

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 15A-0589E

IN THE MATTER OF THE APPLICATION OF THE CITY OF BOULDER, COLORADO FOR APPROVAL OF THE PROPOSED TRANSFER OF ASSETS FROM PUBLIC SERVICE COMPANY OF COLORADO TO THE CITY AND ASSOCIATED AUTHORIZATIONS AND RELIEF.

INTERIM DECISION DISMISSING PORTION OF APPLICATION; GRANTING MOTION TO SUPPLEMENT APPLICATION; PERMITTING DISCOVERY; AND ASSIGNING HEARING COMMISSIONER TO DISCOVERY DISPUTES

Mailed Date: December 30, 2015
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I. BY THE COMMISSION**A. Statement**

1. Through its Application for Approval of the Proposed Transfer of Assets from Public Service Company of Colorado and Associated Authorizations and Relief (Application), filed July 7, 2015, the City of Boulder (Boulder or City) requests the Commission approve the transfer of assets from Public Service Company of Colorado (Public Service or Company) to Boulder so that Boulder can operate a municipal utility. These assets include distribution facilities used solely to provide electric services to Public Service customers located outside the City.

2. On August 5, 2015, Public Service filed a Motion to Dismiss Boulder's Application, and on October 1, 2015, we requested supplemental briefing on the motion.

3. On September 23, 2015, Boulder filed its Motion for Leave to Supplement Application and for a 60-Day Discovery Period (Motion to Supplement Application).

4. By this Decision, the Commission invokes its jurisdiction over the services, assets, and facilities of public utilities operating outside the territorial boundaries of a municipal utility. We grant Public Service's Motion to Dismiss the portion of the Application seeking acquisition of facilities owned and used by Public Service solely to provide electricity to customers located outside the City. These facilities are subject to the doctrine of regulated monopoly, and absent any evidence that Public Service is unwilling or unable to provide service to these customers, the City may not acquire facilities used to serve these customers.

5. We grant Boulder's request to conduct discovery and to supplement its Application with additional proposals. We do not restrict discovery to only Boulder; any party may engage in discovery according to the Commission's Rules of Practice and Procedure.

B. Application

6. By its Application, Boulder seeks to acquire all of Public Service's distribution assets in an area—which Boulder refers to as its "Acquisition Area"—that includes the City of Boulder and parts of unincorporated Boulder County.¹

7. The following are the types of distribution facilities Boulder seeks Commission authority to acquire from Public Service:

- a) Overhead and underground distribution lines;
- b) Distribution transformers (pole and pad mount);
- c) Overhead and underground secondary and service conductors;
- d) Fiber optic and other communications equipment associated with the distribution system;
- e) Meters and other equipment;
- f) Easements and associated property rights for the electric distribution system;
- g) Streetlights and traffic signal lights owned by Public Service within the City limits; and,
- h) Secondary conductors serving streetlights within the Acquisition Area, but outside the City limits, up to the load side of the Point of Delivery, as defined in Public Service's PUC-approved electric tariff.²

¹ Boulder, Public Service, Staff of the Colorado Public Utilities Commission (Staff), the Colorado Office of Consumer Counsel, Tri-State Generation and Transmission Association, Inc., Climax Molybdenum Company, CF&I Steel, L.P., IBM, Inc., the Boulder Chamber of Commerce, the University of Colorado, and Leave BoCo Out, are parties in this proceeding. Poudre Valley Rural Electric Association and United Power, Inc. are participating jointly as *amicus curiae*.

² Boulder's Verified Application, filed on July 7, 2015, at 2-3.

8. Some of these assets serve only Public Service customers located outside of the Boulder city limits (extraterritorial customers). Boulder proposes to enter into an arrangement with Public Service by which Public Service would pay Boulder to use those facilities to provide electricity to Public Service's extraterritorial customers.

C. Motion to Dismiss

9. Public Service's Motion to Dismiss argues that Boulder's Application is incomplete under § 40-6-109.5, C.R.S., and Rule 1303(c) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. One of the grounds Public Service provides for incompleteness under Rule 1303(c) is that the doctrine of regulated monopoly precludes Boulder from acquiring the portion of Public Service's assets used exclusively to provide electricity services to extraterritorial customers, absent a showing of an unwillingness or inability to serve those customers.

10. Public Service also asserts that the Application is incomplete because it does not comply with Commission Decisions issued in Proceeding No. 13D-0498E (Declaratory Judgment Proceeding).³ Public Service argues that, in the Declaratory Judgment Proceeding, the Commission determined that it would decide separation issues, such as either: (a) a joint use agreement for any facilities used to provide service outside of Boulder, or (b) a plan to replace any of Public Service's assets that Boulder seeks authorization to acquire so Public Service can continue to provide electric service to its extraterritorial customers. The Motion also challenges the Application's request to acquire facilities without a showing, in this proceeding, that the transfer will not impair the reliability, adequacy, and safety of services provided to extraterritorial customers.

³ See Decision No. C13-1350, issued October 29, 2013, and Decision No. C13-1550, issued December 18, 2013, in Proceeding No. 13D-0498E. These decisions were affirmed by the Boulder District Court. Order re: Judicial Review of the Colorado Public Utilities Commission Decisions, *City of Boulder v. Pub. Utils. Comm'n.*, Case No. 14CV30047, issued January 14, 2015.

11. Staff filed a response supporting Public Service's Motion to Dismiss. In its response opposing the motion, Boulder argued that the Commission should deny Public Service's Motion to Dismiss because it asks the Commission to opine on the merits of the Application, not completeness.

12. We determined that Public Service's motion raises factual questions about how best to transfer Public Services assets to Boulder. We decided to construe Public Service's Motion to Dismiss, as it relates to the doctrine of regulated monopoly, as a motion to dismiss under Colorado Rules of Civil Procedure (C.R.C.P.) 12(b)(5) for failure to state a claim upon which relief can be granted.⁴ We directed the parties to file additional briefing on the application of the regulated monopoly doctrine to the portion of Boulder's Application that seeks to acquire facilities used exclusively to serve extraterritorial customers.

D. Briefs Supporting Dismissal Under C.R.C.P. 12(b)(5)

13. Public Service, Staff, and Poudre Valley Rural Electric Association and United Power, Inc. (jointly) filed briefs supporting dismissal under C.R.C.P. 12(b)(5). These parties argue that because Public Service owns the CPCN for the portion of the Acquisition Area outside of Boulder, and consequently, has the right and obligation to serve those customers, the doctrine of regulated monopoly requires that Public Service retain ownership of facilities used exclusively to serve those customers.

14. Additionally, because Boulder proposes to own all of the distribution facilities in the Acquisition Area, Public Service would have no control over the quality, reliability, or safety of the electric service provided to its customers. Public Service would therefore be impeded from fulfilling its obligations under its CPCN and the doctrine of regulated monopoly.

⁴ Decision No. C15-1079-I, ¶ 20, issued October 1, 2015.

15. Boulder filed a brief opposing dismissal. Boulder argues that the doctrine of regulated monopoly grants the certificated utility the right and obligation to serve its customers—provide them with electricity—not own and control all the facilities over which the electricity travels. According to Boulder, under its proposal, the City would be providing a service to Public Service, not to Public Service’s customers.

16. Boulder also argues that, under the joint use statute, § 40-4-105, C.R.S., the Commission has the authority to order one utility to serve its customers by using another utility’s facilities, if such joint use is in the public interest.

17. Boulder requests that the Commission not dismiss its entire application, even if the Commission determines that the doctrine of regulated monopoly precludes it from granting Boulder’s request to acquire all of the distribution facilities in the Acquisition Area. Boulder’s Application also seeks orders (e.g., approval of a transition plan and a power supply arrangement) that are independent of the asset transfer proposal. Boulder also references its pending Motion to Supplement its Application, which states that the City is willing to consider different transfer proposals after it has the opportunity to conduct discovery.

E. Motion to Supplement Application

18. Boulder’s Motion to Supplement Application proposes that, after conducting discovery, Boulder will file a Second Supplement with proposed alternatives to its original acquisition plan. These alternatives may include:

- Boulder wheeling power to its in-City customers over Public Service’s lines where feeders pass outside the City’s boundaries before reaching those customers;
- The utility with the majority of customers on an individual feeder line owning that feeder and allowing the other utility to wheel power over that feeder to serve its customers;
- Modification to the location and number of points of separation of the City’s and Public Service’s systems;

- The construction of additional facilities to address specific customer locations; and
- An interim plan incorporating distribution wheeling by both the City and Public Service to allow for an orderly transition and separation.⁵

19. Boulder's Motion to Supplement also requests that only the City be permitted to conduct discovery during an initial 60-day period. Boulder plans to use discovery to conduct an engineering review and alternatives analysis, and then supplement its Application with alternative proposals. After Boulder files its Second Supplement, it proposes that the interveners be permitted to conduct discovery.

20. IBM objects to allowing Boulder to file an Initial or Second Supplement to its Application before the Commission rules on the pending Motion to Dismiss and provides protections for confidential information. Staff, the University of Colorado, IBM, and Leave BoCo Out object to Boulder's request for unilateral discovery.

F. Doctrine of Regulated Monopoly

21. We have constitutional and statutory jurisdiction over the services, assets, and facilities of public utilities. Colo. Const. art XXV; § 40-4-101, C.R.S.; *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm'n.*, 763 P.2d 1020 (Colo. 1988). A threshold characteristic of a public utility is the dedication of the corporation's *property* to a public use. § 40-3-101(2); *Colo. Utils. Corp. v. Pub. Utils. Comm'n.*, 61 P.2d 849, 851 (Colo. 1936) (holding that a coal company was not a public utility because it did not dedicate its property to public use). Allowing public utilities to make a reasonable return on investments into property dedicated to public use also underlies the doctrine of regulated monopoly. *Denver and Rio Grande W. R.R. Co. v. Pub. Utils. Comm'n.*, 351 P.2d 278, 280 (Colo. 1960).

⁵ Boulder's Motion for Leave to Supplement Application and For a 60-Day Discovery Period, filed September 23, 2015, at 4.

22. Under the doctrine of regulated monopoly, a certificated utility has the right and obligation to provide service to all current and future customers in the utility's service area. § 40-5-101, C.R.S.; *Pub. Serv. Co. v. Trigen-Nations Energy Co.*, 982 P.2d 316, 324 n.9 (Colo. 1999); *Pub. Serv. Co. v. Pub. Utils. Comm'n.*, 765 P.2d 1015, 1021 (Colo. 1998).

23. We protect the rights of certificated utilities from competition in their certificated area. *See Ephraim Freightways, Inc. v. Public Utils. Comm'n.*, 151 Colo. 596, 599, 380 P.2d 228, 230-31 (1963) (holding that the PUC properly denied a permit to a common carrier because other common carriers were willing and able to provide adequate service in the area). In exchange, the certificated utility must provide service, at tariffed rates, to all customers in its certificated area. §§ 40-3-101, -102, C.R.S.

24. Public Service holds a certificate of public convenience and necessity (CPCN) to provide service to customers in the portion of the Acquisition Area outside of the Boulder city limits. The Commission has jurisdiction over Public Service's services, assets, and facilities that are used to serve these extraterritorial customers. *City of Loveland v. Pub. Utils. Comm'n.*, 580 P.2d 381, 383 (Colo. 1978); *City and County of Denver v. Pub. Utils. Comm'n.*, 507 P.2d 871, 875 (Colo. 1973).⁶ As affirmed by the Boulder District Court, we have jurisdiction over a municipal utility to the extent that it will serve customers outside of Boulder.⁷ *See Denver v. Public Utils. Comm'n.*, 181 Colo. 38, 46, 507 P.2d 871, 875 (1973).

⁶ See also Order re: Judicial Review of the Colorado Public Utilities Commission Decisions, *City of Boulder v. Pub. Utils. Comm'n.*, Case No. 14CV30047, affirming PUC Decision No. C13-1350, ¶ 28, which states:

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.

⁷ *Id.* at 11.

Thus, we 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 before Boulder can acquire any assets through eminent domain.⁸

25. The doctrine of regulated monopoly also provides that a certificated public utility cannot be forced to give up the exclusive right to provide service in its certificated service area without due process. In this instance, due process requires proof that the certificated utility is unwilling or unable to continue to serve its customers or to serve new customers in the certificated area. *Pub. Serv. Co. v. Trigen-Nations Energy Co.*, 982 P.2d at 324 n.9; *Pub. Serv. Co. v. Pub. Utils. Comm'n.*, 765 P.2d at 1021.

26. Here, Boulder states that it is not seeking approval to acquire Public Service's CPCN to provide service to customers in the portion of the Acquisition Area outside of the city limits. Boulder instead is seeking to acquire Public Service's facilities throughout the Acquisition Area, including those facilities used to serve only Public Service's extraterritorial customers. Boulder does not allege that Public Service is unwilling or unable to continue to serve these extraterritorial customers. Instead, even though Boulder will own the facilities, Boulder argues that Public Service will continue to "serve" its extraterritorial customers by paying Boulder to allow Public Service to transmit electricity to its customers over Boulder's lines.

⁸ *Id.* at 12.

27. The Supreme Court has applied the regulated monopoly doctrine to the use or extension of facilities, not simply the billing for retail service as argued by Boulder. In *Pub. Serv. Co. v. Pub. Utils. Comm'n.*, 765 P.2d 1015, Public Service interconnected with an industrial customer within its certificated territory, and the customer constructed its own lines to provide power to buildings located within another public utility's certificated territory. Even though the facilities delivering power to its point of use were owned by the customer and not Public Service, the Court ruled that Public Service had improperly "extended" its service into the area of another certificated public utility. *Id.* at 1021 ("Without such a showing [of inadequate service or an unwillingness to serve], the PUC was prohibited from approving Public Service's extension into Union's certificated territory.").

28. In *Pub. Serv. Co. v. Shaklee*, 784 P.2d 314 (Colo. 1989), the Court addressed whether the construction of a transmission line across private property constituted a public use and thus would allow a public utility to invoke its condemnation powers. The Court ruled that the transmission line was for a public use and was within the doctrine of regulated monopoly. *Id.* at 319 ("Although evidence was presented that Public Service had indicated to members of the community that the transmission line was the 'Coors Line,' and was unavailable for use by others, as a regulated monopoly Public Service is obligated to provide service to the public without discrimination."). The Court's concurring opinion elaborated on the application of the regulated monopoly doctrine to a transmission facility, by viewing the deployment of the line as valid only because it did not extend into the certificated area of another public utility. *Id.* at 319-20 (Lohr, J., concurring).

29. In addition, the Court has stated that certification rights and obligations extend to property and facilities. *See Poudre Valley Rural Elec. Ass'n. v. Loveland*, 807 P.2d 547, 555 (Colo. 1991) (“Both Poudre Valley’s facilities and its right to serve customers under the certificate of public convenience and necessity are property for purposes of the takings clause.”) (emphasis added); *City of Loveland v. Pub. Utils. Comm’n.*, 580 P.2d at 383 (“Loveland’s electrical facility clearly falls within the statutory definition of a public utility.”) (emphasis added); *Rocky Mountain Airways, Inc. v. Pub. Utils. Comm’n.*, 509 P.2d 804, 805 (Colo. 1973) (“The granting of an additional certificate of public convenience and necessity requires a showing that the existing facilities and services are *substantially inadequate.*”) (underlined emphasis added).

30. Because the regulated monopoly doctrine often is couched in terms of whether the certified carrier is unwilling or unable to provide “service” to its customers, some parties have focused upon the word “service” and its meaning as determinative of the scope of the doctrine. As shown above, the doctrine extends beyond a restricted definition of “retail service” and extends to lines, equipment and facilities used to deliver electricity. Also, even if the word “service” were relevant to the doctrine’s scope, the Court has defined “service” in terms broader than retail billing in regulated monopoly cases. *See W. Colo. Power Co. v. Pub. Utils. Comm’n.*, 411 P.2d 785, 796 (Colo. 1966) (holding that the utility’s “generation service” duplicated the “services” of existing certification utilities and thus violated the regulated monopoly doctrine).

G. Findings and Conclusions

31. In evaluating a motion to dismiss under C.R.C.P. 12(b)(5), we must accept all factual allegations as true, and the allegations of a complaint must be viewed in the light most favorable to the applicant. *Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus, LLC*, 2012 CO 17, ¶ 11. A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that no set of facts can prove that the applicant is entitled to relief. *Id.*

1. Motion to Dismiss

32. Under Colorado Law, the doctrine of regulated monopoly applies to facilities used to serve customers located in a utility's certificated service area. *See Pub. Serv. Co. v. Shaklee*, 784 P.2d at 319; *Pub. Serv. Co. v. Pub. Utils. Comm'n.*, 765 P.2d at 1021; *City of Loveland v. Pub. Utils. Comm'n.*, 580 P.2d at 383.

33. We conclude that Public Service's rights as a certified public utility for the provisioning of service to customers located outside the City under the doctrine of regulated monopoly extend to its facilities used to provide those services. Public Service's rights are not limited to only a retail billing service for power provided to customers.

34. Boulder's other contentions are inconsistent with Colorado law. Boulder argues that the doctrine of regulated monopoly does not apply to the City as the future owner of the facilities providing wholesale services to Public Service; rather, the doctrine applies only to services provided to the "public," which Boulder defines as retail end user customers. We disagree, consistent with *W. Colo. Power Co. v. Pub. Utils. Comm'n.*, 411 P.2d at 792 , in which the Court applied the doctrine of regulated monopoly to a cooperative's construction of generation and provisioning of wholesale power and wheeling services to retail

service providers. The Court characterized the “furnishing of wholesale power” as a “public utility service” that is “as entitled to the protection of its regulated monopoly status as any other.”

35. Boulder also argues that its home rule powers under Article XX authorize condemnation of the facilities and thus immunize the City from the regulated monopoly doctrine. According to Boulder, after condemnation, the joint use statutes allow the City to wheel services to Public Service. This theory—that Boulder’s condemnation authority overcomes the Commission’s authority under Article XXV to regulate Boulder’s activities to serve customers located outside the City—was rejected by the Commission’s prior decisions in the Declaratory Judgment Proceeding and the Boulder District Court’s Order on judicial review.⁹ The Commission’s and the District Court’s rulings bind the City in this proceeding.

36. We conclude that the joint use statute cannot be used to force a certificated utility to sell its assets to a municipal utility so that the municipal utility can then charge the public utility to “wheel power” over those facilities to its customers. Boulder’s interpretation of the joint use statute is inconsistent with the statute’s plain language. The joint use statute, § 40-4-105(1), C.R.S., provides that the Commission may require a utility to use the facilities of another utility, instead of constructing its own, if the Commission finds that the joint use is in the public interest.¹⁰ Nothing in the joint use statute forces a change of ownership of facilities or

⁹ See Order re: Judicial Review of the Colorado Public Utilities Commission Decisions, *City of Boulder v. Pub. Utils. Comm’n.*, Case No. 14CV30047 (affirming Decision No. C13-1350 and Decision No. C13-1550 in Proceeding No. 13D-0498E).

¹⁰ § 40-4-105(1) states:

Whenever the commission, after a hearing upon its own motion or upon complaint of a public utility affected, finds that the public convenience and necessity require the use by one public utility of the ... wires, poles, pipes, or other equipment, or any part thereof on, over, or under any street or highway that belongs to another public utility, ... and that such use will not result in irreparable injury to the owners or other users of such ... poles, pipes, or other equipment or to the railroad's use of the right-of-way, or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms and conditions or compensation for the same, the commission by order may direct that such use be permitted and prescribe reasonable compensation and reasonable terms and conditions for the joint use.

alters application of the regulated monopoly doctrine. Boulder admits as much in its briefing: “[t]he transfer of the assets is not authorized by the joint use statute...”¹¹

37. Finally, we conclude that the doctrine of regulated monopoly bars the portion of Boulder’s Application that seeks approval to acquire Public Service’s facilities used solely to provide electricity services to customers located outside the City, which includes customers within and beyond the Acquisition Area. Boulder’s numerous allegations and proffers of evidence that its ownership of Public Service’s extraterritorial facilities will not impair reliability, safety, or service quality are invalid grounds to overcome the regulated monopoly doctrine. *Pub. Serv. Co. Pub. Utils. Comm’n.*, 765 P.2d at 1022; *Pub. Serv. Co. v. Pub. Utils. Comm’n.*, 485 P.2d 123, 126 (Colo. 1971).

38. Absent from Boulder’s Application and responsive briefing is any allegation that Public Service is unwilling or unable to provide adequate electricity service through its facilities to customers located outside the City in the Acquisition Area or beyond.

39. Consistent with these findings, we dismiss the portion of Boulder’s Application seeking to acquire facilities used exclusively to serve these extraterritorial customers.

2. Supplemental Application, Discovery, and Completeness

40. We conclude that the Application as filed is inconsistent with the doctrine of regulated monopoly. Boulder has withdrawn its request for a finding of completeness and agrees to the Commission’s consideration of completeness after the City files its Second Supplement.

41. We grant Boulder’s motion for leave to file the Initial Supplement and a Second Supplement to its Application. Requests for confidentiality shall comply with Commission rules.

¹¹ Boulder’s Response to Public Service’s Motion to Dismiss, filed October 14, 2015, at 7.

42. Boulder's Supplemental Application must contain sufficient information and evidence to demonstrate the reliability and safety of the resulting network and the reasonableness of the resulting costs to Public Service and its ratepayers. Further, the Commission must be satisfied that the application is consistent with the doctrine of regulated monopoly.

43. We grant Boulder's request to conduct discovery, but clarify that all parties to this Proceeding may conduct discovery. Discovery processes and procedures shall be consistent with Commission rules, and the Commission is receptive to motions for a technical conference on additional or alternative discovery procedures. We find that, for administrative efficiencies, Chairman Joshua B. Epel shall serve as a Hearing Commissioner to address discovery disputes and related matters regarding access to confidential information.

II. ORDER

A. It is Ordered That:

1. The Motion to Dismiss filed by Public Service Company of Colorado (Public Service) on August 5, 2015 is granted, in part, and denied, in part, consistent with the discussion above.

2. We dismiss the portion of the City of Boulder's (Boulder's) Verified Application (Application) requesting acquisition of facilities used exclusively to serve Public Service customers outside of the Boulder city limits under C.R.C.P. 12(b)(5).

3. We deny the requests of Public Service and the Staff of the Colorado Public Utilities Commission to dismiss Boulder's Application in its entirety.

4. The Motion for Leave to Supplement Application and for a 60-Day Discovery Period filed by Boulder on September 23, 2015 is granted, in part, and denied, in part, consistent with the discussion above.

5. We accept into the record Boulder’s Initial Supplement to the Application filed on September 23, 2015, and allow Boulder to file a Second Supplement. The Commission will consider the completeness of Boulder’s Application upon the filing of a Second Supplement, consistent with this Decision.

6. We permit Boulder and any other party to conduct discovery in accordance with our Rules of Practice and Procedure.

7. Chairman Joshua B. Epel shall serve as a Hearing Commissioner for the purpose of addressing discovery disputes in this matter, consistent with the discussion above.

8. This Decision is effective upon its upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS’ DELIBERATION MEETING
November 4, 2015.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners