

## APPEAL TO WASHINGTON COUNTY BOARD OF COUNTY COMMISSIONERS

**Appeal from:** The Washington County Planning Commission (“**Planning Commission**”)

**Applicant:** Public Service Company of Colorado, a Colorado corporation conducting business as Xcel Energy (“**Xcel Energy**”)

**Applications:** Xcel Energy – Colorado’s Power Pathway (“**Pathway**”) – Washington County Permit Application to Site and Construct a Major Facility of a Public Utility (“**1041 Application**”) Request for Concurrent/Combined Review and Approval with Pending Use by Special Review Application (“**USR Application**”)

**Planning Commission Hearing Date:** September 19, 2022

**Relief Requested:** Xcel Energy respectfully requests that the Board of County Commissioners (“**Board**”) should take the following actions in response to this appeal: (1) Make a determination and/or confirm that the Applications are complete; and (2) Direct the Planning Commission to hold a public hearing regarding the Applications to: (a) approve, approve with conditions, or deny the 1041 Permit Application; and (b) forward a recommendation to the Board regarding the USR Application.

**Counsel for Xcel Energy:** Gil McNeish and Jamie Cotter, Spencer Fane LLP, 1700 Lincoln Street, Suite 2000, Denver, CO 80203, [gmcneish@spencerfane.com](mailto:gmcneish@spencerfane.com); [jcotter@spencerfane.com](mailto:jcotter@spencerfane.com)

### BASIS FOR APPEAL

#### Introduction

On September 19, 2022, the Planning Commission convened a public hearing for the stated purpose of conducting a hearing on the 1041 Application and the USR Application (collectively, “**Applications**”) (the “**Hearing**”). Hearing Agenda, attached as Exhibit 1. Prior to the Hearing, the Planning and Zoning Department on behalf of Washington County (“**County**”) “deemed the [A]pplications complete.” Xcel Power Pathway Staff Summary and Review, Section II, pg. 3, attached as Exhibit 2. Prior to the start of the Hearing, County Staff stated for the record that notice of the Hearing was properly published and posted by and at the direction of the County pursuant to applicable requirements in the Regulations as defined below; therefore, the Planning Commission had jurisdiction to proceed.<sup>1</sup> The Hearing was then opened, and County Staff’s Opening Statement was read. *Id.*

Immediately following Staff’s Opening Statement, a motion was made by Planning Commission member Mollohan to “table” the public hearing for both Applications until November 21, 2022, claiming that the Applications were incomplete (“**Motion**”) *Id.* The Motion passed with only one “nay” vote. *Id.* The Motion was based on the belief that the Applications were not complete because they did not contain the signatures of all landowners who may be crossed by the

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<sup>1</sup> Video of Hearing can be found at [https://drive.google.com/file/d/15UcrsJTh4WD9-C21N\\_I9dM5NdMBkHMR/view](https://drive.google.com/file/d/15UcrsJTh4WD9-C21N_I9dM5NdMBkHMR/view) (“**Video Recording**”)

Project. *See* Regulations Relating to Application for Uses by Special Review, Application Requirements for Community Business, etc. (“**USR Regulations**”), Section 2(a); and The Administrative Regulations related to Zoning Regulations and Designation of Matters of State Interest for Washington, County, Colorado (“**1041 Regulations**”), Section 3.402(2). Copies of the USR Regulations, Chapter 1, Article 4 of the 1041 Regulations, and Chapter 3 of the 1041 Regulations are attached as Exhibits 3-5, respectively. Neither County Staff nor Xcel Energy were permitted to provide comment on this Motion. Video Recording. The Hearing was then closed. *Id.*

Xcel Energy hereby appeals the Motion. For all of the reasons set forth below, the Board should take the following actions in response to this appeal: (1) Make a determination and/or confirm that the Applications are complete; and (2) Direct the Planning Commission to hold a public hearing regarding the Applications to: (a) approve, approve with conditions, or deny the 1041 Permit Application; and (b) forward a recommendation to the Board regarding the USR Application.

### **Applicable Regulations and Planning Commission Action**

#### **I. USR Application Requirements**

In order to request a Use By Special Review determination by the Board, Xcel Energy was required to first submit its initial proposal to the Commissioners’ Office. USR Regulations, Section 1. Xcel Energy completed this process on April 4, 2022. Next, the Board was required to hold a “brief review” of the proposal “at which time the Board will assess the matter and set forth the requirements for the formal application process.” *Id.* The Board conducted this review with Xcel Energy at its regularly scheduled, publicly noticed Board meeting on April 5, 2022. *See* Agenda from BOCC April 5, 2022 Meeting, attached as Exhibit 6 and Notes from April 5, 2022 Meeting, attached as Exhibit 7. At a subsequent meeting with Tammy Leonard, Washington County’s Planning and Zoning Official, on May 13, 2022, Ms. Leonard informed Xcel Energy that because it was the “facility owner or operator,” for purposes of Section 2(a) of the USR Application, the County would consider Xcel Energy both the “Applicant” and the “Property Owner” for that application. *See* Notes from May 13, 2022 Meeting, attached as Exhibit 8.<sup>2</sup>

Following its May meeting with Ms. Leonard, the last step was for Xcel Energy to submit its complete application to the County. USR Regulations at Section 2. Xcel Energy submitted its USR Application on June 30, 2022. Under the USR Regulations, once that application was deemed “complete,” the County’s Planning and Zoning official was charged with “logging in” the submittal, *notifying the Board that the application was complete*, referring the application to the Planning Commission, and scheduling the application for hearing along with the applicable posting requirements. *Id.* at Section (3). Ms. Leonard made this completeness determination and complied with this process on September 2, 2022, scheduling the Hearing to take place on September 19, 2022. *See* Exhibit 2, Leonard Memo. In the memo to the Planning and Zoning Commission, County staff specifically concluded that Xcel Energy’s “application submittals required by the

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<sup>2</sup> The Notes included in Exhibits 7 and 8 were taken by Xcel Energy consultants and provided to the Planning and Zoning staff for review, who acknowledged they were accurate summaries of those meetings.

County's USR and 1041 regulations have been provided by Xcel" and that "the Planning and Zoning Department ha[d] deemed the applications complete."

As part of its review ahead of this completeness determination, the County made no request for additional information from Xcel Energy within 28 days from receipt of the application pursuant to C.R.S. §29-20-108(2). And as part of the completeness determination, County staff explained its reasoning behind that determination:

As an initial matter, the Washington County USR (Section 2(a) of application requirements for industrial uses by special review) and 1041 Permit regulations (Section 3.402(2)) require property owners of the subject properties to approve the use of their property for the proposed project (the "**Consent Requirements**"). Xcel has not obtained approval of all such landowners. To do so, would require Xcel to obtain property rights for every property upon which the transmission line would be located. The portion of the Xcel Project in Washington County involves more than 80 potential parcels. Xcel has the authority to condemn property, which means that Xcel has the legal authority to acquire the rights needed to complete the Project on the property that is the subject of the application. Xcel is seeking a waiver of this requirement due to the nature of the Project and its authority to obtain the property once the final route of the transmission line is determined. Planning staff is recommending that the Xcel application be permitted to proceed through the USR and 1041 hearings, subject to a condition that Xcel acquire all property rights necessary to complete the Project prior to commencing construction on any portion of the project in Washington County.

Exhibit 2, Staff Memo at 3.

Due to the County Staff's completeness determination, the Planning Commission was required to hold a public hearing on the USR Application and forward their recommendations to the Washington County Board of County Commissioners ("**Board**") who would then hold a second hearing and make a final determination on that Application. USR Regulations, Section 7. At the second hearing, the Board then must take one of the following actions: (1) Approve as submitted and/or recommended by the Planning Commission; (2) Approve with additional or different conditions; (3) Table; (4) Take the request under advisement, or (5) Deny. *Id.*

The Planning Commission opened the public hearing on September 19, 2022 but refused to hear the matter on the basis that it believed the USR Application was incomplete because it did not include signatures from every landowner impacted by the Project. Hearing Video. The Planning Commission tabled the hearing until November 21, 2022. It therefore did not forward its recommendations to the Board. Video Recording.

## II. 1041 Regulations

The 1041 Regulations provide for a similar framework. In order to receive a 1041 permit, Xcel Energy was required to submit its 1041 Application to the Planning Commission. 1041 Regulations, Article 4, Section, 1.401(1). Xcel Energy made this submission on July 18, 2022.

With its 1041 Application, Xcel Energy was required to include “a list of all affected property owners of record, their current addresses, telephone numbers and an original written statement from each with their signature of approval for any related easement, right-of-way, purchase or lease.” *Id.*, Section 3.402(2). Xcel Energy did include a list of all affected property owners of record and their addresses in Attachment E to its Applications. It also included a position statement on the landowner signature requirement with its Application and a request for a waiver of that requirement from the Planning Commission as contemplated by Section 3.402 of the 1041 Regulations.

After receiving the 1041 Application, the Planning Commission was prohibited from formally accepting the 1041 Application unless it was complete. 1041 Regulations, Section, 1.401(2). The Planning Commission received the 1041 Application on September 2, 2022 and set and noticed the Hearing. Under the 1041 regulations, the Planning Commission was then required to provide a written decision on the 1041 Application within 20 days of the Hearing. *Id.* Section 1.406(3). The Planning Commission, however, refused to hear the 1041 Application and instead “tabled” it until Xcel Energy met the Consent Requirement described in the 1041 Regulations at section 3.402(2).

**The Board Should Direct the Planning Commission to  
Accept and Process the Applications as Complete**

I. *The Board Should Reverse the Planning Commission’s Motion Because Both Applications Were Already Deemed Complete Before the Hearing.*

Although the timing and processes differed between the two Applications, both the USR Application and the 1041 Application were deemed complete before the Hearing, divesting the Planning Commission of jurisdiction to reverse those decisions.

A. USR Application.

With respect to the USR Regulations, Xcel Energy submitted the USR Application to the County on June 30, 2022. The County did not request any additional information from Xcel Energy following that submission, and as it is charged to do under the Code, County Staff made a determination that the USR Application was complete on September 2, 2022. There is no provision in the USR Regulations allowing the Planning Commission to review or reconsider that determination. USR Regulations, Section 3. Exhibit 2, Section II, pg. 3. Therefore, by the Hearing on September 19, 2022, the USR Application was already deemed complete, and the Planning Commission lacked jurisdiction to conclude otherwise. At that point, it should have held the Hearing and forwarded a recommendation to the Board regarding the USR Application. Xcel Energy therefore respectfully appeals the Planning Commission’s Motion continuing its hearing and requests the Board to affirm County Staff’s completeness determination with respect to the USR Application.

B. 1041 Application.

Under the 1041 Regulations, the Planning Commission's acceptance of the Application acts as a determination that the Application is Complete. 1041 Regulations, Section, 1.401(2). Indeed, any 1041 Application cannot be "formally accepted unless it is complete." *Id.* And if the Planning Commission rejects a 1041 Application and refuses to set it for hearing, it "shall specify what additional information is required." *Id.* The Planning Commission did neither here. Nor did it request additional information from Xcel Energy within 28 days from receipt of the Application pursuant to C.R.S. § 29-20-108(2). Instead, the Planning Commission set and noticed the Hearing. The Planning Commission's act of accepting the 1041 Application and setting it for hearing therefore deemed the 1041 Application complete under the County's Code. Accordingly, Xcel Energy respectfully appeals the Planning Commission's Motion to continue its hearing on the 1041 Application and requests that the Board Direct the Planning Commission hold a hearing on the merits of the 1041 Application.

II. *Alternatively, the Board Should Reverse the Planning Commission's Decision About the Landowner Consent Requirements.*

Alternatively, should the Board not deem both Applications already complete, Xcel Energy asks the Board to: (1) with respect to the USR Application, reverse the Planning Commission's decision deeming the application incomplete and affirm County Staff's decision to deem it complete; and (2) reverse the Planning Commission's decision not to grant a waiver under Section 3.402 of the Consent Requirements. It should do so for two reasons.

A. The Consent Requirements Do Not Benefit the County with Respect to The Applications.

Because of the special nature of projects like the Pathway Project, Xcel Energy does not believe that the Consent Requirements serve the interests of Washington County, affected landowners, or Xcel Energy with respect to the Applications. Xcel Energy is in the process of obtaining all land rights necessary for its Project, but it has not finished that process. The Consent Requirements therefore put the County's constituents into a difficult position. If the County requires Xcel Energy to have landowner consent prior to its consideration of the Applications, Xcel Energy will be forced to accelerate acquisitions which may increase the likelihood of using its power of eminent domain on all outstanding land interests for the Project within the County. While it certainly can and will do so if forced to, that is contrary to how Xcel Energy approaches landowners on whose property a project would cross. The historical practice of Xcel Energy within Colorado has been to apply for and obtain local land use permit approval and thereafter finalize securing any outstanding land rights from landowners along the permitted route. This gives both Xcel Energy and impacted landowners more time to negotiate toward a voluntary acquisition. The Consent Requirements could interrupt those negotiations and force landowners into immediate litigation.

The Consent Requirements are intended to ensure a landowner knows about a proposed project on their land, and in many cases to enable the landowner to participate in a project's application proceedings. All landowners subject to the Pathway Project have been informed about

it for a long time now, and all notice requirements for the Applications have been complied with. Any landowners within the Application's route are free to participate in the Application's proceedings before the Planning Commission and the Board. Accordingly, as discussed in more detail below, because Xcel Energy has the ability to obtain its land rights by condemnation if necessary, imposing the Consent Requirements on this Project's Applications is unnecessary and would needlessly and dramatically delay the Project in a manner that is inconsistent with Colorado law while at the same time subject many of its constituents to immediate condemnation.

B. The Consent Requirements Conflict with Two Colorado State Statutes and are Preempted by State Law.

As applied to this Project and Xcel Energy's Applications, the County's landowner consent requirements in Section 3 of its USR Regulations and Section 3.402(2) of its 1041 Regulations also have the operational effect of conflicting with Colorado state law.

The Colorado State Legislature has acknowledged on multiple occasions that the provision of safe, reliable, and economical service is a matter of statewide concern. C.R.S. § 29-20-108; C.R.S. § 24-65.1-101, *et seq.* And while the legislature has delegated some authority to local jurisdictions relating to the siting of major facilities of a public utility, that delegation is limited to "[w]here feasible" locating such facilities "so as to avoid direct conflict with adopted local government, regional, and state master plans." C.R.S. §25-65.1-204(6). And with respect to all local land use decisions relating to electric facilities of a major public utility, the state legislature has imposed strict deadlines to make such decisions. C.R.S. §29-20-108(2).<sup>3</sup>

The County's Consent Requirements run afoul of both statutory provisions for multiple reasons. First, the Consent Requirements do not further C.R.S. §25-65.1-204(6)'s, or indeed any, purpose. The Consent Requirements are generally meant to ensure the County that the applicant has the land rights necessary to complete the project proposed or to otherwise seek the entitlements contemplated. Xcel Energy, as an entity with condemnation authority under C.R.S. §§ 38-4-103 and 38-5-105, among other statutes, will be able to secure any necessary land rights for its project through eminent domain. Accordingly, the Consent Requirements are unnecessary, and as explained above, serve only to force the County's landowners into early condemnation proceedings.

Second, the Planning Commission's decision not to waive the Consent Requirement for the 1041 Application or consider the USR Application at its previous hearing runs afoul of C.R.S. § 29-20-108(2), which requires final action on the application within 90 days of the application's submission. At its hearing on September 19, 2022 the Planning Commission continued the matter to November 21, 2022 which falls well outside that 90-day deadline.

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<sup>3</sup> Xcel Energy notes that C.R.S. § 29-20-108(5) also provides a mechanism for the PUC to overturn government decisions that "impose[] requirements or conditions" on an "application that will unreasonably impair the ability of the public utility or power authority to provide safe, reliable, and economical service to the public." For the reasons stated in this appeal, it is Xcel Energy's position that the Consent Requirements are unreasonable and unnecessary, and therefore unreasonably impair its ability to provide safe, reliable, and economical service to the public."

As the County is aware, it cannot act in ways that conflict with state statute or materially impede the state's interest. *City of Longmont v. Colorado Oil & Gas Assoc.*, 369 P.3d 573 (Colo. 2016). The Consent Requirements do both.

“A local regulation and a state regulatory statute impermissibly conflict if they ‘contain either express or implied conditions which are inconsistent and irreconcilable with each other.’” *Colo. Mining Ass'n v. Bd. of Cty. Comm'rs*, 199 P.3d 718, 725 (Colo.2009).\_ And “[e]ven though an ordinance may be an otherwise legitimate exercise of a municipality's police powers, to the extent that it conflicts with a state statute,” it is invalid. *In re Tri-State Generation*, 2008 WL 5158810 (Nov. 14, 2018). As discussed above, the Planning Commission's application of the Consent Requirements here conflict with both the limits of C.R.S. §25-65.1-204(6)'s delegation and C.R.S. § 29-20-108(2)'s express time limits.

Further, the Planning Commission's failure to waive the 1041 Consent Requirement or otherwise consider the USR Application materially impedes the state's interest in allowing public utilities to develop projects quickly so that they can provide vital energy to Colorado's citizens. Requiring a public utility to acquire all land rights for a project prior to submitting its land use applications will significantly delay such projects and the delivery of imperative services to Colorado communities without serving any real purpose. Such requirements are therefore preempted by state law. *See City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003).

### **Conclusion**

For all of the reasons set forth above, Xcel Energy respectfully requests that the Board grant the Waiver and direct the Planning Commission to hold a public hearing regarding the Applications to approve or deny the 1041 Permit Application and forward a recommendation to the Board regarding the USR Application.

To the extent that the Board has any concerns that granting the Waiver will result in a lack of notice to affected property owners, the Board could require Xcel Energy to provide all affected property owners with written notice of the hearings and process for the Applications. Xcel Energy has no objection to such requirement. Also, if the Board needs any additional information before hearing this appeal, Xcel Energy will provide any additional requested information.