

DISTRICT COURT, BOULDER COUNTY, COLORADO

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

**Petitioner:**

THE CITY OF BOULDER, a Colorado Home Rule City,

v.

**Respondents:**

PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation, d/b/a XCEL ENERGY; U.S. BANK NATIONAL ASSOCIATION; and PAUL WEISSMANN, in his official capacity as Treasurer of Boulder County.

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**COURT USE ONLY**

Case Number: 2019CV31226

Division: 3

**ANSWER TO PETITION IN CONDEMNATION, AFFIRMATIVE DEFENSES, AND  
CROSS-PETITION**

Respondent, Public Service Company of Colorado, a Colorado corporation (“PSCo”), through its counsel, Faegre Baker Daniels LLP, hereby answers each allegation of the Petition in Condemnation (“Petition”) filed by the City of Boulder (“Boulder”); asserts its affirmative defenses; submits a Cross-Petition pursuant to C.R.S. § 38-1-109; and elects a commission pursuant to C.R.S. § 38-1-105.

## ANSWER

1. PSCo admits the allegations in Paragraph 1 of the Petition.
2. PSCo admits that the cited provisions grant authority to condemn in certain instances but denies that Boulder has legal authority to condemn pursuant to those provisions here. PSCo denies the remaining allegations in Paragraph 2 of the Petition.
3. PSCo admits that Colorado Constitution Article XX, sections 1 and 6 grant condemnation authority in certain instances but denies that Boulder has legal authority to condemn pursuant to those provisions here and denies the remaining allegations in Paragraph 3 of the Petition.
4. PSCo denies that Boulder has accurately quoted Article XV, section 8. PSCo admits that Paragraph 4 contains an accurate quote of a portion of Article XX section 1. PSCo denies that Boulder is properly exercising condemnation powers pursuant to these sections here and denies the remaining allegations in Paragraph 4 of the Petition.
5. PSCo admits that it owns and operates existing electric distribution facilities and other property interests, and other related entities may also have an interest. PSCo denies the remaining allegations in Paragraph 5 of the Petition. PSCo also denies that Boulder has adequately described the property to be acquired in these proceedings.
6. PSCo denies the allegations in Paragraph 6 of the Petition.
7. PSCo denies the allegations in Paragraph 7 of the Petition.
8. PSCo admits the allegations in Paragraph 8 of the Petition.
9. PSCo admits that it owns existing electric distribution facilities and other property interests in and near the City of Boulder and throughout the State of Colorado. Other related entities may also have an ownership interest. PSCo denies the remaining allegations in Paragraph 9 of the Petition.
10. PSCo admits that U.S. Bank serves as trustee under certain Indenture instruments encumbering some lands and interests of PSCo used in its electric utility business. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the remaining allegations in Paragraph 10 of the Petition and therefore denies the same.
11. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the allegations in Paragraph 11 of the Petition and therefore denies the same.
12. PSCo denies the allegations in Paragraph 12 of the Petition.

13. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the allegations in Paragraph 13 of the Petition and therefore denies the same.

14. PSCo admits that this action is brought in Boulder County. PSCo also admits that it owns existing electric distribution facilities and other property interests in Boulder County. Other related entities may have an ownership interest. PSCo denies the remaining allegations in Paragraph 14 of the Petition.

15. PSCo admits that the rule authorizes venue in Boulder County but denies that venue is proper here under the circumstances of this case. PSCo denies the remaining allegations in Paragraph 15 of the Petition.

16. PSCo denies the allegations in Paragraph 16 of the Petition.

17. PSCo denies the allegations in Paragraph 17 of the Petition.

18. PSCo denies the allegations in Paragraph 18 of the Petition.

19. PSCo admits that the Colorado Constitution grants Boulder authority to condemn in some instances but denies that Boulder has legal authority to condemn here. PSCo denies that Boulder has authority to condemn any property interests owned by it or other related entities inside substations for the additional reason that the Colorado Public Utilities Commission (“PUC”) denied Boulder’s request to approve the designation of any assets inside substations for potential transfer to Boulder through condemnation. PSCo denies the remaining allegations in Paragraph 19 of the Petition.

20. PSCo admits that it owns over 100,000 pieces of equipment in and around the City of Boulder, including the types of facilities described in Paragraph 20 of the Petition. Other related entities may also have an ownership interest. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the remaining allegations in Paragraph 20 of the Petition and therefore denies the same.

21. PSCo admits that changes to its electric distribution system are sometimes made. PSCo admits that it provided certain information about its system to Boulder at various times but denies that PSCo provided the Exhibits attached to the Petition.<sup>1</sup> PSCo denies that plans for future

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<sup>1</sup> PSCo is inhibited in its ability to answer the Petition because Boulder has not served a full version of Exhibit 1 or any version of Confidential Exhibits 2 and 3 on PSCo in these proceedings and Exhibit 1 cannot be located by following the directions to Boulder’s website contained on Public Exhibit 1 attached to the Petition. Boulder’s allegation, in Paragraph 28 of the Petition, that “Confidential Exhibits 2 and 3 have been provided to Xcel” and its cross reference to an inaccurate website address in Exhibit 1, and referencing documents on that website that have been modified over time, are insufficient in a proceeding in which Boulder seeks to exercise the power of eminent domain to take property from PSCo. This is particularly true given changes to documents purporting to identify facilities, real property and GIS system mapping that have differed over time

amendments to the Petition are an appropriate substitute for adequately identifying the property to be taken in the first instance. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the remaining allegations in Paragraph 21 of the Petition and therefore denies the same.

22. PSCo admits that Boulder has provided PSCo with certain spreadsheets and GIS mapping as part of prior PUC proceedings and condemnation cases relating to some of PSCo's property interests. PSCo denies that Boulder has provided any spreadsheets or GIS mapping as part of this case and is therefore is without sufficient information or knowledge regarding the remaining allegations in Paragraph 22 of the Petition and therefore denies the same.

23. PSCo admits that certain information relating to its facilities and property interests are CEII but is without sufficient information or knowledge regarding the truth or accuracy of the remaining allegations in Paragraph 23 and therefore denies the same.

24. Paragraph 24 of the Petition contains an assertion about what Boulder intends to do (but has not done as of the time of filing this Answer) that requires no response by PSCo.

25. PSCo admits that it owns some of the property interests discussed in Paragraph 25 of the Petition. PSCo denies that the allegations in Paragraph 25 constitute an adequate description of the property to be acquired in these proceedings. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the remaining allegations in Paragraph 25 of the Petition and therefore denies the same, including subparts 25(A) through (C). PSCo states that Boulder has not served PSCo with or otherwise provided in these proceedings a full version of Exhibit 1 or any version of Confidential Exhibits 2 or 3. PSCo further states that the "Public Exhibit 1" referenced in subpart (A) and attached to the Petition does not contain accurate directions to find the alleged "spreadsheet that contains 1597 pages identifying the facilities individually" on Boulder's website, nor would a 1597 page spreadsheet conform with the exhibit approved by the PUC designating certain assets for potential transfer to Boulder. PSCo further states that documents found on Boulder's website containing a list of some PSCo facilities have been modified over time through Boulder updates to the site and could be modified again, such that it is impossible to know what Boulder intends to take by referencing a website subject to change.

26. PSCo admits that the PUC approved the designation of certain assets outside substations for potential transfer from PSCo to Boulder in Decision No. C19-0874, which speaks for itself. PSCo is without sufficient information or knowledge regarding the full version of Public

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and various PUC rulings relating thereto. PSCo has no way of knowing what is contained in the exhibits referenced in the Petition but not served upon PSCo. PSCo is entitled to service of all exhibits in which Boulder purports to describe the property it is acquiring. PSCo cannot adequately respond to the Petition or defend itself in these proceedings without this information. Finally, PSCo's ability to fully respond to the Petition also depends upon Critical Energy Infrastructure Information ("CEII") information and other confidential data that cannot be disclosed absent orders protecting its confidentiality that Boulder has not yet sought.

Exhibit 1 or Confidential Exhibit 2 to respond to the remaining allegations in Paragraph 26 and therefore denies the same.

27. PSCo admits that it owns some of the property interests discussed in Paragraph 27 of the Petition. PSCo denies that Paragraph 27 identifies all of the property being taken or damaged by Boulder and denies that the allegations in Paragraph 27 constitute an adequate description of the property to be acquired. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the remaining allegations in Paragraph 27 of the Petition, including subparts 27(A) through (F), and therefore denies the same.

28. PSCo denies that Boulder served Confidential Exhibits 2 and 3 on PSCo. PSCo denies the remaining allegations in Paragraph 28 of the Petition.

29. Paragraph 29 of the Petition contains an assertion about what Boulder intends to do (but has not done as of the time of filing this Answer) that requires no response by PSCo.

30. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the allegations in Paragraph 30 of the Petition and therefore denies the same.

31. PSCo admits that the PUC approved the designation of certain assets outside substations for potential transfer from PSCo to Boulder in Decision No. C19-0874, which speaks for itself. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the remaining allegations in Paragraph 31 of the Petition and therefore denies the same.

32. PSCo admits that it provided information about certain real property interests to Boulder as part of the PUC proceedings but is without sufficient information or knowledge regarding the truth or accuracy of the remaining allegations in Paragraph 32 of the Petition and therefore denies the same.

33. PSCo admits that it has constructed, operated, and maintained facilities in and near the City of Boulder for many years. PSCo denies the remaining allegations in Paragraph 33 of the Petition.

34. PSCo admits that Exhibit 4 (which is also labeled as Exhibit 5 on the second page) contains an Easement Sharing Agreement entered into by Boulder and PSCo, which speaks for itself. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the remaining allegations in Paragraph 34 and therefore denies the same.

35. PSCo denies the allegations in subparts 35(A) through (D) and subparts 35(G) through (I) of Paragraph 35. PSCo admits that Boulder has indicated that it is not seeking to acquire any transmission or generation facilities for electricity or distribution or transmission facilities for natural gas, but PSCo states that some or all of these facilities and property and business interests related thereto will be taken or damaged as a result of Boulder's condemnation. PSCo denies the remaining allegations in Paragraph 35 of the Petition.

36. PSCo admits that Boulder has developed a general “Separation Plan” but denies that the Separation Plan is properly considered part of the “Project” as that term is used in Colorado condemnation law and denies that the Separation Plan has been determined since final design is not complete and since Boulder has not indicated what its new plan will be regarding the construction of substations, and the resulting change in distribution system acquisition and design, given that the PUC has made clear that Boulder cannot condemn any assets inside substations. PSCo denies the remaining allegations in Paragraph 36 of the Petition.

37. PSCo denies that Paragraph 37 properly describes a “Project” as that term is used in Colorado condemnation law. PSCo further denies that there is any project for which Boulder can acquire PSCo’s property because (i) the PUC denied Boulder’s request to approve the designation of any assets inside substations for potential transfer to Boulder through condemnation and (ii) because Boulder itself has indicated that it does not know whether it will ever proceed with any project or acquire any of the property it purports to identify in the Petition. PSCo further denies that Boulder can acquire through condemnation any rights to install any equipment inside existing PSCo substations as alleged in subpart B or use condemnation proceedings to acquire PSCo assets inside substations to interconnect as alleged in subpart C. PSCo denies the remaining allegations in Paragraph 37 of the Petition, including its subparts.

38. PSCo admits that Boulder has indicated it does not intend to actually acquire any property or actually proceed with any project unless and until certain conditions that would transpire after this case is over are met, including the conditions alleged in Paragraph 38. PSCo denies the remaining allegations in Paragraph 38.

39. PSCo denies the allegations in Paragraph 39 of the Petition and states that Boulder has no right or authority to make any of the connections or acquire any of the substations listed in Paragraph 39. PSCo further states that the SIS Report and the Facilities Study Reports were prepared at the request of Boulder in order for Boulder to obtain potential design and cost information as part of Boulder’s on-going evaluation of whether to create its own municipal utility but the existence of the study reports does not give Boulder any rights to acquire any of PSCo’s property inside any substations or to make or require to be made any of the modifications described in Paragraph 39 as to any of the existing PSCo substations. Finally, PSCo states that references to the “Future acquisition of substation facilities and property in accordance with applicable law” are not an appropriate substitute for adequately identifying the property to be taken and the project for which they are needed in the first instance. PSCo is without sufficient information or knowledge regarding the truth or accuracy of the remaining allegations in Paragraph 39 of the Petition and therefore denies the same.

40. Paragraph 40 of the Petition contains legal conclusions that PSCo denies. PSCo admits that Boulder has indicated it does not intend to acquire any electric generation or transmission facilities, any natural gas facilities, or any property interests necessary for such facilities, but states that some of these interests are being taken or damaged by Boulder. PSCo denies the remaining allegations in Paragraph 40.

41. PSCo denies the allegations in Paragraph 41 of the Petition and further states they are inconsistent with other Boulder allegations in the Petition, including but not limited to Paragraph 39.

42. PSCo admits that Paragraph 42 contains an accurate quote of part of a sentence contained in the 2017 PUC Decision but denies that Paragraph 42 accurately states either the substance of paragraph 114 of the 2017 PUC Decision or the complete findings of the PUC. PSCo further denies any implication that the 2017 PUC Decision designated any PSCo assets inside substations for transfer to Boulder. PSCo states that the 2017 PUC Decision speaks for itself. PSCo denies the remaining allegations in Paragraph 42 of the Petition.

43. PSCo denies the allegations in Paragraph 43 of the Petition and states that the Cost Agreement speaks for itself.

44. Paragraph 44 of the Petition contains legal conclusions that PSCo denies. PSCo denies any remaining allegations in Paragraph 44 of the Petition.

45. PSCo admits that voters in Boulder adopted Ballot Question 2C, which speaks for itself, on November 1, 2011. The remaining allegations in Paragraph 45 of the Petition are legal conclusions and PSCo denies the same.

46. PSCo admits that voters in Boulder adopted Ballot Question 2O, which speaks for itself, on November 7, 2017. The remaining allegations in Paragraph 46 of the Petition are legal conclusions and PSCo denies the same.

47. PSCo admits that the Boulder City Council adopted Ordinance No. 7918, which speaks for itself, on August 20, 2013. The remaining allegations in Paragraph 47 of the Petition are legal conclusions and PSCo denies the same.

48. PSCo admits that Boulder filed a Petition in Condemnation, naming both PSCo and Xcel Energy, Inc. as respondents, on July 17, 2014 in the case numbered 14-CV-30890, which pleading speaks for itself. PSCo denies the remaining allegations in Paragraph 48 of the Petition.

49. PSCo admits that it and Xcel Energy, Inc. filed a Motion to Dismiss on August 12, 2014, which speaks for itself. PSCo denies the remaining allegations in Paragraph 49 of the Petition.

50. PSCo admits that the court granted the Motion to Dismiss on February 13, 2015. The remaining allegations in Paragraph 50 of the Petition are legal conclusions and PSCo denies the same. PSCo states that the District Court's order speaks for itself.

51. PSCo admits that on January 28, 2014, the Boulder County District Court in Case No. 2014-CV030047 granted Boulder's Petition for Writ of Certiorari or Review of the PUC's Decision No. C13-1530 dated October 29, 2013 and Decision No. C13-1550 dated December 18,

2013 in Proceeding No. 13D-0498E. PSCo denies the remaining allegations in Paragraph 51 of the Petition.

52. PSCo admits that on January 14, 2015, the District Court issued a decision, which speaks for itself, affirming the PUC's October 29, 2013 Decision No. C13-1350 and December 11, 2013 Decision No. C13-1550. The remaining allegations in Paragraph 52 of the Petition are legal conclusions and PSCo denies the same.

53. PSCo states that the January 14, 2015 District Court decision speaks for itself. The remaining allegations in Paragraph 53 of the Petition are legal conclusions and PSCo denies the same.

54. PSCo denies the allegations in Paragraph 54 of the Petition.

55. PSCo admits that on July 7, 2015, Boulder filed an application with the PUC in Proceeding No. 15A-0589E, which speaks for itself. PSCo denies the remaining allegations in Paragraph 55 of the Petition.

56. PSCo admits that on December 30, 2015, the PUC issued a decision dismissing a portion of Boulder's application, which speaks for itself. The remaining allegations in Paragraph 56 of the Petition are legal conclusions and PSCo denies the same.

57. PSCo admits that Boulder filed a Second Application, which speaks for itself, on or about September 28, 2016. The remaining allegations in Paragraph 57 of the Petition are legal conclusions and PSCo denies the same.

58. PSCo admits that Boulder filed a Third Application on or about May 12, 2017, which speaks for itself. The remaining allegations in Paragraph 58 of the Petition are legal conclusions and PSCo denies the same.

59. PSCo admits the allegations in Paragraph 59 of the Petition.

60. Paragraph 60 of the Petition contains legal conclusions and PSCo denies the same. PSCo denies any remaining allegations in Paragraph 60 of the Petition.

61. PSCo admits that on October 26, 2018, Boulder and PSCo filed a Joint Notice of Filing of Permanent Easement Agreement, Cost Agreements, and Corrected List of Assets Outside Substations and Boulder's Report Regarding the Commencement of Condemnation Proceedings. PSCo denies the remaining allegations in Paragraph 61 of the Petition.

62. PSCo admits that it filed a Notice of objections to the list of assets or, in the alternative, a motion for leave to file out of time objections to the asset list and request for hearing but denies that it filed a Notice of Withdrawal from the list of assets and denies the remaining allegations in Paragraph 62 of the Petition.



63. PSCo denies the allegations of Paragraph 63 of the Petition. PSCo states that it and IBM disputed the inclusion of certain PSCo assets on the list of facilities (including the portion of all assets inside substations, assets serving IBM, and other assets) and requested that the disputed assets be stricken from the list of assets and the PUC granted that request in its final decision on October 28, 2019. PSCo denies that Exhibit 5A contains all facilities that may be taken or damaged by Boulder if this case proceeds. PSCo denies the remaining allegations in Paragraph 63 of the Petition.

64. PSCo denies the allegations in Paragraph 64 of the Petition.

65. PSCo denies the allegations in Paragraph 65 of the Petition and states that the 2017 PUC Decision speaks for itself.

66. PSCo denies the allegations in Paragraph 66 of the Petition and states that the 2017 PUC Decision speaks for itself.

67. PSCo denies the allegations in Paragraph 67 of the Petition. PSCo states that neither the project nor the property sought to be acquired have been sufficiently defined in the Petition, Boulder has admitted it may change both of them over time, and Boulder lacks any present intent to actually proceed with a project or to acquire any property from PSCo.

68. PSCo admits that Boulder filed a Petition in Condemnation on June 28, 2019 in Civil Action No. 2019CV030637. PSCo denies the remaining allegations in Paragraph 68 of the Petition.

69. PSCo admits that it filed a Motion to Dismiss the First Amended Petition in Condemnation in Civil Action No. 2019CV030637 on August 5, 2019. PSCo denies the remaining allegations in Paragraph 69 of the Petition.

70. PSCo admits that the Court dismissed Boulder's First Amended Petition in Condemnation in Civil Action No. 2019CV030637 on September 4, 2019. The Court's order speaks for itself. PSCo states that Boulder has appealed that order and is seeking C.A.R. 50 review from the Colorado Supreme Court. PSCo denies the remaining allegations in Paragraph 70 of the Petition.

71. PSCo admits that the PUC issued Decision No. C19-0874, which speaks for itself, on October 28, 2019, and a copy of the decision is attached to the Petition as Exhibit 6. PSCo states that, as to assets inside substations, Decision No. C19-0874 also referred to its Decision No. C19-0805-I, which affirmed again that the 2017 PUC Decision denied Boulder's request that the Commission approve the designation of assets *inside* substations for potential transfer from PSCo to Boulder through condemnation. The remaining allegations in Paragraph 71 of the Petition are legal conclusions and PSCo denies the same.

72. PSCo denies the allegations in Paragraph 72 of the Petition. PSCo states that the 2017 PUC Decision denied Boulder's request for designation of assets inside substations for

potential transfer from PSCo to Boulder and held that, absent agreement between PSCo and Boulder on the transfer of assets inside substations, Boulder would need to build its own new substations to serve its municipal customers. PSCo further states that the PUC affirmed this holding from the 2017 PUC Decision in Decision No. C19-0805-I, issued September 30, 2019. Finally, PSCo states that the PUC did not, in the 2017 PUC Decision or in any other Decision, relinquish or delegate its jurisdiction over the transfer of PSCo assets to FERC or any FERC process.

73. PSCo admits that Boulder submitted its Transmission-to-Load Interconnection Request on January 9, 2018 and that PSCo issued a System Impact Study Report on October 31, 2018, both of which speak for themselves. PSCo denies that the existence of the SIS Report and subsequent SIS and other preliminary reports, gives Boulder any rights under condemnation law or any FERC laws or processes, including the OATT process, to acquire any of PSCo's assets inside any substations. PSCo denies the remaining allegations in Paragraph 73 of the Petition.

74. PSCo denies the allegations in Paragraph 74 of the Petition. PSCo denies that the existence of the SIS Report and subsequent SIS and other preliminary reports, or any alleged Boulder "acceptance" thereof, gives Boulder any rights under condemnation law or any FERC laws or processes, including the OATT process, to acquire any of PSCo's assets inside any substations.

75. PSCo denies the allegations in Paragraph 75 of the Petition. PSCo states that the SIS Report was prepared at the request of Boulder in order for Boulder to obtain potential design and cost information regarding particular substation proposals made by Boulder as part of Boulder's on-going evaluation of whether to create its own municipal utility; the existence of the SIS Report, and subsequent SIS and other preliminary reports, does not give Boulder any rights under condemnation law or any FERC laws or processes, including the OATT process, to acquire any of PSCo's assets inside any substations.

76. PSCo states that the SIS Report, subsequent SIS reports, and documents related thereto speak for themselves. PSCo denies that the SIS Report and subsequent SIS and other preliminary reports, give Boulder any rights under condemnation law or any FERC laws or processes, including the OATT process, to acquire any of PSCo's assets inside any substations. The remaining allegations in Paragraph 76 of the Petition are legal conclusions and PSCo denies the same.

77. PSCo states that no "Substation Asset list" has been identified in the Petition. PSCo states that the SIS Report, subsequent SIS reports, and documents related thereto speak for themselves. PSCo denies that the SIS Report and subsequent SIS and other preliminary reports, give Boulder any rights under condemnation law or any FERC laws or processes, including the OATT process, to acquire any of PSCo's assets inside any substations. The remaining allegations in Paragraph 77 of the Petition are legal conclusions and PSCo denies the same.

78. PSCo admits that it entered into a Facilities Study and Detailed Engineering Design Agreement with Boulder dated as of May 6, 2019, which speaks for itself. PSCo denies that the

Facility Study Agreement was negotiated pursuant to any application by the City and denies that the Facility Study Agreement is the next phase of an OATT process. PSCo states that the Facility Study Agreement was negotiated at the request of Boulder in order for Boulder to obtain additional design and cost information as part of Boulder’s on-going evaluation of whether to create its own municipal utility but the existence of the Facility Study Agreement and the studies and design drawings being done pursuant to the Facility Study Agreement, do not give Boulder any rights under condemnation law or any FERC laws or processes, including the OATT process, to acquire any of PSCo’s assets inside any substations. The remaining allegations in Paragraph 78 of the Petition are legal conclusions and PSCo denies the same.

79. PSCo admits that preliminary facilities studies were done and Facility Reports completed. PSCo denies that the existence of the Facility Reports, or any alleged Boulder “acceptance” thereof, gives Boulder any rights under condemnation law or any FERC laws or processes, including the OATT process, to acquire any of PSCo’s assets inside any substations. The remaining allegations in Paragraph 79 of the Petition are legal conclusions and PSCo denies the same.

80. PSCo denies the allegations in Paragraph 80 of the Petition.

81. PSCo denies the allegations in Paragraph 81 of the Petition. PSCo denies that Boulder can acquire PSCo assets inside substations through the OATT process.

82. PSCo admits that certain SIS Agreements and the Facilities Study Agreement were filed with the FERC in the Docket numbers referenced and were accepted for filing, which documents speak for themselves. The remaining allegations in Paragraph 82 of the Petition are legal conclusions and PSCo denies the same.

83. PSCo admits that Boulder City Council adopted Ordinance 8302, which speaks for itself, on or about December 4, 2018 and that a copy of the Ordinance is attached as Exhibit 7 to the Petition. PSCo denies the remaining allegations in Paragraph 83 of the Petition.

84. PSCo denies the allegations in Paragraph 84 of the Petition.

85. PSCo admits that a right-of-way agent sent a letter titled “Notice of Intent to Acquire and Final Offer” on November 20, 2019, and subsequently representatives of PSCo met with representatives of Boulder. PSCo denies the remaining allegations in Paragraph 85 of the Petition.

86. PSCo denies the allegations in Paragraph 86 of the Petition.

87. PSCo denies the allegations in Paragraph 87 of the Petition.

88. PSCo denies the allegations in Paragraph 88 of the Petition.

89. PSCo denies the allegations in Paragraph 89 of the Petition.

90. PSCo denies the allegations in Paragraph 90 of the Petition.
91. PSCo denies the allegations in Paragraph 91 of the Petition.
92. PSCo denies the allegations in Paragraph 92 of the Petition.
93. PSCo denies the allegations in Paragraph 93 of the Petition.

### **AFFIRMATIVE DEFENSES<sup>2</sup>**

1. As set forth in PSCo's Motion to Dismiss filed contemporaneously with this Answer, the Court either lacks subject matter jurisdiction over this action or should dismiss this action under its inherent authority because this condemnation action is duplicative of a pending condemnation action (Boulder County District Court Case No. 2019CV30637) and Boulder has no right to maintain two separate actions against PSCo involving the same subject matter at the same time brought in the same court. PSCo's Motion to Dismiss should be ruled upon before any further action is taken by the Court in these proceedings.

2. The Court also lacks subject matter jurisdiction over this action because Boulder does not presently intend to take any property through these condemnation proceedings or move forward with the project alleged in the Petition and thus has failed to invoke this Court's jurisdiction to conduct an eminent domain action.

3. Portions of Boulder's Petition are barred by claim and issue preclusion.

4. Portions of Boulder's Petition are barred by controlling PUC decisions.

5. The Petition fails to state a claim upon which relief can be granted.

6. The Petition does not contain a sufficient description of the property sought to be acquired by Boulder.

7. Boulder does not currently possess the legal authority to condemn PSCo's property for the purposes stated in the Petition.

8. Boulder never made the required necessity determination for the property it attempts to describe in the Petition and no such necessity exists.

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<sup>2</sup> As discussed in footnote 1 with respect to the Answer, PSCo is limited in its ability to assert affirmative defenses because the Petition is based on information that PSCo has not been served with. PSCo's ability to fully respond to the Petition also depends upon CEII information and other confidential data that cannot be disclosed absent orders protecting its confidentiality that Boulder has not yet sought.

9. Boulder never made the required public purpose or public use determinations for the project or the property it attempts to describe in the Petition and no such public purpose or public use exists.

10. Boulder has not negotiated in good faith with PSCo for the acquisition of PSCo's property.

11. Boulder has not complied with all conditions precedent to filing its condemnation action.

12. The Petition by its own terms recognizes that this action is premature and uncertain, and that Boulder has no present authority or intent to go forward with the project or the acquisition of any property from PSCo.

13. Any decision made by Boulder's staff, employees, consultants or attorneys with respect to the project, the property, or the public purposes and necessity associated therewith constitute an unlawful delegation of condemnation powers by Boulder.

14. The Petition implicates facilities, property, property interests, business and contract interests that may be taken or damaged and that are held by third parties who should be joined pursuant to C.R.C.P. 19(a) or, if joinder is not feasible, these parties are indispensable pursuant to C.R.C.P. 19(b). These third parties include but are not limited to Xcel Energy Services, Inc.; IBM; Tri-State Generation and Transmission Association; Poudre Valley REA, holders of various agreements between PSCo and third parties referenced in Paragraph 27(F) of the Petition and other such agreements; underlying fee owners and other third parties affected by the real property interests Boulder may seek to acquire.

15. One of the forms of relief requested by Boulder is that PSCo be ordered to make certain regulatory filings before regulatory tribunals. This form of relief is not available in a condemnation action, which is a special proceeding that is limited to a determination of whether the condemnor is properly exercising the power of eminent domain and, if it is, just compensation for the taking of the subject property interests.

16. PSCo reserves the right to raise any additional defenses or other matters at an *in limine* hearing as provided for in C.R.S. § 38-1-105, -109 and other relevant laws.

17. If additional facts come to light that are relevant to any of PSCo's defenses, PSCo reserves the right to amend its answer to allege such facts.

## CROSS-PETITION

1. Boulder's Petition named PSCo as a respondent and alleged that PSCo has an interest in the property being acquired by Boulder.

2. The Petition includes allegations about the property to be acquired from PSCo, but the description of the property is ambiguous, inconsistent, and indefinite. The Petition does not satisfy the requirements for an adequate description of the property to be acquired under the relevant Colorado statute or case law.

3. The PUC denied Boulder's request to approve the designation of any assets inside substations for potential transfer from PSCo to Boulder through condemnation. This denial precludes Boulder from condemning PSCo's assets inside substations and leaves Boulder with the option of either reaching agreement with PSCo on the purchase of assets inside substations or building its own substations. The description of Boulder's taking is ambiguous, inconsistent, and indefinite in part because it is unclear whether or how Boulder intends to address the substation issue. As a result, PSCo cannot fully describe all of the property interests omitted from the Petition which will be taken or damaged by Boulder if this action proceeds. The list of impacted property interests below is therefore necessarily a partial list.

4. Additional issues limiting PSCo's ability to identify the errors and omissions in Boulder's property description are (1) Boulder's failure to serve a full version of Exhibit 1 or any version of Confidential Exhibits 2 and 3 on PSCo in these proceedings; and (2) the fact that the Petition is based on highly confidential information that cannot be disclosed to the Court or to third parties absent a protective order.

5. The Petition omitted certain property interests owned by PSCo which will be taken or damaged by Boulder if a condemnation action by Boulder is authorized to proceed, including but not limited to the following:

- a. Additional facilities, equipment, and appurtenances not identified in the Petition or inadequately described in the Petition;
- b. Additional real property interests not identified in the Petition or inadequately described in the Petition, including recorded and non-recorded easements, numerous easements previously identified by Boulder in GIS shape files as "City Easements" that contain recorded real property interests owned by PSCo, rights to use easements within subdivision plats, prescriptive and other common law easements, tariff easements, licenses, state law rights to use street right-of-way and other public property, rights granted or reserved by other instruments, and other rights to use real property;
- c. Interests in substations;
- d. Going concern, business goodwill, and revenue and other business losses;

- e. PSCo's certificate of public convenience and necessity giving it the exclusive right to provide bundled retail electric services (i.e. generation, transmission and distribution) to customers within Boulder city limits and the direct taking of and damages to PSCo's business related thereto;
- f. Contributions In Aid of Construction and other facilities and property provided to PSCo by third parties but not included in PSCo's Uniform System of Accounts;
- g. Stranded investments and assets associated with the distribution facilities and property to be acquired by Boulder;
- h. Stranded generation and transmission assets and investments;
- i. Impacts to PSCo's renewable energy portfolio;
- j. Losses related to PSCo's investments in Solar Rewards and DSM programs within Boulder and the surrounding area;
- k. Separation costs, easement replacement costs, true up costs, and other related damages, to the extent they are not otherwise addressed by agreements between the parties approved by the PUC;
- l. Damages to other real property, facilities, and business operations based upon Boulder's proposed shared use of easements and other property rights also containing electric distribution, transmission, or natural gas facilities to be retained by PSCo, or rights by PSCo to use such property rights for such other facilities that may be addressed at least in part by agreements between the parties;
- m. Personal property and equipment;
- n. Contract rights and agreements, technology systems and data, GIS and other facilities information and mapping, books, records, manuals, studies and reports, permits, approvals, licenses, other governmental and regulatory rights, engineering, accounting, legal, human resource, customer, and other intangibles;
- o. Impacts to PSCo's remaining electric distribution, transmission and generation facilities, real property, business interests and operations and customers outside Boulder served by PSCo; and
- p. All other property, facilities, equipment, personal property, business, contract, going concern, tangible and intangible interests being taken or damaged by Boulder's acquisition not specifically identified herein. PSCo reserves the right to identify such additional interests as this case proceeds and more information becomes available regarding the scope of Boulder's proposed project and property acquisitions.

6. C.R.S. § 38-1-109 provides that “[a]ny person not made a party to [an eminent domain] proceeding may become such by filing a cross petition at any time before the hearing, setting forth that he is an owner or has an interest in the property sought to be taken or damaged by the petitioner and stating the character and extent of such interest.”

7. A person who is already a party to an eminent domain proceeding may also file a cross-petition pursuant to C.R.S. § 38-1-109 to include additional property. *Scanland v. Bd. of Cnty. Comm’rs*, 46 P.2d 894, 895 (Colo. 1935); *Denver & R.G.R. Co. v. Griffith*, 31 P. 171, 172 (Colo. 1892).

8. Because PSCo’s property interests listed in this Cross-Petition will be taken or damaged by Boulder’s acquisition in this action, PSCo respectfully requests that these property interests be included in the proceedings.

WHEREFORE, PSCo prays as follows:

1. That the Court first consider and resolve PSCo’s Motion to Dismiss filed simultaneously with this Answer and Cross-Petition before taking any other action in this proceeding.

2. That, if the Motion to Dismiss is denied, the Court consider and resolve, *in limine*, all issues touching upon the sufficiency of the Petition and other challenges to the taking before this matter proceeds to a determination of just compensation.

3. That the Petition be dismissed and that PSCo be awarded its reasonable attorney fees and costs pursuant to C.R.S. § 38-1-122.

4. In the alternative, if the Petition is not dismissed, PSCo prays that the Court:

- a. Grant PSCo’s Cross-Petition and order that PSCo’s property interests listed in the Cross-Petition are included in these proceedings.
- b. Deny any request by Boulder that PSCo be ordered to make regulatory filings or complete other affirmative acts.
- c. Require Boulder to specifically and accurately identify all of the property it seeks to acquire so that the parties and the Court can fully evaluate legal challenges to the taking and determine the just compensation owed.
- d. Require Boulder to pay just compensation to PSCo pursuant to the provisions of Article II, Section 15 of the Colorado Constitution, and all other applicable laws relating to the taking of property for public use.



- e. Require Boulder to pay interest as provided by law pursuant to the provisions of Article I, Title 38 of C.R.S.
  - f. Require Boulder to pay all of the expenses incurred by PSCo in defending this proceeding as are appropriate under law including, but not limited to, all of PSCo's court costs, deposition costs, witness fees, expert witness fees, consultant fees, appraisal costs, attorney fees, and any other litigation expenses which are otherwise appropriate for Boulder to pay PSCo in eminent domain proceedings.
  - g. Should a sufficient award be entered, require Boulder to pay all of PSCo's attorney fees pursuant to C.R.S. § 38-1-122(1.5).
  - h. Grant such other and further relief that the Court deems appropriate.
5. PSCo, pursuant to C.R.S. § 38-1-105, demands a commission to determine the just compensation owed for the taking and damaging of its property.

Respectfully submitted this 27th day of January, 2020.

**FAEGRE BAKER DANIELS LLP**

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