SETTLEMENT AGREEMENT

This Settlement Agreement (the “Agreement”) is entered into on this 17th day of May, 2019 (the “Effective Date”), by and between, on the one hand, PUBLIC SERVICE COMPANY, a Colorado corporation (“PSCo”) and, on the other hand, THE CITY OF BOULDER, COLORADO, a Colorado home rule municipality (the “City”). PSCo and the City shall be referred to collectively as the “Parties” and each individually as a “Party.”

RECITALS

A. On May 6, 2014, the Boulder City Council enacted ordinance 7969 adding chapter 11-7 and section 2-3-23 to the Boulder Revised Code and creating a municipal electric utility pursuant to section 178 of the Boulder Home Rule Charter. According to the City, the utility was created to provide an enterprise through which the City could issue debt to finance the acquisition of PSCo’s assets in 2014.

B. On June 3, 2014, PSCo filed a complaint challenging ordinance 7969, which was assigned case number 2014CV30681 (“the Litigation”).

C. On November 7, 2017, the Boulder voters amended Charter Section 178. Charter Section 178(d) now provides in part that “Only after approval of the registered electors at a regular or special election may the electric utility enterprise incur debt for construction to separate from the existing utility system to provide electricity to customers of the City by a separate system.”

D. It is the City’s position that because of the new charter language, the utility created by ordinance 7969 is no longer necessary. PSCo does not agree with the City’s position.

E. Despite differing views of what may be required in the future, the Parties desire to settle the current Litigation, in accordance with the provisions and upon the terms and conditions set forth below.

AGREEMENT

In consideration of the mutual promises and releases contained herein, the adequacy and sufficiency of which is mutually acknowledged, the Parties hereto agree as follows:

1. Elimination of Utility. City staff will request that the Boulder City Council adopt an ordinance repealing ordinance 7969 and removing Chapter 11-7 and section 2-3-23 from the Boulder Revised Code. If the Boulder City Council fails to repeal ordinance 7969 within 45 days of the execution of this Agreement, then this Agreement shall be null and void, except that the Parties will be bound by the provisions in paragraph 6, below, concerning recommencement of the Litigation.

2. Treatment of Ordinance 7917. With respect to questions regarding the ongoing validity and effect of City ordinance 7917 (frequently referred to in the Litigation as the “Metrics Ordinance”), the Parties agree as follows: The Parties remain bound by all determinations of the Colorado Supreme Court in City of Boulder v. Pub. Serv. Co. of Colo., No. 16SC894, 420 P.3d 289 (Colo. 2018), including all appellate mandates implementing that opinion [the “Supreme
Neither Party will rely upon any proceedings or rulings concerning the Metrics Ordinance subsequent to the Supreme Court Opinion, including, without limitation, the December 21, 2018, Order Re: Defendant’s Motion for Determination of Matters of Law Pursuant to C.R.C.P. 56(h) issued by the District Court, Boulder County (Salomone J.) [the “Rule 56(h) Order”], and neither Party will use the Rule 56(h) Order as the basis of any collateral estoppel or claim preclusion defense.

3. **No New Utility.** The City agrees not to enact any ordinance creating a new municipal electric utility: (1) unless the utility to be created complies with the City’s Charter, and (2) only after a majority vote of the voting citizens as set forth in Charter Section 178.

4. **Dismissal of Complaint.** Upon the effective date of the ordinance described in paragraph 1, above, PSCo will file a motion to dismiss, with prejudice, the second amended complaint in the Litigation. For the avoidance of doubt, the dismissal is with prejudice only as to issues raised in the second amended complaint and does not preclude PSCo from challenging any other ordinances, code or charter provisions. This paragraph 4 is also subject to the terms of paragraph 2.

5. **No Utility Condemnation Defense.** PSCo agrees that it will not assert the lack of existence of the utility as a direct defense in support of any motion or otherwise in any condemnation proceeding brought by the City concerning the electric distribution system in Boulder. PSCo reserves the right to assert any other claim or defense in such proceeding, even if it relates in some way to the City’s obligations under its Charter with respect to municipalization. PSCo also reserves the right to raise future legal challenges to the City’s municipalization efforts, including but not limited to challenges to the formation of a new utility or the City’s compliance with its Charter.

6. **Stay of Litigation and Vacation of Trial Date.** The Parties agree, upon the full execution of this Agreement, to inform the Court of the potential settlement of this matter and seek a stay of all pending Case Management Order and other Litigation deadlines for a period of 45 days to effectuate the settlement, including in particular but without limitation, passage of the ordinance described in paragraph 1, and to seek a vacation of the August 26, 2019 trial date. Failure of the Court to enter the requested stay shall not result in the termination of this Agreement or relieve any Party of any obligation under this agreement. If the ordinance described in paragraph 1 is not passed within 45 days or the settlement is not otherwise fully effectuated, then the parties will, within 7 business days, file a motion seeking new Case Management deadlines and a new trial date.

7. **Representations and Warranties.** Each Party warrants and represents to the other Party that:

   (a) Such Party has taken all necessary corporate, municipal, and legal actions, to the extent required, to duly approve the making and performance of this Agreement;

   (b) Such Party has authority to enter into this Agreement;
(c) This Agreement has been validly executed and delivered by such Party and constitutes that Party's valid and binding obligation, enforceable against it in accordance with the terms hereof; and

(d) Such Party has read this Agreement and fully understands all of its terms, covenants, conditions, provisions and obligations and such Party believes that this Agreement is a fair, just, and reasonable resolution of the disputes between the Parties.

(e) The City additionally represents and warrants that execution of this Agreement complies with Boulder Municipal Code Section 2-2-14 (Initiation and Settlement of Claims and Suits).

8. Miscellaneous

(a) No Admissions. This Agreement is being entered into solely for purposes of compromise and settlement. Each of the Parties expressly denies any wrongdoing or liability whatsoever. By entering into this Agreement, no Party is admitting any liability or wrongdoing, and nothing in this Agreement shall in any way be deemed or construed to constitute an admission of wrongdoing or liability by any Party or the waiver of any defense.

(b) Binding Effect. This Agreement shall inure to the benefit of and be binding upon the Parties and their employees, predecessors, successors, directors, officers, administrators, assigns, agents, principals, subsidiaries, parent and affiliate companies, trustees, representatives, insurers, attorneys, and elected officials.

(c) Execution in Counterparts. The Parties agree that this Agreement may be executed in counterparts and that when so executed by all Parties shall constitute one agreement binding on all Parties hereto. The Parties agree that a facsimile or other electronically transmitted copy of this Agreement shall be deemed as binding and as valid as the original signatures to this Agreement, in which case the Party so executing this Agreement shall promptly thereafter deliver its originally executed signature page (but the failure to deliver an original shall not affect the binding nature of such person's signature).

(d) Governing Law. The validity, construction, interpretation and administration of this Agreement shall be governed by the substantive laws of the State of Colorado.

(e) Amendment. This Agreement shall not be modified or amended except by an instrument in writing signed by the Parties.

(f) Attorneys' Fees and Costs. The Parties agree that the obligations set forth in this Agreement include, and are in complete satisfaction of, any right that each Party, or any attorney employed by that Party, may have, or claim to have, to recover attorneys' or consultant/expert fees against any other Party in connection with the Litigation. Each Party shall bear its own costs and shall waive and not make any claims against the other for any costs, expenses, fees or any other expenditure of monies incurred in the Litigation.

(g) Entire Agreement. This Agreement constitutes the full and entire understanding and agreement between the Parties with regard to the subject hereof and supersedes any prior
negotiations, representations or agreements, written or oral, with respect to such subject matter (none of which prior matters shall be binding upon the Parties).

(h) Party Communications. Communications made in the negotiation or implementation of this Agreement are not intended as and will not be construed as waivers by any Party of any applicable privilege, protection, or immunity. All negotiations leading to this Agreement and all communications related thereto will be deemed to fall within the protection afforded compromises and offers to compromise by Rule 408 of the Colorado Rules of Evidence.

(i) Savings Clause. If any term or provision of this Agreement is held to be invalid, illegal, or contrary to public policy, such term or provision shall be modified to the extent necessary to be valid and enforceable and shall be enforced as modified; provided, however, that if no modification is possible such provision shall be deemed stricken from this Agreement. In any case, the remaining provisions of this Agreement shall not be affected thereby.

(j) Waiver of Rights. Any waiver of either Party’s rights under this Agreement is only effective if in writing signed by the Party or its duly authorized representative, and any such waiver shall only be effective for the specific matter waived and shall not be deemed to apply to any other conduct, provision or other matter.

(k) Advice of Counsel. The undersigned have carefully read this Agreement, fully understand it, and, upon advice of counsel, sign this Agreement as the free and voluntary acts of the undersigned. Boulder City Council has been fully advised of the terms of this Agreement and the obligation to adopt an ordinance repealing ordinance 7969 and removing Chapter 11-7 and section 2-3-23 from the Boulder Revised Code.

(l) Arm’s Length. This Agreement was jointly drafted and was negotiated between the Parties at arm’s length. Each Party had the opportunity to consult with independent legal counsel. Neither Party will be entitled to have any language contained in this Agreement construed against the other because of the identity of the drafter.

(m) No Third-Party Beneficiary. This Agreement is not intended to and shall not be construed to give any third party any interest or rights with respect to this Agreement or any of the provisions contained herein, except as otherwise expressly set forth in this Agreement.

[Signature Page Follows]
PUBLIC SERVICE COMPANY OF COLORADO, A COLORADO CORPORATION

Alice K. Jackson, President
Dated: 05/17/2019

CITY OF BOULDER

Jane S. Brautigam
City Manager
Dated: ________________

ATTEST:

Lynnette Beck
City Clerk

APPROVED AS TO FORM

Thomas A. Carr
City Attorney

APPROVED AS TO COMPLIANCE WITH B.M.C. § 2-2-14:

Thomas A. Carr
City Attorney
PUBLIC SERVICE COMPANY OF COLORADO, A COLORADO CORPORATION

Alice K. Jackson, President

Dated: ____________________

CITY OF BOULDER

Jane S. Brautigam,
City Manager

ATTEST:

Lynnette Beck,
City Clerk

APPROVED AS TO FORM:

City Attorney’s Office

Date: 5/18/19

APPROVED AS TO COMPLIANCE WITH B.M.C. § 2-2-14:

Thomas A. Carr,
City Attorney