DISTRICT COURT, LARIMER COUNTY, COLORADO 201 La Porte Ave., Suite 100 Fort Collins, CO 80521 **Plaintiff: VIRGINIA FARVER,** **v.** **Defendants: CITY OF FORT COLLINS, FORT COLLINS ELECTRIC UTILITY; and DOES 1-100.**	DATE FILED: December 15, 2016 4:40 PM FILING ID: E9BD9C02EC609 CASE NUMBER: 2016CV144 COURT USE ONLY
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DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW all of the above-named Defendants ("Defendants"), by and through counsel, Kimberly B. Schutt of Wick & Trautwein, LLC, and John R. Duval of the Fort Collins City Attorney's Office, and pursuant to C.R.C.P. 56, respectfully submit the following Motion for Summary Judgment:

I. INTRODUCTION

The *pro se* Plaintiff, Virginia Farver, ("Plaintiff") brought this action challenging the implementation of the Advanced Meter Fort Collins Project ("Project") by the City of Fort Collins ("City") through the City's Utility Services ("Utility Services"). Utility Services is the City's administrative service area that operates the City's various utilities, including the City's

electric utility ("Electric Utility"). The Project involved the City's replacement of its older, analog electro-mechanical meters which had to be read manually at their location, with a digital "smart meter" that allows for remote meter reading through wireless communications ("Smart Meter"). The Project therefore required the replacement of all electric meters throughout the City, with extensive prior notice provided to the Electric Utility's customers that the City's meters at their properties would be replaced,[1] and giving them three options for the type of meter that would be installed by the Electric Utility. Customers could choose a Smart Meter that frequently recorded and communicated data wirelessly or a Smart Meter that would record and communicate data on a less frequent basis. For those customers who did not want either of these Smart Meters, the City would install a non-communicating digital meter that had to be manually read at a fee of $11 per month. The non-communicating digital meter was ultimately installed on the Plaintiff's home, and she has been charged the $11 monthly fee since April 2014.

Plaintiff's 45-page First Amended Complaint consists of five causes of action and 198 numbered allegations raising several objections about Smart Meters and the Project itself, but the primary thrust of the Complaint is that the Project was allegedly adopted and implemented by the Electric Utility without proper authorization and oversight by the Fort Collins City Council ("Council"). Plaintiff thus contends that the City's implementation of the Project and its collection of a meter-reading fee from customers who chose the installation of a non-communicating digital meter rather than a Smart Meter are allegedly contrary to law, and seeks declaratory, injunctive and monetary relief related thereto.[2]

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[1] The meters used to measure the electrical energy consumption of the Electric Utility's customers are owned by the City. City Code Section 26-396(a) provides that "[n]o person shall take electrical energy from the distribution system except through a meter or other measuring device owned and installed by the City without the consent of the electric utility to take such electrical energy."

[2] The Plaintiff has named in the caption both the City of Fort Collins and Fort Collins Utilities as defendants. However, "Fort Collins Utilities" is not an independent legal entity, but rather the Utility Services department of the

However, as set forth below, the undisputed facts (as reflected in the extensive attached documentation of Council's actions and the supporting affidavits) demonstrate that the Project was clearly adopted and implemented in accordance with the City Charter and Code. Indeed, the Project was a key component of the "Climate Action Plan" adopted by the Council in 2008 and an "Energy Policy" adopted by Council in 2009, and implemented by Utility Services in the years that followed with various appropriations and related actions approved by the Council, and with regular oversight from Council and the City Manager. Therefore, Plaintiff's claims that the Project was adopted and implemented without proper authorization and oversight are without merit and must fail as a matter of law.

Likewise, Plaintiff's other claims challenging the validity of the Project are also fatally flawed. For instance, Plaintiff makes several assertions that the Project was allegedly implemented by the Electric Utility in violation of the Colorado Sunshine Act of 1972, C.R.S. § 24-6-101, et seq. ("the Sunshine Act"), with decisions being made informally and secretly by the Electric Utility. However, as discussed above and as reflected in the extensive documentation from the history of Council's actions and oversight, the Project was implemented over the course of several years through multiple Council actions and appropriations in furtherance of its adopted policies, including the 2008 Climate Action Plan and the 2009 Energy Policy. Those Council actions occurred at public meetings and in work sessions for which proper public notice was given under the applicable provisions of the Sunshine Act.[3]

City of Fort Collins, and thus any claims against "Fort Collins Utilities" should simply be treated as claims against the City itself.

[3] The applicable provisions of the Sunshine Act are in the Colorado Open Meetings Law found in C.R.S. §24-6-402.

To the extent that City employees administered and managed the day-to-day activities of carrying out the details of the Project, the express terms of the applicable provisions of the Sunshine Act make clear that they do not apply to the meetings and administrative decisions of City staff, including employees of the Electric Utility.

Plaintiff also asserts that the City violated her due process rights under Article II, Section 25 of the Colorado Constitution by allegedly denying her the right to be aware of and participate in the policy-making process related to the Project and the imposition of the $11 monthly manual meter reading fee for not having a Smart Meter. However, again, the undisputed facts clearly demonstrate that the Project was addressed at numerous Council meetings with properly noticed opportunities for public input. Likewise, the monthly fee for manual meter reading, which was also specifically approved and adopted by the Council, is a valid charge for the additional services related to having an actual meter reader go out to Plaintiff's home on a monthly basis to manually read her non-communicating digital meter. Finally, to the extent that the Plaintiff asserts a violation of due process for the removal of "her" meter, the City Code makes it expressly clear that the electric meter is the City's property – not the property of the individual homeowner. Thus, as a matter of law, there simply is no due process violation as alleged by the Plaintiff.

Accordingly, based on the undisputed facts and ample legal authority set forth below, the Court should conclude as a matter of law that the Defendants are entitled to summary judgment in their favor.

II. STANDARD OF REVIEW

In considering this Motion, it is important to note that the Court's role is not to second-guess the City's decision to utilize Smart Meters or to consider the relative merits of the Project from a policy standpoint. Rather, the Court's role is limited to determining whether the implementation of the Project complied with applicable provisions of the City Charter and Code, as well as state law invoked by the Plaintiff.

In making this determination in the context of this Motion, the Court must apply the well-established review standards for summary judgment. A motion for summary judgment is properly granted if the evidence establishes no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Dominguez v. Babcock*, 696 P.2d 338, 341 (Colo. App. 1984), *aff'd*, 727 P.2d 362 (Colo. 1986); *Abrahamsen v. Mountain States Telephone & Telegraph Co.,* 494 P.2d 1287 (Colo. 1972). All doubts must be resolved against the moving party. *Dominguez v. Babcock*, 696 P.2d 338, 341 (Colo. App. 1984), *aff'd*, 727 P.2d 362 (Colo. 1986). And, "[t]he moving party has the burden of establishing the nonexistence of a material fact." *Roberts v. Holland & Hart*, 857 P.2d 492, 496 (Colo. App. 1993). However, "[i]f the burden of persuasion would belong to the non-moving party at trial, the moving party needs only to identify those portions of the record and of the affidavits which demonstrate an absence of a genuine issue of material fact." *Id.* And, [i]f the non-moving party cannot produce enough evidence to establish a triable issue, then a trial would be useless and summary judgment is proper." *Id.*

As discussed further below, application of these standards to this case must lead to the conclusion that there are no genuine issues of material fact and the Defendants are indeed entitled to judgment as a matter of law. It is clear the Plaintiff will not be able to produce any

evidence to establish a triable issue on her claims challenging the validity of the Project. This is particularly true given the presumptions of validity afforded to the City's actions in this context.

The courts have often noted that "[i]t is well established that courts presume the validity and regularity of official acts of public officials and entities . . . . [and] presume that public officials discharge their duties properly and in compliance with the law." *Crested Butte South Metropolitan District v. Hoffman,* 790 P.2d 327, 329 (Colo. 1990). In the absence of clear evidence to the contrary, the Court is to apply these presumptions to all of the actions taken by the Council and other City officials with respect to the Project. *Jensen v. City and County of Denver,* 806 P.2d 381, 386 (Colo. 1991). This includes the presumption that the City's administrative officials are acting within their delegated authority. *E.g., City of Raleigh v. Riley,* 308 S.E.2d 464, 473 (N.C. App. 1983); 3 *McQuillin Mun. Corp.* §12:173.8 (3rd Ed.); Annotation, *Presumption that Public Officers have Properly Performed their Duty, as Evidence,* 14 A.L.R. 1037 (1942).

III. STATEMENT OF UNDISPUTED FACTS

Based on the pleadings and on the documents and affidavits attached hereto, Defendants believe that these are the controlling and undisputed facts that support granting this Motion:

1. On November 6, 1999, the Council adopted Resolution 99-137[4] ***[Exhibit A]***, by which it established a policy that the City shall proactively identify and implement actions to reduce greenhouse gas emissions within the City by at least 30% below predicted 2010 levels while achieving cost-effectiveness in those programs. To accomplish this, the Council directed the City Manager in Resolution 99-137 to implement the "municipal greenhouse gas reducing activities" identified in the "Fort Collins' Local Action Plan to Reduce Greenhouse Emissions:

[4] The ordinances and resolutions included as Exhibits and discussed in the Statement of Undisputed Facts are authenticated by the City Clerk's affidavit included as Exhibit V.

September 1999," that was then on file in the City Clerk's Office ("1999 Greenhouse Gas Reduction Plan").

2. On March 25, 2003, the Council adopted Resolution 2003-038 ***[Exhibit B]***, by which it adopted the City's "Electric Energy Supply Policy" ("2003 Energy Policy"). Resolution 2003-038 states that one of the primary objectives of the 2003 Energy Policy is to "reduce the environmental impact of electric generation and consumption through energy efficiency and increased use of renewable energy." The 2003 Energy Policy references the "growing awareness of and concern about global climate change and the harmful contributing effects of greenhouse gases." It also mentions the 1999 Greenhouse Gas Reduction Plan as part of the City's efforts to significantly reduce greenhouse gas emissions. The 2003 Energy Policy lists eleven future objectives to accomplish this reduction in greenhouse gases, which include: (1) reducing per capita electric consumption by 10% from 2002 levels by 2012; (2) reducing per capita demand peak by 15% from the baseline of 2002 by the year 2010; and (3) developing and implementing effective demand side management programs. The 2003 Energy Policy directed the City Manager to provide the Council with annual status reports on these and the other objectives set in the Policy.

3. On March 6, 2007, the Council adopted Resolution 2007-015 ***[Exhibit C]***, which directed the City Manager to appoint and convene a task force of citizens, City board and commission members, and City staff to update the City's 1999 Greenhouse Gas Reduction Plan and to advise the Council on "matters related to energy conservation and environmental quality" ("Climate Task Force").

4. On May 20, 2008, the Council adopted Resolution 2008-051 ***[Exhibit D].*** This Resolution observed that the City was not on track to achieve the greenhouse emissions goal for

2010 established in the City's 1999 Greenhouse Gas Reduction Plan and that the Climate Task Force was recommending an additional goal of reducing the community's greenhouse gas emissions by the end of 2012 to a level not exceeding 2.466 million tons. The Council therefore established in Resolution 2008-051 new target goals of reducing the City's community-wide greenhouse gas emissions 20% below 2005 levels by 2020 and 80% below 2005 levels by 2050 and the 2012 goal recommended by the Climate Task Force. To achieve these goals, the Council directed the City Manager in Resolution 2008-051 to prepare for Council's consideration an updated plan that identified interim milestones needed to put the City on a trajectory to meet the 2020 goal. Council further directed that the updated plan should include a list of strategies demonstrating how the interim milestones could be met and that the strategies should consider, among other things, relevant technical, economic, political and social factors.

5. On August 26, 2008, the Council conducted a work session to hear a presentation from City staff and for Council to provide direction to City staff concerning the City's development of a "Climate Action Plan" ***[See Exhibit E].*** Included in the materials provided to the Council for the work session was a list of "Short-term Climate Protection Strategies" recommended by the Climate Task Force. One of these recommended strategies was "Advanced Metering Infrastructure (Smart Meters)," which is described in the materials as:

> Advanced Metering Infrastructure (AMI) includes "smart" meters and an infrastructure for two-way communication. This strategy assumes that the meters would provide detailed electricity use information back to customers in real time, allowing customers to track consumption and manage bills by reducing usage and shifting electric loads. AMI systems can also pinpoint outages and transmit billing data to the utility, reducing costs for reading meters. AMI, smart meters, and innovative rate structures are part of an advanced electric grid system. This measure proposes to install advanced smart meters in all homes by mid decade and is integral to the Electric Energy Policy update currently under consideration.

6. On October 28, 2008, the Council conducted a second work session to further discuss development of the City's "Climate Action Plan" ***[See Exhibit F].*** Included in the materials provided to Council for the work session was a draft of the "Climate Action Plan" that included a list of "New Measures" to reduce greenhouse gases being recommended by the Climate Task Force and City staff. Two of these listed "New Measures" are "Smart Grid" and "Advanced Metering Infrastructure."

7. On December 2, 2008, the Council adopted Resolution 2008-122 ***[Exhibit G]***, approving and adopting the "2008 Fort Collins Climate Action Plan" attached as Exhibit "A" to the Resolution ("Climate Action Plan"). The Resolution states that the City Manager prepared the Climate Action Plan as directed by Council in Resolution 2008-051 and that it supersedes the City's 1999 Greenhouse Gases Reduction Plan. The Climate Action Plan contains a list of "New Measures," which it describes as strategies to help the City achieve its goals in reducing greenhouse gases. It also observes that many of these strategies "will require significant decisions about City budget priorities and trade-offs between community costs and benefits." The Climate Action Plan specifically lists "Smart Grid" and "Advanced Metering Infrastructure" as two of the City's "New Measures" to be utilized in reducing greenhouse gases. Resolution 2008-122 directs the City Manager to "prepare an annual status report tracking progress toward attainment of the goals established herein, including . . . a list of quantified emission reductions (sic) actions for the preceding calendar year."

8. On January 6, 2009, the Council adopted Resolution 2009-002 ***[Exhibit H]***, by which it adopted the "Fort Collins Utilities Energy Policy 2009," which is attached as Exhibit "A" to the Resolution ("2009 Energy Policy"). The 2009 Energy Policy updated Council's 2003 Energy Policy. The 2009 Energy Policy states that its purpose "is to provide strategic planning

guidance for Fort Collins Utilities' Light and Power Service Unit, the Energy Services group and the entire City government" and it describes four goals. Under the first goal, "Provide highly reliable electric service," the Policy states:

> "Smart grid innovations are expected to have an increasing role in the electric system. Smart grid is the integration of an electric transmission or distribution system, a communications network, software and hardware to monitor, control and manage the reliability and overall system efficiency of the generation, distribution, storage and consumption of energy."

The Policy also sets as an objective the creation of a "smart grid roadmap" by the end of 2009.

9. Pursuant to the policy directives contained within the Climate Action Plan and the Fort Collins Utilities Energy Policy of 2009, Utility Services staff started developing a budget proposal for the Project to be presented to Council for its consideration in the City's 2010 budget. *See Affidavit of Steve Catanach* at ¶ 6, **Exhibit Y;** *Affidavit of Dennis Sumner* at ¶ 6, **Exhibit X.**

10. Utility Services staff also learned in 2009 of the availability of grant funding under the federal government's recently adopted American Recovery and Reinvestment Act. This grant funding was available from the United States Department of Energy ("DOE") under its Smart Grid Investment Grant Program for electric grid modernization projects ("Smart Grid Grant Program"). The Electric Utility submitted a grant application to the DOE requesting funding under the Smart Grid Grant Program for the Electric Utility's advanced metering infrastructure improvements proposed for the Project as contemplated under the Climate Action Plan and the 2009 Energy Plan. The total proposed funding for the Project was approximately $32 million. *See Affidavit of Steve Catanach* at ¶7; *Affidavit of Dennis Sumner* at ¶ 7.

11. In October 2009, the Electric Utility was notified that the DOE had awarded it a grant of $15.7 million under the Smart Grid Grant Program ("DOE Smart Grid Grant") that was

conditioned on the City providing matching funds for the Project. As described below, in April and May of 2010, Council took several formal actions, in publically noticed Council meetings, to agree to the conditions of the DOE Smart Grid Grant and to provide the required matching funds for the Project. *See Affidavit of Steve Catanach* at ¶8; *Affidavit of Dennis Sumner* at ¶ 8.

12. On April 20, 2010, the Council passed on first reading Ordinance No. 043, 2010 ***[Exhibit I]***. This Ordinance appropriated the unanticipated revenue that the Electric Utility was to receive from the DOE Smart Grid Grant and from the bond proceeds to be collected from the issuance of revenue bonds by the City's Electric Utility Enterprise ("Electric Enterprise"),[5] with such grant funds and bond proceeds to be largely used to fund the Project.

13. Also on April 20, 2010, the Council, acting as the Board of the Electric Enterprise ("Electric Enterprise Board") ***[Exhibit J]***, passed on first reading Ordinance No. 001, authorizing the issuance of $17 million of Electric Utility Enterprise Revenue Bonds ("Electric Enterprise Bonds") to provide the Electric Utility with the matching funds for the Project required for the DOE Smart Grid Grant.

14. On May 18, 2010, the Council adopted on second and final reading Ordinance No. 043, 2010 ***[Exhibit K]***, appropriating the needed funds for the Project ("Appropriation Ordinance"). The Council specifically notes in the Appropriation Ordinance's recitals that the DOE Smart Grid Grant "provides the City with the opportunity to install an Advanced Metering Infrastructure (AMI) system and accelerate the implementation of the City's long range information technology (IT) needs, and to begin the modernization of its electrical distribution

[5] The Electric Enterprise was established by the Council in City Code Section 26-392, as authorized in Article V, Section 19.3(a) of the City Charter. The Electric Enterprise was established to be the type of "enterprise" or "government-owned business" authorized under the Taxpayer's Bill of Rights in Article X, Section 20 of the Colorado Constitution ("TABOR") to be free from TABOR's election requirements. By qualifying as this type of "enterprise," the Electric Enterprise can issue revenue bonds without obtaining the prior voter approval required by TABOR when governments that are not a qualified "enterprise" are issuing bonds.

system." In Section 1 of the Appropriation Ordinance, the Council appropriated the funds to be received from the DOE Smart Grid Grant expressly stating that these funds were being appropriated "for expenditure in the Light and Power Fund for the Advanced Metering Infrastructure (AMI) and smart grid technology project." And, in Section 2 of the Appropriation Ordinance, the Council appropriated the proceeds to be received from the Electric Enterprise Bonds expressly stating that these proceeds were being appropriated "for expenditure in the Light and Power Fund for the Advanced Metering Infrastructure (AMI) and smart grid technology project."

15. On May 18, 2010, the Council, acting as the Electric Enterprise Board, adopted on second and final reading Ordinance No. 001 ***[Exhibit L]***, authorizing the issuance of the Electric Enterprise Bonds for the Project.

16. On May 18, 2010, the Council adopted Resolution 2010-030 ***[Exhibit M],*** authorizing the City Manager, on the City's behalf, to enter into the "Assistance Agreement" with the DOE required for the DOE Smart Grid Grant ("DOE Grant Resolution"). The Council notes in the DOE Grant Resolution's recitals that the funds from the DOE Smart Grid Grant would be used for "the Project," which is identified in the Resolution's recitals as "to develop smart grid technology." The Council further states in the recitals that "the City's focus in implementing the Project will include installation of an Advanced Metering Infrastructure ("AMI") System, installation of meter data management system, grid automation, improved cyber security and enhanced demand response programs designed to increase customer engagement." In Section 1 of the DOE Grant Resolution, the Council expressly authorizes the City Manager to enter into the Assistance Agreement with the DOE "for the receipt of grant

funds, to be used for the installation and deployment of smart grid technology in Fort Collins . . . on terms and conditions consistent with the terms of this Resolution."

17. In 2010, Fort Collins Utilities began extensive public outreach to provide information and education on smart grid technologies and their impacts on customers and on the City's electrical distribution system. The public outreach emphasized the importance of the technology support services and the customer's role in demand side management, load control and energy conservation through the tag line of "Monitor My Use." Customer communications were coordinated through a variety of tools, including:

- Utility bill inserts;
- Utility Services and City web sites;
- Electronic newsletters and City newsletters;
- News releases to local print media;
- Coordinated residential, commercial and key accounts support, including newsletters;
- Targeted communications for specific areas of program implementation such as meter installation, deployment of in-home displays, efficiency and renewable energy; and

Well-established education programs (Q&A sessions/seminars), including, fact sheets distributed at City facilities. *See Affidavit of Steve Catanach* at ¶12; *Affidavit of Dennis Sumner* at ¶ 10.

18. After public outreach and industry research, Utility Services recognized that some customers may have concerns with the technology associated with Smart Meters. To address these concerns, Utility Services developed three potential options for different meters to offer customers:

- Option 1: Standard mode with full functionality and ability to take advantage of the new technology

- Option 2: Limited mode collects data only once a day
- Option 3: Manual mode: meter read manually once per month (added monthly cost)

See Affidavit of Steve Catanach at ¶13; *Affidavit of Dennis Sumner* at ¶11.

19. On July 12, 2011, the Council held a work session to discuss "Modernizing Water and Electric Infrastructure" ***[See Exhibit N].*** Participating in the work session with Council were then Utility Services Director Brian Janonis, Light & Power Operations Manager Steve Catanach, and Kraig Bader, Standards Engineering Manager for Light & Power. *See Affidavit of Steve Catanach* at ¶14; *Affidavit of Dennis Sumner* at ¶12. As stated in the "Work Session Item" provided to Council, the objective of the work session was to provide Council with an update on the Project. This specifically included informing Council that Utility Services was planning on providing its customers with the three potential options for the type of meter they could choose to replace the existing meter. The Work Session Item asked for Council input on the questions of whether "Council was comfortable with the options?" The Work Session Item and the information provided with it, reflect that the decisions Utility Services was making concerning its planned implementation of the Project followed the policy direction that the Council had previously given City staff through its adoption of the Climate Action Plan, the 2009 Energy Policy, the Appropriation Ordinance and the DOE Grant Resolution. This information provided for the Work Session also reflects that Utility Services had studied and considered the potential health impacts from the advanced metering technology being discussed.

20. Council gave specific direction on the Project to Utility Services management staff at that work session. Council supported offering the three options proposed and was very clear in their direction that associated operational costs should be fairly recovered from those

customers selecting the modified offering of Option 2 and 3 ***[See Exhibit O]***. Council also directed staff to "continue to explore opportunities related to the wide area communication network the project will be installing." *See Affidavit of Steve Catanach* at ¶15.

21. Based upon the specific direction provided by Council, Utility Services moved forward with the Project and the plan to offer those three options to customers. Utility Services also continued its efforts to educate the public about the Project. Among other things, Steve Catanach, the Light & Power Operations Manager, worked with *The Coloradoan* to run a detailed newspaper story about the Project on April 3, 2012. *See* ***Exhibit P***. The story covered several aspects of the Project, including its purpose, how the Smart Meters would work, safety issues, and the fact that customers who opted out of having a smart meter would have to pay an additional $11 monthly meter reading charge. *See Affidavit of Steve Catanach* at ¶16; *Affidavit of Dennis Sumner* at ¶13.

22. Utility Services also made available to its customers written information describing the three options they would have for replacement of the existing meter on their home: As reflected in ***Exhibit Q***, the written information explained the three options in very simple terms:

> "**Option 1**. You don't need to do anything. A new digital electronic meter and water meter device will be installed, at no cost to you. Electric usage data will be recorded every 15 minutes and water consumption data will be recorded every hour.
>
> **Option 2**. A new digital electric meter and water meter device will be installed at no cost to you. Water usage data will be recorded every 12 hours and electric usage data will be recorded every 24 hours. No meter reading fee applies.
>
> **Option 3**. The meter will be upgraded to a more accurate digital device but data will not be transmitted electronically. The meter will be manually read on a monthly basis. Contact Utilities to select this option. An $11

monthly charge to cover the cost of manual meter reading will be added to your monthly utility bill."

See Affidavit of Steve Catanach at ¶17; *Affidavit of Dennis Sumner* at 14.

23. The Electric Utility began installing the advanced metering technology in a small test area in March 2012. *See Affidavit of Steve Catanach* at ¶18; *Affidavit of Dennis Sumner* at ¶ 15.

24. On May 1, 2012, the Council adopted on second and final reading Ordinance No. 033, 2012 ***[Exhibit R]***, amending City Code Section 26-712 to set several miscellaneous Utility Services fees and charges, including a monthly $11 meter reading charge for those customers who selected the Option 3 meter.

25. In Fall 2012, Utility Services began its wide-spread installation of the advanced meters throughout the community. The meter installations were done by Corix, a contractor hired by the City under a services agreement to install the meters for the Project, which was anticipated completion sometime in 2014. As part of that process, Utility Services notified customers by postcard approximately 6 weeks before the time that meters would be installed in their particular neighborhood, and then a second time approximately two weeks out from the anticipated installation date for their property. Corix would also leave a packet at each residence when a new meter was installed, informing the customer that the replacement had been made ***[Exhibit S]***. If Corix employees ran into a concern or problem in the process of replacing a meter, Corix was instructed by Utility Services to simply pass over that particular residence until the issue could be resolved by Utility Services representatives. Those issues may have involved anything from customer concerns about potential damage to rose bushes or other plantings around the electric meter, to logistical problems in the contractor gaining access a meter (some

of which were located inside a residence), to customer questions or concerns about the new meter. Utility Services sent a letter to customers at those residences asking them to contact Utility Services to discuss the particular problem or concern in order for the installation process to proceed. If a customer did not contact Utility Services after a certain period of time, a Utility Services employee would follow up by telephone with that customer to answer questions and/or address the logistical issues for gaining access to the meter. *See Affidavit of Steve Catanach* at ¶19; *Affidavit of Dennis Sumner* at ¶16.

26. There were approximately 500 residences passed over in the initial installation to resolve issues according to the process described above, and then approximately 50 residences for which these issues were not resolved through telephone calls. Most of those 50 residences involved situations where the customers failed to respond to repeated efforts by Utility Services to contact them to resolve these issues, and a smaller number involved customers who simply refused to cooperate in the installation of the new meter. *See Affidavit of Steve Catanach* at ¶20; *Affidavit of Dennis Sumner* at ¶17.

27. At that point, the Utility then sent termination notices to these remaining customers via certified mail to inform them that their electric service would be discontinued due to their failure to contact Utility Services or to otherwise cooperate in the installation of a new meter under one of the three options offered by Utility Services ***[Exhibit T]***. Most customers who were sent a termination notice contacted Utility Services to resolve issues and facilitate the installation of one of the meters offered. *See Affidavit of Steve Catanach* at ¶21; *Affidavit of Dennis Sumner* at ¶18.

28. The Plaintiff and her husband, Craig Farver, were among the customers who refused to cooperate in the installation of a new meter after receiving a termination notice. *See Affidavit of Steve Catanach* at ¶22; *Affidavit of Dennis Sumner* at ¶19.

29. On November 18, 2013, Dennis Sumner, Utility Services Implementation Project Manager, made a courtesy phone call to Craig Farver to discuss the electric service termination notice sent to the Farver residence. During that phone call, which lasted over 20 minutes, Sumner explained to Mr. Farver the various meter options available for installation in an effort to avoid terminating service at the Farver residence. Mr. Sumner explained that the alternative meter option did not contain the "smart" wireless technology about which Plaintiff was concerned, and offered several times to allow the Plaintiff and her husband to inspect the different meters, and to provide whatever information they needed to understand how the Option 3 non-communicating digital meter worked. *See Affidavit of Steve Catanach* at ¶23; *Affidavit of Dennis Sumner* at ¶20.

30. On February 4, 2014, the Council adopted on second and final reading Ordinance No. 017, 2014 ***[Exhibit U]***, to amend City Code Section 26-712 to clarify the descriptor language for the monthly $11 meter reading charge set in Ordinance No. 033, 2012, to read: "Manual meter reading charge, per month, charged to service addresses where metering equipment without remote communications capability is used, requiring an on-site visit to collect use for water and/or electric service."

31. By March 2014, Utility Services had only 5 customers who refused to cooperate in the installation of a new meter, including the Farvers. Using a police stand-by, Utility Services representatives visited the Plaintiff's home to install the Option 3 non-communicating

digital meter on the Plaintiff's home. *See Affidavit of Steve Catanach* at ¶24; *Affidavit of Dennis Sumner* at ¶21-22.

32. In April 2014, Utility Services began charging the $11 per month meter reading charge to its customers for whom an Option 3 meter was installed, including the Plaintiff and her husband. *See Affidavit of Steve Catanach* at ¶25; *Affidavit of Dennis Sumner* at ¶ 23.

33. In May 2014, customers began having access to review their metering data online and receive information about their consumption through an online web portal. The access was available on mobile devices beginning in December 2014. *See Affidavit of Dennis Sumner* at ¶24.

34. As of June 2016, Utility Services had approximately 59,700 electric accounts using an Option 1 meter, 122 electric accounts using an Option 2 meter, and 221 electric accounts using an Option 3 meter. *See Affidavit of Dennis Sumner* at ¶25.

IV. ARGUMENT

The essence of the five causes of action in the Plaintiff's Complaint is that the Project was not properly approved by the City Council and, therefore, Utility Services had no authority to implement it or to charge the Plaintiff an $11 per month meter reading charge. The Plaintiff's causes of action ignore the formal actions the Council has taken to approve the Project and to direct City staff to implement it. They are also premised on a lack of understanding concerning how the Council establishes the City's policies for Utility Services and how the City Manager and the Director of Utility Services have been delegated the administrative authority to implement these policies with respect to the Project. Based on the undisputed facts presented above and for the reasons hereafter discussed, all of the Plaintiff's causes of action are without merit and should be dismissed with prejudice.

A. Council-Manager Form of Government

The City's form of government, as established by the Charter, is a "Council Manger government" with all of the City's powers vested in the Council, but they are to "be exercised in the manner prescribed by [the] Charter or, if the manner be not therein prescribed, then in such manner as may be prescribed by ordinance."[6] The Council's powers are further enumerated in the Charter to include "*the determination of all matters of policy* . . . except as otherwise provided by [the] Charter" and to include, without limitation, the power to:

> (a) appoint and remove the City Manager;
>
> (b) establish, change, consolidate or abolish administrative offices, service areas or agencies by ordinance, upon report and recommendation of the City Manager, so long as the administrative functions and public services established by this Charter are not abolished in any such reorganization. *The city shall provide for all essential administrative functions and public services, including, but not limited to the following*:
>
> . . . .
>
> (4) *electric utility services*;
>
> (c) adopt the budget of the city;
>
> (d) authorize the issuance of bonds by ordinance as provided by this Charter;[7] (Emphasis added.)

The Charter requires the Council to exercise its powers by "ordinance, resolution, or motion."[8] However, the Council is required to exercise certain powers only by ordinance and, as relevant here, these include: "All legislative enactments and every act creating, altering, or abolishing any agency or office, . . . making an appropriation, authorizing the borrowing of money, . . . establishing any rule or regulation for the violation of which a penalty is imposed, or

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[6] Charter Article I, Section 1.

[7] Charter Article I, Section 5.

[8] Charter Article I, Section 6.

placing any burden upon or limiting the use of private property . . . ."[9] It also includes the Council setting by ordinance "such rates, fees, or charges for water and electricity and for other utility services furnished by the city as will produce revenues sufficient to pay the cost of operation and maintenance of the city's utilities in good repair and working order."[10]

Related to the City Manager's role in the City's council-manager form of government, the Charter provides that the City Manager "shall be the chief executive officer and head of the administrative branch of the city government."[11] In this role, the City Manager is responsible to the Council "*for the proper administration of all affairs of the city* and to that end shall have power and be required to":

. . . .

(b) prepare the budget annually and submit it to the Council and *be responsible for its administration after adoption*;

. . . .

(f) enforce the laws and *ordinances* of the city;

(g) perform such other duties as may be prescribed by this Charter *or required of the City Manager by the Council* not inconsistent with this Charter.[12] (Emphasis added.)

Clearly, under the Charter the Council sets the City's policy through its formal actions and the City Manager and his staff carry out that policy in the exercise of their administrative authority. Based upon the affidavits submitted in support of this motion, including the Affidavit of the City Manager attached hereto as ***Exhibit W***, as well as the undisputed facts set forth

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[9] *Id.*

[10] Charter Article XII, Section 6.

[11] Charter Article III, Section 1.

[12] Charter Article III, Section 2.

above, it should be undisputed that the Project was adopted and implemented consistently with what the Charter and Code provide.

B. Council Actions Delegating Authority to City Manager and Utility Services Director

In the exercise of its powers related to providing electric services to the City's residents, the Council has adopted by ordinance numerous City Code provisions and regulations, some of which are relevant here. In 2007, the Council amended Code Section 2-504 to read:

> Utility Services shall be and is hereby created. Utility Services shall be in the charge of a Director who shall be directly responsible to the City Manager for the functions and duties of Utility Services, including, without a limitation, ***the functions and duties necessary to provide for the design,*** *construction, reconstruction, addition, repair,* ***replacement, operation and maintenance of the City's electric,*** *water, wastewater and stormwater* ***utility services***, and shall have control and supervision over such agencies, service units, departments, divisions, offices or persons as may be deemed appropriate by the City Manager.[13] (Emphasis added.)

At least since 1993, City Code Section 26-396 has provided: "No person shall take electrical energy from the distributing system except through a meter or other measuring device owned and installed by the City without the consent of the electric utility to take such electric energy." Then, in 2006, the Council approved by Ordinance No. 194, 2006 ***[Exhibit Z]***, in accordance with City Code Section 26-463,[14] Utility Services' "Electric Service Rules and Regulations" ("Electric Regulations").[15] Section 8.1.2 of the Electric Regulations provides that

[13] This Code section reads as it was adopted by Council in Ordinance No. 005, 2007, and in effect during the years relevant to the Plaintiff's claims here (2010-2014), but minor, non-substantive amendments were made to it in 2015 in Council Ordinance No. 108, 2015.

[14] Code Section 26-463 authorizes the Utility Services Director to recommend rules and regulations for the provision of electric services, which must be approved by City Council.

[15] On June 7, 2016, these Electric Regulations were, in substantial part, incorporated into the City's "Electric Service Standards" approved by Council in Ordinance No. 066, 2016.

Utility Services "shall own and maintain metering equipment suitable and necessary for measuring the electric energy supplied."

When Code Sections 2-504 and 26-396 and Electric Regulation Section 8.1.2 are read together, the Council has clearly delegated to the City Manager and the Utility Services Director, both expressly and impliedly, the authority to direct the Electric Utility to replace the meters it uses to measure the energy consumption of its customers without further Council authorization. Code Section 2-504 expressly delegates to the Utility Services Director, under the City Manager's supervision, the "functions and duties necessary to provide for the design, . . . replacement, operation and maintenance of the City's electric . . . utility services." And, Code Section 26-396 and Electric Regulation Section 8.1.2 impliedly delegate to the City Manager and the Utility Services Director the authority to determine the type of meters that the Electric Utility will own, install and operate. *See, Hawses v. Kelly,* 65 P.3d 1008, 1016 (Colo. 2003) ("it is also well established that [administrative] agencies possess implied and incidental powers filling the interstices between express powers to effectuate their mandates. . . . Thus, the lawful delegation of power to an administrative agency carries with it the authority to do whatever is reasonable to fulfill its duties."); *Rocky Mountain Motor Co. v. Airport Transit Co.,* 235 P.2d 580, 586 (Colo. 1951) ("When [Denver] established the airport and by declaration of its city council placed the management thereof in the department of improvements and parks, there was, and is, in (sic) implied grant of power to the manager of the department of improvements and parks to have contractual powers to grant among other things a taxicab concession at the airport and control the limousine and taxicab operations incident thereto without ordinance authority.").

However, even without this delegated express and implied authority, it is clear from the other, more direct actions the Council took with respect to the Project that the Council expressly

authorized the Project and directed the City Manager and the Utility Services Director to implement it.

C. Council Actions Directly Authorizing the Project's Implementation

The Council first established its general policy concerning the Project in the Climate Action Plan and the 2009 Energy Policy. The Climate Action Plan identified "Smart Grid" and "Advanced Metering Infrastructure" as two of the "New Measures" to be used by the City in the short term to help achieve the City's 2020 goal set for greenhouse gas emissions. The 2009 Energy Policy added to this by setting the goal that "[s]mart grid innovations are expected to having an increasing role in the electric system." The 2009 Energy Policy described these innovations as including "a communication network, software and hardware to monitor, control and manage the reliability and overall system efficiency of the generation, distribution, storage and consumption of energy." The 2009 Energy Policy further directed Utility Services to "[c]reate a smart grid roadmap by the end of 2009, defining specific objectives and implementation plans."

With this general policy direction, Utility Services had its direction from Council to implement the Project, but it did not have the funds to do so. Therefore, Utility Services prepared in 2009 a budget offer to fund the Project for Council to consider as part of the City's 2010 budgeting process. However, before this budget offer was presented to Council, Utility Services learned of the availability of grant funds under DOE's Smart Grid Grant Program that could be used to fund the Project. The City applied for a grant and was awarded $15.7 million by the DOE, with the requirement that the City provide matching funds for the Project. To provide these matching funds, the Council, acting as the Board of the Electric Utility Enterprise, adopted on May 18, 2010, Ordinance No. 001 authorizing the issuance of the Electric Enterprise

Bonds in the amount of $17 million. Then, with the expected availability of these grant funds and bond proceeds, the Council adopted the Appropriation Ordinance on May 18, 2010.

The Council specifically stated in Section 1 of the Appropriation Ordinance that it was appropriating the DOE Smart Grid Grant funds "for expenditure in the *Light and Power Fund* for the Advanced Metering Infrastructure (AMI) and smart grid technology project" and in Section 2 that it was appropriating the Electric Enterprise Bond proceeds "for expenditure in the *Light and Power Fund* for the Advanced Metering (AMI) and smart grid technology project" (emphasis added). The "Light and Power Fund" is established in Code Section 8-77, which provides:

> "There is hereby created a fund to account for the City's municipal electric utility known as the light and power fund. Revenues for the fund shall include receipts from charges for electric services. *Expenditures shall be made for approved purposes in connection with furnishing electric services*." (Emphasis added.)

Charter Article XIII defines "appropriation" to mean "the authorized amount of funds set aside for expenditure during a specified time *for a specific purpose*." (Emphasis added.) Sections 1 and 2 of the Appropriation Ordinance clearly identified that the funds appropriated were to be expended from the Light and Power Fund "for a specific purpose," the Project. And, once these funds were in the Light and Power Fund, Code Section 8-77 authorized them to be spent for "approved purposes," which here was the Project.

If the Appropriation Ordinance was not sufficient Council approval of the Project and clear Council direction to Utility Services to implement it using these appropriated funds, the Council also adopted on May 18, 2010, the DOE Grant Resolution approving the "Assistance Agreement" required by the DOE. In the DOE Grant Resolution the Council was clear that "the City's focus in implementing the Project will include the installation of an Advanced Metering Infrastructure ("AMI") System" and that the City Manager was authorized to enter into the Assistance Agreement "for the receipt of grant funds, to be used for the installation and

deployment of smart grid technology in Fort Collins . . . on terms and conditions consistent with the terms of this Resolution."

When the Climate Action Plan, the 2009 Energy Plan, the Appropriation Ordinance and the DOE Grant Resolution are read together, there is only one reasonable conclusion. Acting in accordance with the City Charter and Code, the Council directly, clearly and sufficiently authorized and approved the Project and the City Manager, the Utility Services Director and Utility Services staff properly exercised their delegated administrative authority to implement the Project.

D. Compliance with the Sunshine Act

As previously noted, the Plaintiff makes several assertions in her Complaint that the Project was allegedly implemented by the Electric Utility in violation of the Sunshine Act, with decisions being made informally and secretly by the Electric Utility. To the extent the Sunshine Act is applicable to the Council and the City's administrative departments and officials, the applicable provisions are found in C.R.S. § 24-6-402, known as the Colorado Open Meetings Law ("COML"). [16]

[16]The City is assuming in this Motion, for the sake of argument, that the City and its administrative officials are subject to the COML. However, under the home rule authority granted to it in Article XX of the Colorado Constitution, the City reserves and does not intend to waive the right to later assert in this action, if necessary, that the meeting procedures and notice requirements to be followed by the Council for its meetings are matters of strictly local and municipal concern, particularly as they related to the City's operation and control of the Electric Utility and the City's other public utilities. Article XX, Sections 1 and 6 of the Colorado Constitution. Accordingly, the Council's open meeting and notice requirements as set in City Charter Article II, Section 11, and in Division 2, Article II of City Code Chapter 2, preempt and are controlling over any conflicting provisions in the COML. *E.g., Cook v. City of Delta,* 64 P.2d 1257 (Colo. 1937) (home rule city's acquisition of a light plant is a local and municipal matter under Article XX, Sections 1 and 6 of Colorado Constitution); *Glenwood Post v. City of Glenwood Springs,* 731 P.2d 761, 762 (Colo. App. 1986) (home rule city may enact its own rules regarding council meetings).

The COML provides that "[a]ll meetings of a quorum or three or more members of any *local public body*, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times."[17] (Emphasis added.) It defines a "local public body" to include "any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of any *political subdivision of the state* and any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function ***but does not include persons on the administrative staff of the local public body***."[18] (Emphasis added.) A "political subdivision of the state" is defined in the COML to include a home rule city.[19] Therefore, subject to the home-rule reservation expressed in footnote 16 of this Motion, the COML arguably applies to the City.

With regard to the public notice required for a local public body's meetings that must be opened to the public, the COML provides:

> "*Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after* ***full and timely notice to the public***. In addition to any other means of full and timely notice, a local public body shall be deemed to have given full and timely notice if the notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. The public place or places for posting such notice shall be designated annually at the local public body's first regular meeting of each calendar year. The posting shall include specific agenda information where possible."[20] (Emphasis added.)

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[17] C.R.S. § 24-6-402(2)(b).

[18] C.R.S. § 24-6-402(1)(a)(I).

[19] C.R.S. § 24-6-402(1)(c).

[20] C.R.S. § 24-6-402(2)(c).

In determining what is considered "full and timely notice to the public" under the COML, the Colorado Supreme Court has observed that the COML "neither establishes the manner in which notice must be given nor defines the content of the required notice." *Benson v. McCormick,* 578 P.2d 651, 653 (Colo. 1978). The Court further stated that "[i]n view of the numerous meetings to which the statutory requirement is applicable, we hold that that the 'full and timely notice' requirement establishes a flexible standard aimed at providing fair notice to the public . . . . Consequently, whether the statutory notice requirement has been satisfied in a given case will depend on the particular type of meeting involved." 578 P.2d at 653. The Court has also observed that the COML is "not intended to interfere with the ability of public officials to perform their duties in a reasonable manner." 578 P.2d at 653. Applying these standards from *Benson*, in *Van Alstyne v. Housing Authority of the City of Pueblo*, 985 P.2d 97, 100 (Colo. App. 1999), the Colorado Court of Appeals concluded that the Pueblo Housing Authority's publication of a meeting notice in a newspaper of general circulation in Pueblo County six days before the noticed meeting was "full and timely notice" under the COML.

Under these standards, there is little question that the actions taken by the City to provide public notice of the relevant Council meetings as described in the City Clerk's affidavit attached hereto as ***Exhibit V***, were more than adequate to satisfy the requirement of "full and timely notice" under the COML.

And, to the extent the Plaintiff has alleged that the administrative staff of the Electric Utility violated the Sunshine Act or the COML by holding informal and secret meetings related to the Project that were not publicly noticed, the bolded language in the definition of "local public body" quoted above is clear that COML's open meeting and notice requirements applicable to a "local public body" are not applicable to "persons on the administrative staff of

the local body."[21] If this was not true, every time three or more administrative officials of any local government decide to have a meeting to discuss a matter that has been delegated to them, they would be required to provide "full and timely notice to the public" and allow the public to attend the meeting. Such a requirement would bring local government operations to a grinding halt and critical services needed for the public's health, safety and welfare would become close to impossible to provide in a timely manner.

E. No Violation of Due Process

Plaintiff's third cause of action complains that she was allegedly deprived of a property interest without due process of law under Article II, Section 25 of the Colorado Constitution. Both the federal and state constitutions mandate that a person may not be deprived by the state of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 25. "The essence of procedural due process is fundamental fairness; this embodies adequate advance notice and opportunity to be heard prior to state action resulting in deprivation of a significant property interest." *Meridian Ranch Metro. Dist. v. Colorado Ground Water Comm'n*, 240 P.3d 382, 391 (Colo. App. 2009); *Barham v. Univ. of Northern Colorado,* 964 P.2d 545, 550 (Colo. App.1997). However, the protections offered by procedural due process "are not as stringent when a deprivation of property is involved as opposed to a deprivation of a personal liberty." *Colorado Ins. Guar. Ass'n v. Sunstate Equip. Co., LLC,* 2016 COA 64, ¶¶ 52-54, *cert. granted in part,* 16SC384, 2016 WL 6407465 (Colo. Oct. 31, 2016); *Dewey v. Hardy,* 917 P.2d 305, 308 (Colo. App. 1995).

[21] This same language excluding a local public body's administrative staff from COML's open meeting and notice requirements is also found in COML's definition of "state public body," thereby also excluding the State's administrative staff from these COML requirements. C.R.S. § 24-6-402(1)(d)(I).

According to Paragraph 175 of the First Amended Complaint, "Due process, in this case, means for the City Council and Fort Collins Electric Utility to fully comply with and follow all the requirements for open meetings and policy making in the City Charter, the Colorado Sunshine Act of 1972 and any other laws which apply to the Project and the process by which to do the Project was made." Plaintiff then goes on to allege in Paragraph 178 as follows:

> "Following these requirements would have enabled Plaintiff to be aware of and participate in the policy making process at multiple steps along the way. She had a right to be aware of the proposed Project and to so participate by, for example, studying the proposed Project, offering her written and verbal comments and recommendations to the City Council and the Fort Collins Electric Utility and making recommendations for alternative policies to the same bodies. Failure to follow due process deprived Plaintiff of her right to do this. When Plaintiff had to choose between being exposed to and suffering from wireless radiation from the smart meter placed on her house, on the one hand, and paying a monthly meter reading charge for this program that was never properly approved, the Defendants were depriving her of property (money) without due process of law."

Plaintiff's due process claim must fail as a matter of law, for multiple reasons. They are flawed in the first instance because they are premised on the false notion, dispelled above, that the Project was never properly approved by City Council. The undisputed factual history of Council actions related to the Project and supporting affidavits clearly show otherwise.

Notwithstanding that fatal flaw, it is doubtful that Plaintiff has even alleged the deprivation of a significant property interest requiring due process in the first instance. Though the allegations of Plaintiff's third cause of action refer to "Plaintiff's meter," it has been established above that the meter is actually owned and operated by the City; it is not the Plaintiff's property. Further, to the extent she complains of being charged a monthly fee for the manual reading of her non-communicating meter, such a fee related to the provision of utility service is considered a discretionary legislative act for which constitutional due process does require notice and hearing. *See, Cottrell v. City and County of Denver,* 636 P.2d 703, 710 (Colo.

1981) (rate-making is a legislative function, requiring the balance of many questions of judgment and discretion, such that there was no constitutional requirement of notice and opportunity to be heard on water rate increase by municipal water board of commissioners); *Bennett Bear Creek Farm and Sanitation Dist. v. City and County of Denver,* 928 P.2d 1254, 1265 (Colo. 1996) (discussing general authority of municipalities to set rates for water service as part of its discretionary legislative powers). Colorado courts have noted on multiple occasions the power of local governments to validly exercise this legislative discretion and charge a reasonable fee for the purpose of defraying the cost of providing a particular government service. *See, e.g., Bruce v. City of Colorado Springs,* 131 P.3d 1187, 1190 (Colo. App. 2005); *Bloom v. City of Fort Collins,* 784 P.2d 304, 308-09 (Colo. 1989) (collecting cases). Such fees need not be voluntary. *Id.* The courts have also said that a municipality's legislation imposing a fee is "presumed constitutional" and that the "challenging party has the burden to prove it is unconstitutional beyond a reasonable doubt." 131 P.3d at 1190.

Aside from the above fundamental problems with the Plaintiff's due process claim, the undisputed factual history of the Project makes clear that it was adopted and implemented with multiple opportunities for Plaintiff to be heard by Council on issues related to the Project. Further, as attested to by the City Clerk, these opportunities all came with advanced notice of the meetings and work sessions when aspects of the Project would be discussed with Council, including the meter options which would be made available to electric customers and the $11 monthly manual meter reading fee associated with the non-communicating meter. That notice included publication to the City's website of all the agendas and materials being considered by Council several days in advance of any meeting when those issues would be considered. *See Affidavit of Wanda Winkelmann, attached hereto as Exhibit V.*

Accordingly, for the above reasons, the Plaintiff's due process challenge to the Project on due process grounds is also without merit, providing further support for the Court's entry of summary judgment in favor of the Defendants.

V. CONCLUSION

The factual history of City Council's action on multiple issues relating to the Project over the course of many years is not and cannot be disputed, and makes it abundantly clear that the Plaintiff will not be able to produce any evidence to establish a triable issue on her claims challenging the validity of the Project. This is particularly true given the presumptions of validity afforded to the City's actions in this context. Simply put, the adoption and implementation of the Project was clearly done in accordance with the City Charter and Code, with repeated notice and multiple opportunities for the Plaintiff to be heard, such that there is no genuine issue of material fact and the Defendants are entitled to judgment as a matter of law.

WHEREFORE, the Defendants respectfully request the Court to enter summary judgment in their favor and against the Plaintiff, and for whatever further relief the Court deems just and proper.

DATED this 15th day of December, 2016.

WICK & TRAUTWEIN, LLC

This document was served electronically pursuant to C.R.C.P. 121 §1-26. The original pleading signed by Kimberly B. Schutt is on file at the offices of Wick & Trautwein, LLC

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CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was filed via Integrated Colorado Courts E-Filing System (ICCES) and served this 15th day of December, 2016, on the following:

Sent by U.S. Mail to:

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Pro se Plaintiff

/s/ Jody L. Minch

[The original certificate of electronic filing signed by Jody L. Minch is on file with the law offices of Wick & Trautwein, LLC.]