond the Commission's jurisdiction. Boulder's primary citation for this proposition is the 1926 case of *Public Service v. City of Loveland*,[6] in which the city sought to condemn Public Service's distribution system used to provide service to Loveland's residents.[7] Public Service challenged Loveland's ability to acquire ownership through eminent domain proceedings and also protested the city's unwillingness to condemn a substation and real estate located within the town. The Court in *Public Service v. City of Loveland* ruled that the town has the authority to condemn facilities, and the selection of which facilities to condemn is a municipal function Public Service could not override. Boulder's RRR also relies upon *City of Thornton v. Farmers Reservoir & Irrigation Co.*,[8] arguing a home rule city has constitutionally-granted powers to condemn "*within or without its territorial limits*," to acquire utilities "*and everything required therefore*."[9]

11. Neither *Public Service v. City of Loveland* nor *City of Thornton* addresses the Commission's jurisdiction over regulated services provided by a municipal utility to customers located outside territorial boundaries. These cases do not diminish the multitude of Supreme Court cases and their citations to article XXV of the Colorado constitution and the public utilities law granting the Commission regulatory authority over services provided to customers located

[6] *Public Service Company v. City Of Loveland*, 245 P. 493 (Colo. 1926).

[7] The distribution system in *Loveland* also served "a few customers located adjacent to or in close proximity with the city." Public Service raised no objections before the Supreme Court to Loveland serving customers located outside the city, and the Court did not address any issues defining either the municipality's or the Commission's authority over facilities used to provide service outside city limits.

[8] *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382 (1978).

[9] *Id.*, 575 P.2d at 388-899 (emphasis that of the Court).

outside city limits. Our Decision lists these cases and their holdings,[10] examples of which include the following:

- "When the city became a public utility under the statute, it had no superior right as to territory outside of its municipal boundaries over the rights of any other public utility, private corporation or otherwise, authorized to furnish service."[11]

- In the 1930 case in which the City of Loveland extended its facilities to serve customers outside the city's boundaries, the Court stated: "the Utilities Act unmistakably and clearly invests the Public Utilities Commission with ***the sole jurisdiction*** to hear and determine, in the first instance, a controversy of this nature."[12]

- In the 1978 *City of Loveland* case, the court stated: "We believe it is essential that the PUC be allowed to regulate the public utility services provided by municipalities outside their boundaries. Not only is the PUC the only protection for the non-resident customers,...***but the PUC must also be allowed the power to resolve jurisdictional disputes between municipalities and private utilities companies over who is to serve areas outside municipal boundaries***."[13].

12. None of the other cases cited in Boulder's RRR impair Commission authority to regulate services provided by a municipal utility outside city boundaries.[14]

13. Boulder's citations also do not reconcile the Court's ruling in *City and County of Denver v. Public Utilities Commission*,[15] in which the Court upheld the Commission's regulatory authority over Denver's provision of tramway services outside its boundaries, even after a

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[10] Decision, issued October 29, 2013, at ¶¶ 20-22.

[11] *Public Utilities Commission v. City of Loveland*, 289 P. 1090, 1094 (Colo. 1930).

[12] *Id.*, 289 P. at 1093 (emphasis added).

[13] *City of Loveland v. Public Utilities Commission*, 580 P.2d 381, 385 (Colo. 1978) (emphasis added).

[14] In *Colorado Cent. Power Co. v. City of Englewood*, 89 F.2d 233 (10th Cir. 1937), cited in Boulder's RRR, a private utility challenged the city's condemnation of facilities located outside the city and part of the system supplying electricity inside and outside of the city. The federal appeals court held that the city may condemn extraterritorial facilities to serve customers within the city. The utility also argued condemnation of such facilities amounted to an effort to generate, distribute, and sell electricity outside the city without first having obtained a certificate of convenience and necessity from the PUC. The court ruled: "Whether the city is required to obtain such a certificate cannot be determined on the complaint of a private suitor. It may be inquired into only on the complaint of the state or the commission." Thus, the federal appeals court did not address Commission jurisdiction to regulate any efforts by the City of Englewood to provide extraterritorial service.

[15] *City and County of Denver v. Public Utilities Commission*, 507 P.2d 871 (Colo. 1973).

district court had completed a condemnation action transferring ownership rights of the system to Denver.

14. Characterizing the selection of facilities for condemnation as a "municipal function" does not undermine the scope of Commission jurisdiction over certifications and facilities used to serve extraterritorial customers. In the 1978 *City of Loveland v. PUC* case,[16] the Court characterized the setting of rates by a city utility for its inhabitants as a "municipal function";[17] however, when the city performed the same function for extraterritorial customers, it was subject to the Commission's jurisdiction.[18] Also, in *Colorado and Southern Railway Co., Inc. v. District Court*,[19] in which a railway company attempted to condemn property for a railroad crossing, the Court referenced the Commission's authority to approve the location of railway crossings and stated "***the commission – not the railroad -- determines what property the railroad requires.***"[20]

15. Boulder's RRR reflects an intention to initiate condemnation proceedings over Public Service's certificate of public convenience and necessity (CPCN) before obtaining the Commission's formal approval: "Because a CPCN is a property right, whether a CPCN will be included in a city's petition in condemnation is likewise a matter within the purview of the city to determine."[21] A major issue addressed in the briefing of parties and *amici* prior to issuance of the Decision was Boulder's ability to condemn Public Service's CPCN for service in unincorporated Boulder County. The Decision, citing the Commission's authority to approve

[16] *City of Loveland v. Public Utilities Commission*, 580 P.2d 381 (Colo. 1978).
[17] *Id.*, 580 P.2d at 384.
[18] *Id.*, 580 P.2d at 384-85.
[19] *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972).
[20] *Id.*, 493 P.2d at 659 (emphasis added).
[21] Boulder RRR at 7.

and regulate CPCN transfers, held that Boulder must obtain Commission approval of any proposed acquisition of Public Service's CPCN to serve extraterritorial customers.[22] Boulder's RRR does not cite any cases or other legal authorities placing this holding into question.

16. Boulder's RRR at times acknowledges Commission authority over CPCNs and services provided to extraterritorial customers; however, its RRR minimizes this authority by suggesting it will satisfy this requirement by simply working and coordinating with the Commission and Public Service to identify which facilities should be acquired and condemned.[23] Boulder also attempts to reduce the extent of Commission approval authority: "[T]he Commission's approval of an application for transfer is not the same as the Commission's deciding what property rights may be transferred and when the transfer may occur."[24]

17. Negotiation and coordination among Boulder, Public Service, and other interested entities and agency staffs are encouraged to reduce the scope of disputed issues and conserve administrative and judicial resources. Informal negotiations, however, do not supplant formal Commission approvals required by statute. Further, an inability to determine which property rights may be acquired conflicts with the Commission's constitutional and statutory duties to regulate the transfer of certification, assets, and facilities used to provide service to extraterritorial customers.

18. Boulder contends that pre-approval proceedings before the Commission will deny Boulder of its right to conduct discovery pursuant to the rules of civil procedure applicable to

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[22] Decision, issued October 29, 2013, at ¶¶ 23-24 (citing *City and County of Denver v. Public Utilities Commission*, 507 P.2d 871 (Colo. 1973), and *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972)).

[23] Boulder RRR at 3, 10.

[24] *Id.*, at 6.

eminent domain actions.[25] The Commission's procedural rules provide Boulder with the same mechanisms to conduct discovery through written interrogatories, requests for production of documents, and depositions.[26] Boulder also objects to delays resulting from Commission approval proceedings.[27] Commission rules allow parties to request expedited proceedings, which accelerate discovery responses and hearing schedules.[28] The Commission will process and decide the matter as efficiently as the issues and the public interest allow.

19. Regulatory oversight of the assets, plant, and facilities used to provide electricity outside Boulder's territorial boundaries advances important public interests. Public Service constructs, engineers, and operates its network as an integrated system, and its service capabilities cross the political boundaries defining the City of Boulder and Boulder County. Performance of the Commission's duty to ensure the reliability of the system for unincorporated Boulder County and other regions of the state requires an evaluation and determination of the optimal division, joint use, and potential replacement of assets and facilities providing services both inside and outside Boulder city limits.

C. Sequencing of Commission and Condemnation Proceedings

20. The Supreme Court's *Colorado and Southern* case[29] governs the sequencing of Commission and condemnation proceedings of property subject to Commission regulation. In *Colorado and Southern*, a railway company commenced a condemnation action for an easement over railroad tracks. The public utilities law granted the Commission "the power to determine

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[25] *Id.*, at 13.

[26] 4 *Code of Colorado Regulations* (CCR) 723-1-1405 of the Commission's Rules of Practice and Procedure.

[27] Boulder RRR, at 9-10.

[28] 4 CCR 723-1-1302(c), 1405(i).

[29] *Colorado and Southern Railway Co., Inc. v. District Court*, 493 P.2d 657 (Colo. 1972).

what property the condemning railroad can use as the 'particular point of crossing.'"[30] The Court issued two holdings applicable to Boulder's RRR: first, because the Commission has the statutory power to determine the point of crossing, "[i]t follows logically then that the commission -- not the railroad -- determines what property the railroad requires";[31] and second, absent Commission approval, the district court sitting in condemnation did not have jurisdiction over the subject matter of the case.[32] Under *Colorado and Southern*, Commission approval proceedings over regulated property is a condition precedent to a condemnation action over the subject property.[33]

21. Boulder's RRR attempts to distinguish *Colorado and Southern*. Boulder first argues that the statute cited in *Colorado and Southern* authorized the Commission to approve the property at issue, whereas, according to Boulder, "Here, there is no such statute. No statute grants this Commission the power to determine, order, and prescribe which property a municipality may seek to condemn in order to create a municipal utility."[34]

22. Two public utilities law provisions prove otherwise and authorize Commission approval of the transfer of property and facilities providing regulated services. As cited in the Decision, § 40-5-105(1), C.R.S., requires Commission approval of the sale, assignment, or lease of assets of a public utility, including any CPCN. This statute also permits the Commission to

[30] *Id.*, 493 P.2d at 659.
[31] *Id.*
[32] *Id.*, 493 P.2d at 659-60.
[33] *Id.*, 493 P.2d at 658-60.
[34] Boulder RRR, at 11.

prescribe the terms and conditions of approval.[35] The transfer of ownership through condemnation means to "purchase" or to "acquire,"[36] which is a "sale," and thus a transfer of facilities used to provide electricity service outside territorial limits is within Commission purview under § 40-5-105(1), C.R.S. Despite arguing no statute grants the ability of the Commission to conduct approval proceedings, Boulder in other portions of its RRR concedes regulatory approval authority over property it may wish to condemn.[37]

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[35] § 40-5-105, C.R.S., says:

> **Certificate or assets may be sold, assigned, or leased.** (1) The assets of any public utility, including any certificate of public convenience and necessity or rights obtained under any such certificate held, own, or obtained by any public utility, may be sold, assigned, or leased as any other property, but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe; except that this section does not apply to assets that are sold, assigned or leased:
>
> (a) In the normal course of business: or
> (b) [Describing circumstances applying only to telecommunications service providers]

[36] *See* Article XX, Section 1 (extended to home rule cities by Article XX, Section 1), which says:

> [The City and County of Denver] ... shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefore, for the use of said city and county and the inhabitants thereof, and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain....

[37] *See, for example*, Boulder RRR at 3 ("The transfer of a CPCN, which is a property right subject to condemnation, cannot take place without the Commission's approval....While Boulder recognizes the authority of the Commission over service provided by a municipal electric utility to customers located outside the jurisdictional boundaries of the municipality, Boulder respectfully submits that the Decision misapprehended certain points of law, as discussed below, and requests that the Commission reconsider its Decision."), and 5-6 ("Once Boulder determines that it may form a retail electric utility in compliance with its Charter requirements and it, in fact, does so, Boulder will file all applicable applications for transfer.").

23. The emphasis in Boulder's RRR upon facilities, and the potential for interference with Public Service's system, invokes a second provision of the public utilities law, § 40-5-101(1)(b), C.R.S. It says:

> If a public utility, in constructing or extending its line, plant, or system, interferes, or is about to interfere, with the operation of the line, plant, or system of any other public utility already constructed, the commission, upon complaint of the public utility claiming to be injuriously affected, after hearing, may prohibit the construction or extension or prescribe just and reasonable terms and conditions for the location of the lines, plants, or systems affected.

Boulder acts as a "public utility" under Commission regulation when it operates outside territorial limits.[38] Any extension of Boulder's system interfering with Public Service's provisioning of service to extraterritorial customers is within this statute, and the Commission may prohibit the extension or prescribe just and reasonable terms for the location of the lines, plant, or systems affected.

24. Independent of these two statutory authorizations is the Commission's constitutional mandate over regulated property and services, as recognized by the Court:

> Article XXV of the Colorado Constitution vests in such agency as the General Assembly may designate all power to regulate the facilities, service, rates, and charges of every public utility operating within Colorado. See Colo. Const. art. XXV. Through the Public Utilities Law, 40-1-101 to 40-7-117, 11 C.R.S. (1998), the General Assembly has assigned to PUC the authority "to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power." 40-3-102, 11 C.R.S. (1998). Accordingly, PUC has power to accomplish functions delegated to it by the Public Utilities Law and article XXV.[39]

25. Boulder's attempt to minimize the precedential value of *Colorado and Southern*—by arguing the public utilities law does not contain a specific statute authorizing the

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[38] *Public Utilities Commission v. City of Loveland*, 289 P.2d 1090, 1094 (Colo. 1930).

[39] *Public Service Company of Colorado, v. Trigen-Nations Energy Company, L.L.L.P.*, 982 P.2d 316, 322 (Colo. 1999).

Commission to select property for condemnation of a municipal utility—is of no consequence. In *Colorado and Southern*, the approval statute at issue also did not reference or grant Commission authority to select facilities for condemnation; rather, as here, the statute granted the Commission general approval powers over the subject property.[40] The approval statutes governing the acquisition of Public Service's assets by Boulder are comparable to the crossing approval statute in *Colorado and Southern*.

26. Boulder's second attempt to distinguish *Colorado and Southern* is to attach significance to the demands of the condemning railway in that case to take immediate possession, in contrast to Boulder's commitment not to take possession of Public Service's assets until after the condemnation action (but by implication before obtaining Commission approval). The language and reasoning of *Colorado and Southern* do not support Boulder's contention. The condemnation action was prohibited from proceeding not because of the demand for immediate possession, but because the district court lacked subject matter jurisdiction over the property absent Commission approval of the crossing pursuant to the public utilities law.[41]

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[40] As quoted by the Court in *Colorado and Southern*, the approval statute at issue stated:

> The [public utilities] commission shall have power to determine, order, and prescribe, in accordance with the plans and specifications to be approved by it, the just and reasonable manner including the particular point of crossing at which the tracks or other facilities of any railroad corporation may be constructed across the tracks or other facilities of any other railroad corporation at grade, or above or below grade; and to determine, order, and prescribe the terms and conditions of installation and operation, maintenance, and protection of all such crossings which may now or hereafter be constructed to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted. 493 P.2d at 658-59.

[41] *Colorado and Southern*, 493 P.2d at 658-60.

III. ORDER

A. The Commission Orders That:

1. The City of Boulder's Application for Rehearing, Reargument, or Reconsideration of Decision No. C13-1350, filed November 18, 2013, is denied.

2. This Decision is effective on its mailed date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING December 11, 2013.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners