

DISTRICT COURT, BOULDER COUNTY, COLORADO		DATE FILED: September 4, 2019 2:40 PM CASE NUMBER: 2019CV30637
Court Address: 1777 Sixth Street P.O. Box 4249, Boulder, CO, 80306-4249		
Petitioner(s) THE CITY OF BOULDER		<p style="text-align: center;">△ COURT USE ONLY △</p> Case Number: 2019CV30637 Division: 5 Courtroom:
v. Respondent(s) PUBLIC SERVICE COMPANY OF COLORADO et al.		
Order: Motion to Dismiss First Amended Petition in Condemnation for Lack of Subject Matter Jurisdiction Pursuant to Colo.R.Civ.P. 12(b)(1)		

The motion/proposed order attached hereto: GRANTED.

The Court, having reviewed the Motion to Dismiss First Amended Petition in Condemnation for Lack of Subject Matter Jurisdiction Pursuant to Colo. R. Civ. P. 12(b)(1) ("Motion to Dismiss"), filed by Respondent, Public Service Company of Colorado ("PSCo"), and being fully advised in the premises, hereby ORDERS that:

1. For the reasons stated in the Motion to Dismiss and the reply thereto, which legal reasoning and conclusions the Court adopts as its own, the Court lacks subject matter jurisdiction; and
2. PSCo's Motion to Dismiss is GRANTED.

Issue Date: 9/4/2019



THOMAS FRANCIS MULVAHILL
District Court Judge

DISTRICT COURT, BOULDER COUNTY, COLORADO

Court Address: 1777 6TH Street, Boulder
Colorado 80302
303-441-3750

Petitioner:

THE CITY OF BOULDER, a Colorado Home Rule City,

v.

Respondents:

PUBLIC SERVICE COMPANY OF COLORADO, a Colorado Corporation, d/b/a XCEL ENERGY; MORGAN GUARANTY TRUST COMPANY OF NEW YORK; and PAUL WEISSMANN, in his official capacity as Treasurer of Boulder County.

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COURT USE ONLY

Case Number: 19 CV 30637

Division: 5

MOTION TO DISMISS FIRST AMENDED PETITION IN CONDEMNATION FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO COLO. R. CIV. P. 12(b)(1)

I. CERTIFICATE OF CONFERRAL

Pursuant to C.R.C.P. 121(c), § 1-15(8), Public Service Company of Colorado (“PSCo” or “Public Service”) certifies it conferred in good faith with counsel for the City of Boulder (the

“City”), who stated that the City opposes this Motion.

II. INTRODUCTION

Public Service Company of Colorado (“PSCo”) is currently the retail electric and gas utility for customers in the City, in Boulder County, and elsewhere in the State of Colorado. In this condemnation action, the City seeks to condemn property in and around the City so as to “separate the existing electrical distribution system serving customers in the vicinity of the City into two separate distribution systems ... one serving only customers within the City ... and the other serving customers of [PSCo], by reconfiguration of the existing equipment and the addition of new facilities so that each system can be operated independently of the other in order to distribute electricity to the respective retail customers of the City and [PSCo].” Am. Pet. ¶ 6.¹ The property the City seeks to acquire includes facilities, both inside and outside of substations, which are currently also used to provide service to customers outside the city limits.

As this Court previously held, this monumental undertaking triggers the Colorado Public Utilities Commission’s (the “PUC” or the “Commission”) exclusive jurisdiction to oversee the safety, reliability, and effectiveness of the state-wide interconnected electrical distribution system prior to a condemnation action being initiated:

The PUC has the authority to regulate public utilities and the facilities, which provide service within the City of Boulder as well as unincorporated Boulder. ... [I]t is necessary and appropriate for the PUC to determine how facilities should be assigned, divided, or jointly used to protect the system’s effectiveness, reliability, and safety. Such a determination ***must be made prior to the City’s condemnation of property for utility municipalization.*** (emphasis added).

See January 14, 2015, Order Re: Judicial Review of the Colorado Public Utilities Commission

¹ Cites to “Am. Pet.” refer to the City’s First Amended Petition in Condemnation.

Decisions (Case No. 14CV30047) (LaBuda, J.) (hereinafter “Final Opinion”) (rejecting the City’s appeal of two PUC decisions implicated by the present condemnation lawsuit).² Accordingly, shortly after issuing the Final Opinion, this Court dismissed a prior condemnation action the City had filed seeking to acquire portions of PSCo’s electric distribution system without first conducting proceedings before the PUC. *See* February 13, 2015 Order Re: Respondents’ ... Motion to Dismiss under C.R.C.P. 12(b)(1) for Lack of Subject Matter Jurisdiction (Case No. 2014CV30890) (LaBuda, J.) (hereinafter “Condemnation Dismissal”).³

Despite this, the City has again filed condemnation proceedings before the PUC has finally determined and approved how facilities should be assigned, divided, or jointly used to ensure the effectiveness, reliability, and safety of the separated systems and what assets Boulder may seek to acquire. Thus, whether analyzed through the lens of issue preclusion or on the underlying merits, this Court lacks subject matter jurisdiction and must dismiss this condemnation lawsuit.

III. PROCEDURAL AND FACTUAL BACKGROUND

Beginning in 2013, PSCo, Boulder, and numerous other parties participated in proceedings at the PUC initiated by PSCo seeking declarations on a number of issues related to the City’s proposal to acquire electric distribution facilities from PSCo and serve customers both within and outside the city limits.⁴

² A true and correct copy of the Final Opinion is attached hereto as Exhibit 1.

³ A true and correct copy of the Condemnation Dismissal is attached hereto as Exhibit 2.

⁴ The docket for these proceedings and the parties’ extensive briefing is available on the PUC’s website: https://www.dora.state.co.us/pls/efi/EFI_Search_UI.search. Enter “13D-0498E” into the “Proceeding Number” box, check the box next to “I’m not a robot,” and then click on the “Search” button. PSCo will provide the Court with copies of its Verified Petition for Declaratory Orders (“Declaratory Petition”) and any briefs or PUC pleadings desired if requested to do so.

The PUC's Declaratory Rulings.

In its initial order on PSCo's Declaratory Petition, the PUC held, in pertinent part:

The Commission exercises its regulatory authority over Public Service's transmission and distribution lines, substations, and other facilities to protect the reliability, safety, and service quality of electricity services provided to unincorporated Boulder County, and to safeguard the integrity of the system statewide. If Boulder seeks to condemn facilities, wherever located, that Public Service currently uses, at least in part, to serve customers located outside of Boulder's city limits, this Commission must have the ability to investigate and determine how the facilities should be assigned, divided, or jointly used to protect the system's effectiveness, reliability, and safety, as well as any other matter affecting the public interest. Thus, ***a Commission proceeding addressing these facilities should precede a condemnation action to allow the district court to rule on the public need and value of facilities that the Commission determines may be the subject of transfer to Boulder.***

October 29, 2013, Decision Issuing Declaratory Rulings (Proceeding No. 13D-0498E, Decision No. C13-1350) (hereinafter "Declaratory Decision") at ¶ 28 (emphasis added).⁵

Upon the City's request for reconsideration, the PUC confirmed its role and the necessity of completing approval proceedings prior to commencing a condemnation action:

Regulatory oversight of the assets, plant, and facilities used to provide electricity outside Boulder's territorial boundaries advances important public interests. Public Service constructs, engineers, and operates its network as an integrated system, and its service capabilities cross the political boundaries defining the City of Boulder and Boulder County. Performance of the Commission's duty to ensure the reliability of the system for unincorporated Boulder County and other regions of the state requires an evaluation and determination of the optimal division, joint use, and potential replacement of assets and facilities providing services both inside and outside Boulder city limits.

* * *

⁵ A certified copy of the Declaratory Decision is attached hereto as Exhibit 3.

Commission approval proceedings over regulated property is a *condition precedent to a condemnation action* over the subject property.”

December 18, 2013, Decision Denying City of Boulder’s Application for Rehearing, Reargument, or Reconsideration (Proceeding No. 13D-0498E, Decision No. C13-1550) (hereinafter “RRR”) at ¶¶ 19, 20 (emphasis added)⁶; *see also id.* ¶ 1 (“Because Colorado Supreme Court precedent interpreting Article XXV of the state constitution ... validates Commission jurisdiction to approve the transfer of regulated property before a condemnation court acquires subject matter jurisdiction over the property, the Commission denies Boulder’s RRR.” (emphasis added)).

This Court Affirms the PUC and Dismisses the City’s Prior Condemnation Action.

The City sought certiorari review of the PUC Decisions in this Court, claiming that the PUC exceeded its jurisdiction when issuing the declaratory orders and that Boulder’s home rule powers pursuant to Article XX of the Colorado Constitution allowed it to condemn property free from PUC involvement.⁷ *See* Final Opinion at 7–8. In the Final Opinion, this Court affirmed the Declaratory Decision and the RRR, without qualification or exception. *Id.* at 12. The review action was assigned to Judge LaBuda, who rejected the City’s arguments and explained:

It is necessary for the PUC to determine which entity will be providing service outside of the City and to then determine how to best allocate the property to accomplish service to the extraterritorial customers and the statewide power grid. In the event Public Service continues serving those outside of Boulder [as is the case], the Court finds that the property in question will not be easy to separate and may require technical expertise in determining the best method of separation in order to avoid negatively impacting the statewide energy grid. The PUC is best suited to exercise jurisdiction in this regard; when the General Assembly vested the PUC with

⁶ A certified copy of the RRR is attached hereto as Exhibit 4.

⁷ The district court “acts as an appellate body” when reviewing a PUC order. *Lake Durango Water Co. v. Pub. Utils. Comm’n*, 67 P.3d 12, 22 (Colo. 2003); *see also* C.R.S. § 40-6-115(1) (authorizing certiorari review by district court).

this jurisdiction in the Colorado constitution, it intended to provide a regulatory body with more expertise in administering utilities than the district court.

* * *

[T]he actual facilities to be taken cannot be identified until it is known what parts of the system will be retained by Public Service; only then can the proper assets be transferred to the City.

* * *

By requiring the PUC to determine the allocation and transfer of assets prior to the City's condemnation, the parties avoid finding themselves in a situation where the City has condemned property to which it ultimately may not be entitled.

Id. at 9, 10, 12 (“The Court hereby **AFFIRMS** the October 29, 2013 Decision No C13-1350 and the December 11, 2013 Decision No. C13-1550, both issued by the PUC.” (emphasis in original)).

Based upon the Final Opinion, the Court also dismissed the City's prior condemnation action, which the City had commenced while the appeal of the PUC's decisions was pending. As the Condemnation Dismissal succinctly explained:

The January 14, 2015 Order permits the Public Utility Commission to determine how facilities should be assigned, divided, or jointly used to protect the utility system's effectiveness, reliability, and safety. The Court noted that such a determination must be made prior to the City's condemnation of property for utility municipalization.

Accordingly the Court **GRANTS** Respondents' Motion to Dismiss and dismisses this matter without prejudice.

Condemnation Dismissal at 1 (emphasis in original). The City did not appeal the Final Opinion or the Condemnation Dismissal.

The Ongoing PUC Proceedings.

On July 7, 2015, the City initiated the PUC proceedings that it must complete prior to

commencing an action to condemn electric distribution facilities in Boulder.⁸ After the PUC rejected the City's first two utility plans, the City submitted a third application, nearly two years after it began the PUC proceedings. *See generally* May 12, 2017, Third Supplemental Verified Application of the City of Boulder, Colorado (Proceeding No. 15A-0589E) ("Third Application").

The PUC conditionally granted in part and denied in part the City's Third Application. *See generally* Aug. 30, 2017, Decision Granting, in Part and with Conditions, and Denying, in Part, Third Supplemental Verified Application ("Third Application Order").⁹ The Third Application Order made two high-level rulings relevant to this Motion to Dismiss. **First**, as to assets located outside of substations, the PUC held that the designation for potential transfer of those assets was subject to Commission approval of: (1) an agreement that "provides Public Service permanent non-exclusive easements and other necessary real property rights for the location of its electric facilities within Boulder's city limits that are necessary for Public Service to provide service to its customers after separation"; (2) a corrected, complete, and accurate list of distribution assets and real property interests outside substations; and (3) one or more agreements for approval addressing "the payment by Boulder to Public Service of the costs incurred by Public Service to effectuate municipalization and the separation of Public Service's system into two separate systems." *See, e.g.*, Third Application Order ¶ 5. **Second**, as to assets inside substations, the PUC denied the

⁸ The PUC docket is available here: https://www.dora.state.co.us/pls/efi/EFI_Search_UI.search. Enter "15A-0589E" into the "Proceeding Number" box, check the box next to "I'm not a robot," and then click on the "Search" button. The extensive docket may take more than a minute to load. Subject to confidentiality restrictions, PSCo will provide the Court with copies of papers from this docket if requested to do so.

⁹ The Third Application Order appears as Exhibit 6 to the City's First Amended Petition in Condemnation.

City's Third Application. *See, e.g.*, Third Application Order ¶ 6. In reaching this decision, the PUC concluded, "[w]e find that it is premature to designate any facilities inside the substations for potential transfer to Boulder from Public Service." *Id.*

In late-2018 and early-2019, the City made a series of filings intended to show compliance with the conditions necessary to obtain approval for the designation of assets for transfer outside substations. These filings included various agreements negotiated between PSCo and Boulder for approval by the Commission and City-updated lists of assets and real property interests. The agreements presented for approval have significant consequences to the condemnation action. For example, the parties submitted an Agreement for Payment of Costs (the "Cost Agreement") addressing, among other things, the City's responsibility to pay PSCo for \$100 million or more in costs related to the separation of the two systems. The Cost Agreement is relied upon by the City numerous times in the Amended Petition to limit the scope of the condemnation and the City's just compensation obligations. *See, e.g.*, Am. Pet. ¶¶ 38, 43, 85–86. But the Cost Agreement by its express terms is not effective unless and until the PUC issues a final, non-appealable order approving the Agreement without modification.¹⁰ Were the PUC to reject or modify the terms of the Cost Agreement, the amount of compensation owed by the City in condemnation would skyrocket and the amount and character of evidence at trial would fundamentally change. Similar important condemnation consequences flow from other agreements still awaiting Commission approval.¹¹

¹⁰A true and correct copy of the Cost Agreement is attached hereto as Exhibit 5; see § VII.A.

¹¹ The Easement Sharing Agreement attached as Exhibit 5 to the Amended Petition governs the shared use of thousands of easements and facilities between PSCo and the City. The parties also negotiated an agreement providing PSCo rights to retain its own electric facilities within the City

By January of this year, significant disagreement concerning the City's filings emerged between the City and various parties to the proceedings, including PSCo. Those disagreements focused primarily on the proper identification of real estate assets (the complete and accurate list specified in the second condition discussed above) and on what is required before the City can seek to condemn any assets within substations.¹² As a result, the PUC stayed proceedings in order to give the City the opportunity to address the concerns and amend its filings. *See, e.g.*, Feb. 8, 2019, Interim Decision Staying Proceeding and Requiring Filings (hereinafter "Stay Order")¹³ ¶ 2. The PUC proceedings remain stayed and the PUC has not issued a final order approving the designation of assets for transfer either within or outside the substations. Rather than completing the necessary work and giving the PUC the opportunity to rule on the proposed designation of assets for transfer, the City filed this condemnation action.

IV. GOVERNING STANDARDS

"Whenever it appears by suggestion of the parties ... that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." C.R.C.P. 12(h)(3) (emphasis added). Defendants bring such challenges pursuant to C.R.C.P. 12(b)(1). *Tulips Invs., LLC v. State ex rel. Suthers*, 340 P.3d 1126, 1131 (Colo. 2105) ("A 12(b)(1) motion to dismiss challenges a court's subject matter

post-separation. If either of these agreements is rejected or materially altered, a very different separation plan may be required and the character of the condemnation, the amount and character of evidence at trial, and the amount of compensation owed by the City would dramatically change.

¹² *See, e.g.*, Jan. 18, 2019, Notice of Public Service Company of Colorado's Withdrawal from the Joint Motion for Modification of Commission Decision C17-0750, etc. (Proceeding No. 15A-0589E) at 2; Jan. 25, 2019, Petition for Declaratory Orders with Regard to the Portion of Commission Decision C-17-0750 Concerning Public Service Assets (Real and Personal) Inside Substations (Proceeding No. 15A-0589E) at 1.

¹³ A true and correct copy of the Stay Order is attached hereto as Exhibit 6.

jurisdiction.”). The burden of demonstrating subject matter jurisdiction falls to the City. *Arline v. Am. Fam. Mut. Ins. Co.*, 431 P.3d 670, 672 (Colo. App. 2018). The City enjoys no presumptions in its favor. *See Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (court weighs competing evidence rather than treating plaintiff’s allegations as true); *see also Coquina Oil Corp v. Harry Kourlis Ranch*, 643 P.2d 519, 522 (Colo. 1982) (courts resolve uncertainty as to condemnation power against the entity asserting the right to condemn). When ruling on a motion to dismiss for lack of subject matter jurisdiction, the Court may consider evidence outside of the pleadings; without converting the motion to one for summary judgment. *Medina*, 35 P.3d at 452.

The existence of subject matter jurisdiction is a “threshold issue” for the Court. *Stell v. Boulder Cnty. Dep’t of Soc. Servs.*, 92 P.3d 910, 914 (Colo. 2004). If jurisdiction is lacking, the case must be dismissed; no other action can be taken. *See People in Interest of P.K.*, 411 P.3d 963, 968 (Colo. App. 2015) (“[A] lack of jurisdiction deprives the court of all authority to act—it is a quintessential threshold matter.”); *In re Support of E.K.*, 410 P.3d 480, 482 (Colo. App. 2013) (“The court’s authority must be properly invoked before it can act”); *People v. Widhalm*, 991 P.2d 291, 293 (Colo. App. 1999) (“A court must always have jurisdiction to act. Thus, any action taken by a court when it lacks jurisdiction is a nullity.”); C.R.C.P. 12(h)(3) (court “shall dismiss” the action); *see also* 4 Colo. Prac., Civil Rules Annotated R 12 (4th ed.) (“Any proceedings that follow a court’s improper exercise of jurisdiction are a nullity and thus a waste of the parties’ time and resources.”).

V. ARGUMENT

The City is trying again to condemn PSCo’s electrical distribution facilities without first obtaining the required approvals from the PUC. While Colorado law is clear on this requirement,

the Court need not conduct a detailed review of this authority—Judge LaBuda has already done that and her prior rulings are binding on the City. Therefore, issue preclusion mandates dismissal of the City’s First Amended Petition in Condemnation due to lack of subject matter jurisdiction.

1. Issue Preclusion Bars this Lawsuit.

The City has already had four opportunities to argue that it can proceed to condemnation prior to receiving approval from the PUC—twice at the PUC, once before this Court on appeal of those rulings, and in a prior condemnation case dismissed by this Court. Pursuant to Colorado’s issue preclusion doctrine, the Court should not give the City a fifth opportunity to litigate this issue.

The doctrine of issue preclusion (historically called collateral estoppel) bars litigation of previously decided issues in certain circumstances. By barring successive litigation, the doctrine protects litigants from needless relitigation of the same issues, furthers judicial economy, and promotes the integrity of the judicial system by affirming that one can rely upon judicial decrees because they are final.

The party seeking to assert issue preclusion to bar relitigation of an issue must show that:

- (1) the issue is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding;
- (2) the party against whom estoppel was sought was a party or was in privity with a party to the prior proceeding;
- (3) there was a final judgment on the merits in the prior proceeding; and
- (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding.

Villas at Highland Park Homeowners Ass’n, Inc. v. Villas at Highland Park, LLC, 394 P.3d 1144, 1152 (Colo. 2017) (citations and quotations omitted).¹⁴

¹⁴ Administrative actions are afforded the same preclusive effect as judicial proceedings. See *Gallegos v. Colo. Ground Water Comm’n*, 147 P.3d 20, 32 (Colo. 2006) (citing *Indus. Comm’n of the State of Colo. v. Moffat County Sch. Dist. Re No. 1*, 732 P.2d 616, 620 (Colo. 1987)). “In all

Here, all four requirements of issue preclusion have been met. **First**, the issue of whether the City can commence a condemnation action before completing PUC proceedings was central to the PUC declaratory proceedings and related district court proceedings and was squarely decided: “[I]t is necessary and appropriate for the PUC to determine how facilities should be assigned, divided, or jointly used to protect the system’s effectiveness, reliability, and safety. Such a determination must be made prior to the City’s condemnation of property for utility municipalization.” Final Opinion at 12; *see also Bristol Bay Prods., LLC v. Lampack*, 312 P.3d 1155, 1160 (Colo. 2013) (“In most cases, the issue raised in a later proceeding is found to be the same, or not to be the same, as the issue decided in the first proceeding without in-depth analysis.”). The City’s related condemnation Petition was also dismissed. Condemnation Dismissal at 1. **Second**, PSCo and the City were both parties to the proceedings that terminated with the Final Opinion. *See* Final Opinion at 1. **Third**, there was a final judgment on the merits—Judge LaBuda’s Final Opinion, which affirmed the PUC’s original Declaratory Decision and RRR.¹⁵ There was

collateral actions or proceedings, the decisions of the commission which have become final shall be conclusive.” Colo. Rev. Stat. § 40-6-112. Therefore, a final judgment entered by the PUC is not subject to collateral attack in another proceeding. *Lake Durango Water Co. v. Public Util. Comm’n*, 67 P.3d 12, 22 (Colo. 2003).

¹⁵ Furthermore, Colorado law precludes the City from using this new condemnation lawsuit as a means to circumvent the prescribed procedures for the review of PUC decisions. C.R.S. § 40-6-115 and its predecessors provide the exclusive procedure for reviewing a PUC decision. *See, e.g., Silver Eagle Servs. v. Pub. Utils. Comm’n*, 768 P.2d 208, 209 (Colo. 1989); *Pub. Serv. Co. of Colo. v. Pub. Utils. Comm’n*, 765 P.2d 1015, 1017 n. 1 (Colo. 1988). If the City was unhappy with Judge LaBuda’s Final Opinion, its remedy lay in an appeal to the Supreme Court, the time for which has long since expired. C.R.S. § 40-6-115(5). As noted above, the City also did not seek review of the Third Application Order (which issued nearly 23 months ago) with either the PUC or the District Court.

also a final judgment dismissing the original condemnation action.¹⁶ *Fourth*, before the PUC and then on appeal to this Court, the City fully and fairly litigated the issue of whether it can commence a condemnation action before completing PUC proceedings, as the PUC and Court dockets reflect. *See* PUC Proceeding No. 13D-0498E docket and Boulder District Court Case No. 2014CV30890 docket.

Because all four elements of issue preclusion have been satisfied, the City cannot relitigate the question of whether the district court has jurisdiction to hear its condemnation claim before the PUC proceedings are completed and the Commission determines how facilities should be assigned, divided, or jointly used. *See O’Neill v. Simpson*, 958 P.2d 1121, 1123 (Colo. 1998) (en banc) (issue preclusion applies to jurisdictional decisions). As the facts recited above demonstrate, the PUC has not issued a final decision approving the designation of any assets sought by the City for potential transfer. *See, e.g.*, Stay Order ¶¶ 24–25 (observing that the City is still seeking final approval, the PUC needs to “better understand where Boulder is in its process of acquiring assets,” and ordering the City to work with the many parties to the PUC proceedings “to develop and to file a proposal for addressing and resolving all outstanding issues and pleadings”); June 19, 2019, Staff’s Response to Boulder’s Notice (Proceeding No. 15A-0589E)¹⁷ at 2 (recognizing that the PUC may be approaching the time when it can consider final transfer of assets but also observing that “serious problems lie ahead”). Accordingly, the Court must dismiss this lawsuit. *See* Condemnation Dismissal at 1.

¹⁶ Indeed, all four elements of issue preclusion independently have been satisfied in the context of the Court’s dismissal of the first condemnation lawsuit for lack of subject matter jurisdiction.

¹⁷ A true and correct copy of the Staff’s Response is attached hereto as Exhibit 7.

2. The City Must Obtain PUC Approval as a Precondition to Condemnation, and This Court Lacks Subject Matter Jurisdiction until It Does.

Even if this Court were to look beyond the Final Opinion and Condemnation Dismissal, Colorado Supreme Court precedent mandates dismissal of this action for lack of subject matter jurisdiction. Courts have recognized that the PUC has considerable expertise in matters concerning utilities within the state, and judicial action that undermines the PUC's authority is disfavored. *See Integrated Network Servs., Inc. v. Pub. Utils. Comm'n*, 875 P.2d 1373, 1377 (Colo. 1994); *Van Wyk v. Public Serv. Co.*, 27 P.3d 377, 384 (Colo. 2001). Where, as here, the PUC has jurisdiction over the property that a condemnor seeks to acquire, a condemnation court lacks jurisdiction to proceed until the agency has acted. *Colorado & S. Ry. Co. v. Dist. Ct. in and for Tenth Jud. Dist.*, 493 P.2d 657, 659 (Colo. 1972) (hereinafter "*Southern Railway*").¹⁸

In *Southern Railway*, C&W Railway filed a condemnation case to acquire an easement over the railroad tracks of two other railroad companies (the "Petitioners"). C&W argued that it had selected a "suitable place" for the crossing and provided the legal description of the easement it sought to condemn. The Petitioners filed a motion to dismiss on the grounds that the condemnation court lacked jurisdiction over the subject matter of the petition because C&W had to first obtain an order from the PUC determining the particular point of crossing.

The condemnation court denied the motion. The Petitioners then filed for a writ of prohibition, which the Colorado Supreme Court granted, holding that the court lacked subject

¹⁸ Other condemnation courts have also dismissed cases where another body has exclusive jurisdiction to determine an issue that is a necessary predicate to the condemnation case moving forward. *See, e.g., In re Tonko*, 154 P.3d 397, 400 (Colo. 2007) (condemnation court lacked subject matter jurisdiction because "the water court, not it, had jurisdiction to determine whether the [condemnor] had or could obtain an adjudicated water right, a requisite for maintaining their ditch right-of-way condemnation action").

matter jurisdiction because the PUC had “the power to determine what property the condemning railroad [could] use as the ‘particular point of crossing.’” *Id.* Absent the PUC exercising its jurisdiction and deciding where the crossing must be placed, proceeding in condemnation would “put the cart before the horse.” *Id.* (“If the railroad acquires immediate possession of the property by eminent domain and the commission later determines the ‘particular point of crossing’ to be at another location . . . the railroad would have acquired land or an easement that it cannot use, and the one against whom the decree was entered would have had taken from it property actually not subject to condemnation.”). Thus, until the PUC exercises its jurisdiction to (i) finally determine how the existing integrated facilities will be assigned, divided, or jointly used in a manner that does not threaten service to the customers retained by PSCo or otherwise impair the state’s integrated electric grid and (ii) designates the specific assets both inside and outside substations for potential transfer to the City, there is no defined “property” that is the proper subject of this condemnation action. As *Southern Railway* recognized, without that, this Court cannot proceed.¹⁹

Here, the PUC has not yet analyzed whether the City has satisfied the conditions upon the potential designation of assets for transfer outside of substations (much less issued an order authorizing potential transfer) and has never even conditionally approved the potential designation of assets for transfer within substations, *id.* ¶ 6 (“We find that it is premature to designate any facilities inside the substations for potential transfer to Boulder from Public Service.”). In fact, the

¹⁹ Condemnation courts have similarly recognized that a condemnor is unable to establish the public purpose and necessity elements of a condemnation case in such circumstances. *See, e.g., Pub. Serv. Co. of Colo. v. Shaklee*, 784 P.2d 314, 317 n.3 (Colo. 1989), *overruled on other grounds by Carousel Farms Metro. Dist. v. Woodcrest Homes, Inc.*, 442 P.3d 402 (Colo. 2019); *Silver Dollar Metro. Dist. v. Goltra*, 66 P.3d 170, 172 (Colo. App. 2002).

parties have not yet reached agreement, as required by the PUC, concerning numerous aspects of a potential substation asset transfer and negotiations regarding substation asset issues continue. Ultimately, it is critical to resolve the many outstanding regulatory issues pending before the PUC prior to condemnation for two reasons:

First, as recognized in *Southern Railway*, a decision from the PUC is “absolutely essential to framing a material allegation—the legal description of the property sought to be acquired—in the action.” *Id.* at 659–660. That property, in turn, is the foundation against which legal challenges to the taking are measured, including whether the City has carried its burden of establishing that:

1. It has the legal authority to condemn the property;
2. There is a necessity for it to acquire the particular property;
3. The property sought to be taken will serve a public use or public purpose; and
4. It engaged in good faith negotiations to acquire the specific property at issue.

See Shaklee v. Dist. Ct., 636 P.2d 715, 717–18 (Colo. 1981); *Thornton v. Farmer’s Reservoir & Irrigation Co.*, 575 P.2d 382, 391–92 (Colo. 1978); *Colo. State Bd. of Land Comm’rs v. Dist. Ct.*, 430 P.2d 617, 619 (Colo. 1967); *Swift v. Smith*, 201 P.2d 609, 615 (Colo. 1948) (each case describing condemnation prerequisites that must be proven by a condemnor). All of these legal issues turn on the division of property that can only be authorized by the entity with the technical expertise and sole jurisdiction to do so—the PUC. *See Pub. Serv. Co. of Colo. v. Pub. Utils. Comm’n of State of Colo.*, 765 P.2d 1015, 1018–1019 (Colo. 1988) (holding that because of the expertise of the PUC, courts should not undertake to duplicate the evaluation and judgment of the PUC); Colo. Const. art. XXV (“[A]ll power to regulate the facilities, service and rates and charges [of electric utility systems] ... is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate [the PUC].”); C.R.S. 40-5-105(1); *see also* Final Opinion

at 12 (“By requiring the PUC to determine the allocation and transfer of assets prior to the City’s condemnation, the parties avoid finding themselves in a situation where the City has condemned property to which it ultimately may not be entitled.”).

Second, the practical importance of the PUC’s approval of City plans prior to Boulder’s acquisition of any facilities cannot be overstated. *Southern Railway* involved a single easement to effectuate a railroad crossing. Here the subject matter involves, by the City’s own count, “over 100,000 pieces of equipment” that take thousands of pages to describe. *See* Am. Pet. ¶¶ 19, 21, 24. It also involves the separation and reintegration of complex interconnected electric networks in a manner that ensures ongoing safe and reliable service to the customers retained by PSCo and protects the larger grid.²⁰ Many stakeholders, none of which currently are parties to this proceeding, but all of whom represent important interests related to the proposed separation, are involved in the PUC proceedings, including PUC staff, the Office of Consumer Counsel, IBM, Tri-State Generation and Transmission, Poudre Valley REA, and other customers.²¹ Moving forward with condemnation without the PUC’s final review and approval (and without the input of all key stakeholders) and allowing the City to simply take for itself whatever the City deems desirable to run its own municipal utility threatens the Commission’s ability to protect the safety,

²⁰ The legislature has declared that the location, construction, and improvement of major electrical facilities are matters of statewide concern and that impacts on the electric grid in one location may have impacts on other areas of the state. C.R.S. § 29-20-108(1).

²¹ The Third Application Order did not provide that Boulder had to merely file documents its believes evidence satisfaction of the three conditions. Instead, the Third Application Order provided a 30-day period for any party to request a hearing on whether Boulder has met the conditions and for the Commission to issue a final decision on whether the conditions have been met. Third Application Order ¶¶ 162–63. A hearing has been requested as to several issues by the parties, although proceedings remain stayed.

effectiveness, and reliability of service to the remaining customers and to the statewide electric network. *See* Final Opinion at 12 (“[I]t is necessary and appropriate for the PUC to determine how facilities should be assigned, divided, or jointly used to protect the system’s effectiveness, reliability and safety.”).

VI. CONCLUSION

For the reasons set forth above and the earlier decisions of the Court, the City’s First Amended Petition in Condemnation should be dismissed.

DATED this 5th day of August, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 5, 2019, a copy of the foregoing **MOTION TO DISMISS FIRST AMENDED PETITION IN CONDEMNATION FOR LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO COLO. R. CIV. P. 12(b)(1)** was served on all counsel of record by the methods listed below:

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