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| <p>DISTRICT COURT, BOULDER COUNTY, COLORADO</p> <p>Court Address: 1777 6TH Street, Boulder Colorado 80302 303-441-3750</p> <hr/> <p>Petitioner:</p> <p>THE CITY OF BOULDER, a Colorado Home Rule City,</p> <p>v.</p> <p>Respondents:</p> <p>PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation, d/b/a XCEL ENERGY; MORGAN GUARANTY TRUST COMPANY OF NEW YORK; and PAUL WEISSMANN, in his official capacity as Treasurer of Boulder County.</p> <hr/> <p><i>Attorneys for Respondent, Public Service Company of Colorado, a Colorado Corporation</i> John R. Sperber, Atty. Reg. No. 22073 Sarah M. Kellner, Atty. Reg. No. 38111 FAEGRE BAKER DANIELS LLP 1144 Fifteenth Street, Suite 3400 Denver, Colorado 80202 Telephone: (303) 607-3500 Fax: (303) 607-3600 Email: jack.sperber@faegrebd.com sarah.kellner@faegrebd.com</p> | <p style="text-align: center;">COURT USE ONLY</p> <hr/> <p>Case Number: 19 CV 30637</p> <p>Division: 5</p> |
| <p>RESPONDENT’S MOTION FOR ATTORNEY FEES</p> | |

Respondent, Public Service Company of Colorado (“PSCo” or “Public Service”), by and through its undersigned counsel, submits the following Motion for Attorney Fees pursuant to C.R.S. § 38-1-122(1).

I. CERTIFICATE OF CONFERRAL

Consistent with C.R.C.P. 121, § 1-15(8), PSCo certifies it conferred in good faith with counsel for the City of Boulder (the “City”), who stated that the City opposes this Motion.

II. INTRODUCTION

In January 2015 the Boulder District Court held that the Colorado Public Utilities Commission (“PUC”) had exclusive jurisdiction to determine how PSCo’s facilities should be “assigned, divided, or jointly used” as part of Boulder’s municipalization efforts. *See* Exhibit 1 to PSCo’s Motion to Dismiss, January 14, 2015, Order Re: Judicial Review of the Colorado Public Utilities Commission Decisions (Case No. 14CV30047). That order made clear that “[s]uch a determination must be made prior to the City’s condemnation of property for utility municipalization.” The Boulder District Court also dismissed Boulder’s first attempt to condemn PSCo’s property before obtaining the necessary PUC approvals. *See* Exhibit 2 to PSCo’s Motion to Dismiss, February 13, 2015 Order in 2014CV30890.

Despite still not having any such PUC approvals, on December 4, 2018 Boulder’s City Council adopted an ordinance authorizing the condemnation of PSCo’s property. That ordinance was followed by a Notice of Intent to Acquire sent to PSCo on January 31, 2019, offers and other communications made to PSCo under threat of condemnation and, ultimately, the filing of this condemnation action on June 28, 2019. All these Boulder activities forced PSCo to incur substantial fees and costs to defend itself against the City’s attempt to acquire facilities and real property that was not yet approved by the PUC and to otherwise prepare for and participate in this condemnation litigation.

On September 4, 2019, this Court dismissed the City's Amended Petition in Condemnation on the basis that the PUC still retained exclusive jurisdiction over the separation and use of PSCo's property, making this action premature.

Such a dismissal entitles PSCo to recover of all of its reasonable attorney fees and costs incurred in connection with Boulder's condemnation effort under C.R.S. § 38-1-122(1). *See also Platte River Power Authority v. Nelson*, 775 P.2d 82, 83 (Colo. App.1989).

PSCo has been billed approximately \$677,000 in fees and costs for its outside eminent domain counsel from January 1, 2019 through the end of September. It has also incurred other outside counsel fees, expert witness fees and costs, and expended considerable internal legal and business resources responding directly to Boulder's threatened and actual condemnation litigation. PSCo is entitled to reimbursement of all such fees and costs. But due to the posture of this case and Boulder's stated intent to initiate condemnation proceedings again, PSCo is limiting the fees it seeks at this time to the work done since Boulder filed its improper condemnation action, and is further limiting its request to only the current case's litigation activities (as opposed to work with experts and other activities that may have some continued usefulness in a future condemnation case with Boulder). That amount totals \$210,748.15. The Court should order Boulder to reimburse PSCo the full amount of \$210,748.15 in attorney fees it seeks under C.R.S. § 38-1-122(1).

III. FACTUAL AND PROCEDURAL BACKGROUND

As this Court is aware from the Motion to Dismiss briefing and other information, Boulder's efforts to take PSCo's utility system and business began nearly a decade ago. The property at issue involves thousands of electric distribution facilities, the right to serve all electric utility customers within the City of Boulder, and hundreds of millions of dollars are in dispute.

Any condemnation case that ultimately proceeds will likely involve numerous issues of first impression under Colorado law and complex and highly contested engineering, operational, regulatory, legal and valuation issues. Sperber Affidavit ¶ 17.

Boulder's efforts to date have resulted in many years of litigation at the PUC and in other forums, including an earlier attempt by Boulder to file a condemnation case in July 2014, which was also dismissed while Boulder also sought to appeal PUC orders requiring it to obtain approvals from the Commission before acquiring PSCo's property. Although PSCo was entitled to its fees under C.R.S. § 38-1-122(1) following that dismissal, PSCo ultimately did not move for fees in that case. Sperber Affidavit ¶¶ 3-4. In response to these earlier Boulder District Court orders, the Parties returned to the PUC and have been engaged in extensive negotiations, litigation, and hearings relevant to the PUC's determination of what assets and real property can be subject to transfer. That determination was not made before Boulder filed this condemnation case.¹ Sperber Affidavit ¶ 5.

Leading up to the filing of this second condemnation case, Boulder began taking other actions that required PSCo to begin preparing for and responding to the threatened litigation. On December 4, 2018 Boulder passed an ordinance asking its staff to move forward with acquisition negotiations and ultimately condemnation of PSCo's property, all of which was still the subject of disputed PUC proceedings. Sperber Affidavit ¶ 6. Then, despite communications between the

¹ Since the time of this Court's dismissal, the PUC filed an order on September 30, 2019 confirming its prior decision that Boulder cannot condemn any facilities or real property inside substations. As the Court is aware, the Amended Petition sought to acquire significant interests in four substations. On October 10, 2019 the PUC also indicated in oral deliberations that it will approve the designation of certain facilities and real property outside substations for potential transfer to Boulder identified on exhibits submitted by the parties which are materially different than the assets identified in the Amended Petition. A written Order from the PUC to that effect has not yet issued.

parties wherein PSCo made clear its position that condemnation and negotiations were premature given the pending PUC proceedings, on January 31, 2019 the City sent a formal Notice of Intent to PSCo notifying PSCo of its plan to condemn PSCo's property if necessary and authorizing PSCo to obtain an appraisal at Boulder's expense pursuant to C.R.S. § 38-1-121. Sperber Affidavit ¶ 7. That Notice of Intent was followed by a written offer to acquire on April 10, 2019. PSCo responded, again informing Boulder that it could not negotiate over assets and real property lists that were not final and had not been approved for transfer. Sperber Affidavit ¶ 8. Unwilling to acknowledge its actions were premature, the City sent PSCo its Final Offer to acquire on June 12, 2019. Prior to PSCo's response to that Final Offer, the City filed its second Petition in Condemnation on June 28, 2019. Sperber Affidavit ¶ 8.

In response to Boulder's pre-condemnation actions described above and throughout 2019, PSCo began preparing for the City's threatened condemnation, including legal and valuation research, retention of expert witnesses, the further identification of real property interests and other work necessary for the condemnation litigation. Sperber Affidavit ¶ 9.

Shortly after the Petition in Condemnation was filed, Boulder also filed a Motion for Protective Order regarding certain exhibits relating to that filing. Sperber Affidavit ¶ 10. Prior to responding to that Motion, PSCo conferred with Boulder and explained that the exhibits were subject to PUC confidentiality orders and agreements prohibiting their use in other proceedings without PUC approval and suggested that rather than seeking a protective order from this Court, Boulder should seek an order from the PUC authorizing the use of those exhibits, or alternatively, that Boulder not use the confidential exhibits. Sperber Affidavit ¶ 10. Boulder refused, thus forcing PSCo to spend considerable time evaluating and responding to the Motion, as well as dealing with

the conundrum of how to prepare for a condemnation case based upon exhibits Boulder was relying upon that the PUC had precluded any party from using in other litigation. Sperber Affidavit ¶ 10. Only after PSCo's Response was filed did the City ultimately withdraw its Motion for Protective Order and file an Amended Petition in Condemnation removing the confidential exhibits. *See* Boulder July 22, 2019 filings. Sperber Affidavit ¶ 10.

On August 5, 2019, PSCo filed its Answer, Affirmative Defenses, and Cross-Petition, in which PSCo identified significant property interests impacted by Boulder's condemnation but not included in the Petition, and further alleged that the City's Petition was not authorized by law for various reasons. Sperber Affidavit ¶ 11. On August 5, 2019, and consistent with PSCo's affirmative defenses in its Answer, PSCo also filed a Motion to Dismiss the Petition seeking dismissal for lack of subject matter jurisdiction (the "Motion to Dismiss"). Sperber Affidavit ¶ 12. PSCo's Motion to Dismiss once again pointed out the PUC's exclusive jurisdiction over the separation of the two systems and the fact that Boulder had already raised – and lost – on the issue of whether it could move forward with condemnation before a PUC decision. PSCo also filed a contested Motion for an early case management conference and a hearing pursuant to C.R.S. § 38-1-105 seeking to allow the parties to prepare for and conduct a hearing if needed to determine PSCo's other legal challenges. Sperber Affidavit ¶ 12. While these various motions were pending, the PUC and International Business Machines Corporation ("IBM") sought to intervene in the case and moved to dismiss the Petition on similar grounds as PSCo. Sperber Affidavit ¶¶ 13-14.

On September 4, 2019, the Court entered an Order granting PSCo's Motion to Dismiss the Petition for lack of subject matter jurisdiction, with the Court adopting PSCo's legal reasoning and conclusions as its own. Sperber Affidavit ¶ 15.

IV. ARGUMENT

A. When a condemnor is not authorized to condemn, C.R.S. § 38-1-122(1) entitles landowners to all reasonable fees incurred as a result of the improper condemnation.

Under C.R.S. § 38-1-122(1), a court shall reimburse a property owner for all reasonable fees and costs incurred when a petitioner brings an unauthorized condemnation action: “If the court finds that a petitioner is not authorized by law to acquire real property or interests therein sought in a condemnation proceeding, it shall award reasonable attorney fees, in addition to any other costs assessed, to the property owner who participated in the proceedings.” *See also Platte River Power Authority v. Nelson*, 775 P.2d 82, 83 (Colo. App.1989) (attorney fees awarded where case dismissed because of inadequate description of property); *Billington v. Yust*, 789 P.2d 196 (Colo. App. 1989) (attorney fees awarded when case for private way of necessity dismissed).

“The purpose of § 38–1–122 is to compensate a property owner who is required to incur costs when the condemning authority does not proceed properly.” *Fowler Irrevocable Tr. 1992-1 v. City of Boulder*, 992 P.2d 1188, 1199 (Colo. App. 1999), *aff’d in part, rev’d in part*, 17 P.3d 797 (Colo. 2001). *See also* Leslie A. Fields, *Colorado Eminent Domain Practice* 184, 2nd Ed. (CLE in Colo., Inc. 2017) (“C.R.S. § 38-1-122(1) mandates the payment of respondent’s reasonable attorney fees against the petitioner when the condemnation action is successfully dismissed on any legal ground, not just for lack of legal authority to condemn.”).

Here, PSCo incurred numerous fees and costs dating back at least to December 4, 2018, when Boulder adopted its ordinance authorizing condemnation of PSCo’s property before the PUC made its determination about assets for transfer. Its outside eminent domain counsel alone accrued more than \$900,000 in fees during that time at its standard hourly rates. Sperber Affidavit ¶ 29.

PSCo has also incurred substantial costs on other outside counsel, expert witnesses, and internal legal and business resources that would be recoverable.

PSCo, however, is opting to seek recovery of only a fraction of its fees and costs at this juncture. For example, it is not seeking fees or costs incurred to respond to Boulder's Notice of Intent and pre-filing threats of condemnation. Moreover, since Boulder has stated that it intends to continue pursuing its municipalization efforts, PSCo is willing to refrain from seeking fees now that may have some use in future condemnation litigation.² Finally, PSCo is not currently seeking any of the significant fees it has incurred relating to the PUC proceedings, its fees or costs associated with other outside counsel and experts, or the considerable legal and business time and resources expended by PSCo itself as a result of Boulder's pre- and post-filing condemnation activities. Instead, PSCo seeks only \$210,748.15 in fees at this juncture.³

As discussed in detail below, these fees were necessary to defend against Boulder's improper condemnation efforts and were incurred as a direct result of Boulder's decision to prematurely pursue condemnation now rather than waiting until the PUC issues a decision designating the assets that can be the subject of a condemnation case. The work associated with the claimed fees will not be transferable to any future condemnation case because they relate only

² PSCo reserves the right to seek those fees and costs in any future condemnation action Boulder may file. PSCo would be entitled to those fees if Boulder, once again, proceeds improperly and the case is dismissed or if PSCo recovers 130% or more of Boulder's final written offer before filing any future condemnation action. C.R.S. § 38-1-122.

³ All the charges reflected in Sperber Affidavit **Exhibit 3** through September 30, 2019 have been billed to PSCo and have been or will be paid by PSCo to our firm. Sperber Affidavit **Exhibit 3** lists only the attorney fees that have been incurred through September 30, 2019. PSCo reserves the right to supplement this request with any additional fees to be incurred in pursuing these and other post-trial matters.

to specific litigation activities required by this action. They should therefore be awarded in their entirety. Sperber Affidavit ¶¶ 31-33.

B. PSCo's Attorney Fees Were Reasonable

The attorney fees claimed by PSCo are reasonable. Under Colorado Rule of Professional Conduct 1.5, the factors to be considered in determining the reasonableness of attorney fees include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

The factors most relevant to PSCo's fee request are (1), (3), (4), and (7). As discussed below and as further documented in the Sperber Affidavit, all of these factors demonstrate that the fees PSCo seeks are reasonable.

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly all support PSCo's fee request.

Boulder's municipalization effort has been ongoing for almost a decade and, as described above, involves highly valuable assets and rights to serve. Boulder made a "final offer" of \$82 million to acquire PSCo's property before filing the case and has admitted that it will also need to incur approximately \$100 million in costs to separate the utility system. Sperber Affidavit ¶¶ 8, 17. PSCo contends that the just compensation owed for the taking of its property and business is significantly higher.

The property Boulder seeks to acquire is extraordinary in its scope and complexity. The City's Petition cites to a 1,597-page spreadsheet identifying just the electric distribution facilities the City sought to acquire from PSCo, Petition ¶ 24(A), and there are millions of lineal feet of right of way and real property interests involved. Many issues the parties will face if municipalization moves forward will be matters of first impression because there have been very few municipal condemnations of electric distribution systems in the modern era, and none in Colorado. Sperber Affidavit ¶ 17. The amount in dispute and the novelty and complexity of the legal, valuation, engineering, and utility issues raised in this matter necessitates hiring lawyers with significant and longstanding expertise in eminent domain and related utility work. A case of this magnitude also requires staffing it with a large number of lawyers, but each was tasked with specific areas of responsibility to efficiently address the multitude of issues involved. Sperber Affidavit ¶¶ 26, 31.

As described above, Boulder's actions also significantly increased the fees incurred in this case. Its reliance upon confidential exhibits from the PUC proceedings, including exhibits describing property still in dispute at the PUC, required a significant amount of work and added complexity to the proceedings. And its premature filing and insistence on moving forward as quickly as possible with this case in the face of many unknowns also increased costs and required PSCo to prepare for broader legal challenges, case management, and valuation issues at the same time it incurred costs associated with the Motion to Dismiss. Sperber Affidavit ¶¶ 26, 31.

All of the time spent on the legal work PSCo seeks to recover was reasonable, necessary, and incurred as a result of Boulder's improperly initiated condemnation proceedings.

2. *The rates charged were reasonable.*

The Colorado Supreme Court has held that “attorneys are entitled to an award of reasonable attorney fees at market rates for attorneys of comparable skill, experience and reputation.” *Am. Water Dev., Inc. v. City of Alamosa*, 874 P.2d 352, 387 (Colo. 1994) (emphasis supplied). An attorney fees award carries a “strong presumption of reasonableness” if it is based on the “number of hours reasonably expended multiplied by a reasonable hourly rate.” *Balkind v. Telluride Mountain Title Co.*, 8 P.3d 581, 587-88 (Colo. App. 2000); *see also Double Oak Constr., L.L.C. v. Cornerstone Dev. Int’l, L.L.C.*, 97 P.3d 140, 152 (Colo. App. 2003).

Appropriate bases to establish that a billing rate is reasonable in the community include testimony by the billing attorney, billing records, biographical information for the attorneys, and evidence of billing rates at other firms. *See Madison Capital Co. v. Star Acquisition VIII*, 214 P.3d 557, 561 (Colo. App. 2009) (affidavits of counsel); *Roget v. Grand Pontiac, Inc.*, 5 P.3d 341, 347 (Colo. App. 1999) (testimony of the attorney); *P&M Vending Co. v. Half Shell of Boston, Inc.*, 579 P.2d 93, 95-96 (Colo. App. 1978) (testimony of the attorney); *Crow v. Penrose-St. Francis Healthcare Sys.*, 262 P.3d 991, 999 (Colo. App. 2011) (billing records, affidavit from counsel, biographical information for counsel, and a sampling of hourly rates charged by other firms around the country).

As discussed above, the complexity of this case, novelty, and amounts in controversy requires counsel who are experienced and well-versed in eminent domain and valuation issues. The attorneys for which PSCo is seeking partial fee recoveries at this time have a combined 66 years of experience on eminent domain matters and have additional specialized knowledge regarding utility systems, property rights, and other related issues as a result of representing PSCo

for many years in condemnation cases as both condemnor and condemnee. Sperber Affidavit ¶ 26. Lead counsel, Jack Sperber has been handling condemnation matters for more than 25 years and has been involved in some of the largest and most complex condemnation proceedings in this state. Sperber Affidavit ¶¶ 18-21.

Attachments to the Sperber Affidavit include biographical information for PSCo's attorneys (**Exs. 1 and 2**), information about rates of comparable law firms, and an itemized list of redacted fee entries documenting the time spent by PSCo's attorneys for the specific activities PSCo seeks recovery for (**Ex. 3**). These materials demonstrate that FBD's standard hourly billing rates for the attorneys involved in this case are reasonable and within the range of fees charged by attorneys in comparable law firms and with comparable skill and experience in the community. Sperber Affidavit ¶¶ 22-29. The reasonableness of those rates is further demonstrated by the fact that PSCo is not seeking recovery of its law firm's standard hourly rates, but instead all fees have been discounted by at least 15% based upon a fee agreement negotiated on a firm-wide basis with PSCo's parent company Xcel Energy in recognition of the large volume of work the firm does across many offices and for many different Xcel Energy entities. Sperber Affidavit ¶¶ 22-24, 29. The total fees were reduced even further still – by approximately another 10% – due to billing judgment and other write offs, thus reducing PSCo's legal fees by a total of approximately 25%. Sperber Affidavit ¶¶ 29-30.

3. The results obtained justify the fees requested.

Finally, the results obtained justify PSCo's request. PSCo's legal efforts and time spent were successful in all regards. Boulder ultimately withdrew its Motion for Protective Order and amended its Petition to address the concerns raised in PSCo's Response to that Motion. And, more

importantly, this Court ultimately dismissed Boulder's condemnation action in its entirety, relying on the arguments in PSCo's Motion to Dismiss. Not all fees being claimed were incurred directly to respond to these specific motions. But all these fees, and many times more in total fees and costs, would not have needed to be incurred at all if Boulder had not moved forward with this case before it was lawfully allowed to do so. In an action of this magnitude, the small fraction of those fees that PSCo is seeking reimbursement for here are easily justified as a reasonable and necessary outcome of Boulder's action.

CONCLUSION

For the foregoing reasons, PSCo requests that the Court enter an Order: (1) finding PSCo's attorney fees of \$210,748.15 were reasonably incurred; (2) requiring Boulder to reimburse PSCo for those amounts pursuant to C.R.S. § 38-1-122(1); and (3) holding that PSCo has reserved its right to claim all other fees and costs incurred as a result of Boulder's municipalization and condemnation efforts not claimed in this motion should Boulder seek to file yet another condemnation case and it is ultimately determined that PSCo is entitled to fees and costs pursuant to C.R.S. § 38-1-122(1), (1.5), or other relevant law.

Respectfully submitted October 16, 2019.

FAEGRE BAKER DANIELS LLP

/s/ John R. Sperber

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 16, 2019, a copy of the foregoing **RESPONDENT'S MOTION FOR ATTORNEY FEES** was served on all counsel of record by the methods listed below:

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