Platte River Power Authority

Estes Park • Fort Collins • Longmont • Loveland

ORGANIZATION AND GOVERNANCE OF PLATTE RIVER POWER AUTHORITY

Formation of Platte River Power Authority

The municipalities of Estes Park, Fort Collins, Longmont, and Loveland ("owner communities") each operate electric distribution utilities. Historically the owner communities purchased wholesale power from federal government hydropower projects. During the early 1960s, the federal government notified the purchasers of wholesale power in the western United States that future hydropower development was limited.

Notice of the future limits on federal hydropower came at a time when the owner communities projected significant growth in the northern Colorado area and economies of scale were decreasing the generation costs for central station power facilities. To meet anticipated growth and to take advantages of economies of scale, the owner communities began to explore opportunities for joint action. After nearly a decade of planning, Platte River's predecessor was initially established as a nonprofit corporation and began revenue-producing operations in July 1973. Initial operations were limited to purchasing energy from the U.S. Bureau of Reclamation for resale to the owner communities, each of which had assigned their contracts with the Bureau to Platte River.

To move beyond remarketing federal hydropower, Platte River needed an infusion of capital. As a nonprofit corporation, Platte River could not issue tax-exempt bonds to finance capital projects. It made sense to explore other avenues for joint action to meet the generation and transmission needs of the owner communities.

Two problems immediately arose: First, there was no ready legal mechanism for Colorado municipal utilities to act jointly. Second, the Colorado Constitution prohibited municipalities from owning generation and transmission facilities with investor-owned and cooperative utilities, so they could not participate in larger generation projects. The owner communities worked with political leaders to address each of these issues, by changing both the Colorado Constitution and Colorado statutes.

The first impediment was resolved by a change to the Colorado statutes. In 1975, legislation (Colorado Revised Statutes (C.R.S.) § 29-1-204) was adopted that provided:

> "[a]ny combination of cities and towns which are authorized to own and operate electric systems may, by contract with each other . . . , establish *a separate governmental entity, to be known as a power authority*, to be used by such contracting municipalities to effect the development of electric energy resources in whole or in part for the benefit of the inhabitants of such contracting municipalities." (Emphasis supplied.)

The second issue, the prohibition of municipal investment in private enterprise, dated from the adoption of the Colorado Constitution in 1876 and was intended to prevent municipal pledges to benefit railroad expansion. In 1974, Colorado's citizens voted to amend the Colorado Constitution (Article XI, Section 2) to allow municipalities to own energy facilities jointly with investor-owned and cooperative utilities.

Organizational characteristics

The statute that authorizes the formation of power authorities sets forth certain organizational features for the resulting organization. For example, the statute specifies that a power authority will be governed by a board of directors in which "all legislative power of the entity is vested." Unless provided otherwise in the formative contract (meaning the Organic Contract for Platte River), C.R.S. § 29-1-204 states that a majority of the directors will form a quorum and a majority of the quorum is necessary to take action. The statute contains a long list of "general powers" that may be exercised by a power authority, including, among other things, the power to develop electric energy resources and transmission infrastructure, the power to condemn property, the power to approve rates for service, and the authority "to exercise any other powers which are essential to the provision of functions, services, or facilities

by the entity and which are specified in the contract."

Immediately after the enactment of C.R.S. § 29-1-204 the four owner communities signed the Organic Contract, which constituted Platte River as a joint action agency and therefore a governmental entity. As noted above, in its preceding years Platte River had operated as a Colorado nonprofit corporation. In fact, the legislative language that eventually became C.R.S. § 29-1-204 was drafted by lawyers who represented Platte River when it was a corporation. As a result, many elements of corporate governance found their way into both the statute and the Organic Contract—not only is a "board of directors" the governing body for any power authority, but the governance components of the Organic Contract were modeled after the bylaws of Platte River in its predecessor corporate form.

One interesting feature of the bylaws carried forward into the Organic Contract is the concept of a weighted vote. While C.R.S. § 29-1-204 specifies that actions by a power authority require support from the majority of the board, it also allows the formative contract to provide otherwise. The bylaws of the nonprofit corporation provided for a weighted vote to break a tie vote of the board. This provision has remained through all iterations of the Organic Contract. The weighted vote mechanism applies only when there is a tie vote, which, to date, has never happened.

As noted above, when Platte River evolved from a nonprofit corporation to a joint action agency, the original Organic Contract invoked the provisions of C.R.S § 29-1-204 (which enumerates specific powers for a power authority). Over time, however, the owner communities recognized the potential benefits of a more flexible legal framework. For this reason, in 1998 they amended and restated the Organic Contract to invoke broader organizational powers under C.R.S. § 29-1-203. This more general authority enables the owner communities "to contract with one another to provide any function, service, or facility lawfully authorized to each," and their contract may establish "a separate legal entity to do so."

The minutes from the board's April 1998 meeting state:

> "The recommended changes were the product of discussions among staff and general, corporate, and bond counsel. The purpose of the changes would be to *expand Platte River's abilities and give it greater flexibility beyond supplying wholesale electric power to four municipalities*." (Emphasis supplied.)

Based on this more flexible statutory authority and accompanying provisions added to the Organic Contract's "purposes" section, Platte River can accommodate the request of two or more owner communities to provide a new function, service or facility as long as (1) Platte River's board unanimously approves, (2) the city or town attorney for each participating owner community determines that the function, service or facility is lawful for that community, and (3) Platte River's bond counsel determines that the function, service or facility is an "enterprise" under subsection 2(d) of Article X, Section 20 of the Colorado Constitution (and would not violate any of our bond covenants or other pre-existing legal obligations). To qualify as an enterprise under the Constitution, a government-owned business must be independent and self-supporting (that is, earn income by providing goods or services, rather than depending on taxes), have the power to issue its own bonds, and not receive more than 10% of its funds through grants from state and local governments.

The Organic Contract has been modified through action of the owner communities many times since 1975, most recently in 2019. It will remain in effect through 2060 and thereafter until terminated by any owner community providing 12 months' written notice.

Fundamental documents

In addition to the Organic Contract there are several fundamental agreements and resolutions of relevance to the board, including:

1. The "Power Supply Agreements" under which each of Platte River's owner communities agrees to purchase "all electric power and energy" the owner community requires. These contracts are the lifeblood of Platte River. The Power Supply Agreements allow Platte River to collect revenues to pay for the resources Platte River has acquired to meet the owner communities' needs for electric power and energy and are the security underlying the bonds that Platte River has issued. The Power Supply Agreements require that the board of directors review and establish rates sufficient to meet Platte River's revenue requirements at least once each year.
2. The General Power Bond Resolution sets forth the terms and conditions under which money has been (and may be) borrowed from investors to finance the construction of Platte River's generation and transmission resources. This resolution constitutes a contract between Platte River and its bondholders. It contains covenants,

including a requirement that Platte River enforce the Power Supply Agreements with the owner communities. The resolution also requires Platte River to meet certain financial standards, such as minimum debt service coverage.

(3) The Fiscal Resolution is the mechanism by which the board governs Platte River's expenditures. Consistent with state law, the Fiscal Resolution requires Platte River to adopt an annual budget and sets forth specific parameters management must follow in spending Platte River's funds. The board updates the Fiscal Resolution periodically, most recently through Resolution No. 25-16.

(4) Platte River has other significant contracts, including:

a. the Yampa Participation Agreement that governs the relations of the owners of Craig Units 1 and 2,
b. hydropower purchase agreements with Western Area Power Administration allocating power from the Loveland Area Projects and the Colorado River Storage Projects ,
c. the Windy Gap Allotment Contract with Northern Colorado Water Conservancy District, which provides raw Windy Gap water,
d. the Reuse Agreement that exchanges Windy Gap water for treated effluent used for cooling at Rawhide, and
e. various contracts related to operations of the Rawhide Energy Station (coal supply, rail services, etc.).

Regulatory and legal characteristics

As a political subdivision, Platte River enjoys certain unique characteristics:

- In general, the Colorado Public Utilities Commission has no jurisdiction over Platte River. Platte River is subject to limited jurisdiction by the Federal Energy Regulatory Commission.
- Platte River's liability for civil wrongs (torts) is limited under the Colorado Governmental Immunity Act, C.R.S §§ 24-10- 101, *et seq*.
- Platte River is a "preference customer" eligible to receive hydroelectric power from the federal government through the Western Area Power Administration.
- Platte River is a not-for-profit entity but it does earn positive net revenues sufficient to maintain fiscal stability. Positive net revenues are reinvested in system assets.
- Platte River has the power to condemn property in some circumstances.
- Platte River can issue tax-exempt debt.
- Platte River's property is exempt from taxation in Colorado.
- Platte River's property is held in trust for the owner communities.

But, as noted earlier, as a political subdivision, Platte River is:

- Subject to the state Local Government Budget Law, C.R.S. § 29-1-101, *et seq*.;
- Subject to the state Open Meetings Law, C.R.S. §§ 24-6-401, *et seq*. and the Open Records Act, C.R.S. §§ 24-72-101, *et seq*.; and
- Restricted in its power and its action by its enabling legislation and the Colorado Constitution.

Governance

Turning to general principles of corporate governance, although Platte River's enabling statutes vest all legislative power with the board of directors, they do not address how the role and responsibilities of the board of directors related to principles of corporate governance. This is not atypical. For example, the Colorado Corporate Code contains numerous provisions defining the qualifications for board service and processes for board actions, but does not attempt to draw a line between the differing roles and responsibilities of the directors and management. Similarly, the clearest line differentiating board responsibilities from management in the Organic Contract is not contained in the provisions addressing the board, but rather in the description of the duties of the general manager. The general manager is designated as the "principal executive officer of the Authority with full responsibility for the planning, operations, and administrative affairs of the Authority, and the coordination thereof, pursuant to policies and programs approved by the Board of Directors."

Accordingly, the Platte River board provides oversight and policy direction—sometimes referred to as strategic management. This contrasts with the day-to-day operational management, which the Organic Contract entrusts to the general manager.

Under the concept of strategic management, board responsibilities typically include:

- The establishment of broad policies and organizational objectives.
- The selection, appointment and performance review of the chief executive.
- Acquisition and appropriation of sufficient resources to meet organizational objectives.
- Periodic review of operational results.
- Audit review and disclosure.

The division of corporate governance responsibilities at Platte River has not always been so clear. During its early years the Platte River board was more "hands on" than contemplated by the strategic management model. Up until 1973, (before the organization had professional staff) the Platte River board—which at the time was composed of the utility directors of the owner communities—directly managed the activities of the organization. The activities of the organization were limited, mostly involving efforts to form an entity capable of supplying the power supply needs of the owner communities. The first general manager was hired in 1973, but even then the business operations of the organization were limited. Platte River held Bureau of Reclamation power sales agreements as agent for the owner communities, but under these agreements the federal government managed power generation and delivery to the owner communities.

Once Platte River reorganized itself as a political subdivision under C.R.S. § 29-1-204, it began efforts to construct and participate in generation and transmission resources. Staff was still limited, and the board remained actively involved in organizational management. This level of board involvement in management may also reflect the make-up of the board during this period—the board was composed solely of the owner communities' utility directors. In 1976 the make-up of the board was expanded to include the mayors of the owner communities, which moved the board toward a more policy and strategic focus.

As the organization matured, it secured and constructed the resources necessary to provide power to the owner communities and retained additional staff. The role of the board shifted to the more traditional model of strategic management. A brief look at the levels and types of board activities over time is illustrative. For example, in 1975 the board met 17 times and adopted 66 resolutions, many of which simply approved specific equipment purchases or staff hires. During some years in the late 1970s, the board adopted nearly 100 resolutions. Presently, the board meets nine times each year—barring special meetings—and typically adopts 20 to 25 resolutions each year.

In summary, Platte River's present governance structure is similar to most complex business organizations. The board of directors provides strategic oversight, including policy guidance. Concurrently, the general manager acts as the chief executive officer providing the ongoing operational management necessary to implement the strategic direction established by the board.

Board ethics and fiduciary duties

Neither the Organic Contract nor Platte River's governing statutes give specific guidance on the duties board members owe to Platte River. Under the Colorado Corporate Code, a corporation's board members have a duty of good faith and loyalty to the organization. The corporate code requires board members to act in a manner they reasonably believe to be in the best interest of the entity, with the same care a prudent person would use in similar circumstances. This guidance translates into two general rules: (1) avoid personal conflicts of interest; and (2) make informed decisions. A personal conflict of interest exists when a board member (or someone close to the board member) has a direct financial interest in a matter coming before the board. This has rarely arisen for Platte River board members, but if such a circumstance were to arise, the board member should promptly consult with general counsel. Regarding the second test, in making informed decisions board members can rely on the information provided by staff or outside experts, so long as they have no reason to believe the information is not reliable.

Board members may also encounter conflicts if they participate in multiple governing bodies. Serving on multiple bodies is not a *per se* conflict of interest, but board members must remember that, when they are acting as a director of Platte River, they owe a fiduciary obligation to Platte River and must act in the best interests of Platte River. If an issue arises that could create divided loyalties, recusal is the proper course of action.