

DISTRICT COURT, BOULDER COUNTY, COLORADO

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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; U.S. BANK
NATIONAL ASSOCIATION; and PAUL WEISSMANN, in
his official capacity as Treasurer of Boulder County.

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Case Number: 2019CV31226

Division: 3

**MOTION TO DISMISS PETITION IN CONDEMNATION OR, IN THE
ALTERNATIVE, STAY ALL PROCEEDINGS**

I. INTRODUCTION

The irrationality of tolerating duplicative litigation ... is all the more pronounced where, as here, two ... judges sitting on the same district court are devoting scarce judicial resources to the adjudication of the same charges by essentially the same plaintiffs against the same defendants.

– *Serlin v. Arthur Andersen & Co.* (7th Cir. 1993)

The City of Boulder has filed this condemnation action while its prior condemnation action involving the same subject matter and the same parties remains pending in the same court. The Court should dismiss or, at the very minimum, stay this duplicative lawsuit.

II. 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” or “Boulder”), who stated that Boulder opposes this Motion.

III. FACTUAL AND PROCEDURAL BACKGROUND

This is the third lawsuit filed by Boulder seeking to condemn PSCo’s electrical distribution system and related real estate assets as part of an effort by Boulder to form its own municipal utility and serve customers within Boulder’s city limits. *See generally* Boulder County District Court Case Nos. 2014CV30890 (the “First Action”) and 2019CV30637 (the “Second Action”).¹ Both earlier Actions were dismissed for lack of subject matter jurisdiction based upon Boulder’s failure to obtain necessary approvals from the Colorado Public Utilities Commission (the “PUC”) before seeking to condemn.

¹ The Court may take judicial notice of related municipal, administrative, and judicial filings and proceedings. *See, e.g.*, C.R.E. 201(b)(2); *People v. Stanley*, 170 P.3d 782, 793–94 (Colo. App. 2007); *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006).

The Second Action, however, is still pending in this Court. Boulder disagrees with Judge Mulvahill’s order dismissing that case and has filed a notice of appeal with the Colorado Court of Appeals, arguing that jurisdiction exists and that the Second Action must proceed. It also recently filed a petition under C.A.R. 50 seeking certiorari review directly from the Colorado Supreme Court on these issues.² If Boulder’s appeal were to succeed, the case would be remanded back to this Court and Boulder’s petition in condemnation in the Second Action would be reinstated. And even while Boulder’s appeal is pending, Judge Mulvahill still has jurisdiction over pending motions relating to PSCo’s claim for attorney fees arising from the dismissal, upon which Boulder has requested a hearing.

Just before filing its C.A.R. 50 petition in the Second Action, Boulder filed this condemnation lawsuit (“Third Action”). Exactly like the Second Action, the Third Action seeks 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. Dec. 19, 2019, Petition in Condemnation (“Pet.”) ¶ 6. The Petition in Condemnation filed in this Third Action is subsumed within the First Amended Petition in Condemnation filed in the Second Action, is predicated upon the same enabling Ordinance adopted by Boulder City Council and relied upon in the Second Action, and names virtually the same parties. *See generally* Ex. 1.³

² *See generally* Colorado Supreme Court Case No. 2019SC001006.

³ Exhibit 1 is a redline showing the limited differences between the operative condemnation petitions from the Second and Third Actions. In the Second Action, the City named the wrong indenture trustee, Morgan Guaranty Trust Company of New York. The Third Action names Morgan’s successor trustee, US Bank National Association. *Compare* Ex. 2 ¶ 10, with Pet. ¶ 10.

The Petitions concern the same subject matter—condemnation of PSCo’s electric distribution system—and have identical prayers for relief. *Compare* Ex. 2⁴ ¶¶ 5–6, (summarizing the property to be acquired and the project for which the property is to be acquired) *with* Pet. ¶¶ 5–6 (using the exact same language to summarize the property to be acquired and the project for which the property is to be acquired); *compare also* Ex. 2 at 15 *with* Pet. at 15 (identical “Requests for Relief” sections); *see generally* Ex. 1. The only substantive difference between the two Petitions relates to Boulder’s efforts in the Second Action to condemn certain substation assets from PSCo that the PUC ruled it cannot take. Those substations are not identified as being acquired in the Third Action, but Boulder’s briefing on appeal makes clear it will certainly seek to acquire them in the Second Action should their appeal be successful. Boulder has also filed a second notice of *lis pendens* against the property it seeks in this Third Action while its notice of *lis pendens* against the property Boulder seeks in the Second Action remains pending.

Thus, Boulder continues to simultaneously pursue both the Second and Third Actions.

IV. GOVERNING STANDARDS

PSCo moves to dismiss pursuant to C.R.C.P. 12(b)(1), C.R.C.P. 12(h), and this Court’s inherent power.

“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). 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,

These two parties represent the same legal interest and the difference in the named Respondent does not change the relevant analysis.

⁴ Exhibit 2 is a true and correct copy (without exhibits) of the operative July 22, 2019, First Amended Petition in Condemnation from the Second Action.

1131 (Colo. 2015) (“A 12(b)(1) motion to dismiss challenges a court’s subject matter jurisdiction.”). The burden of demonstrating subject matter jurisdiction falls to Boulder. *Arline v. Am. Fam. Mut. Ins. Co.*, 431 P.3d 670, 672 (Colo. App. 2018). 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.”); *see also Utils. Bd. of City of Lamar v. S.E. Colo. Power Ass’n*, 171 Colo. 456, 458, 468 P.2d 36, 37 (Colo. 1970) (court erred by failing to grant motion to dismiss for lack of subject matter jurisdiction targeting duplicative lawsuit involving same issues and parties).

Colorado courts also have the inherent authority to exercise all “powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective.” *Pena v. Dist. Court of Second Judicial Dist. In & For City & Cty. of Denver*, 681 P.2d 953, 956 (Colo. 1984) (quotation and citation omitted). The Court’s inherent powers include the power to dismiss a case in appropriate circumstances. *See Powers v. Prof’l Rodeo Cowboys Ass’n*, 832 P.2d 1099, 1104 (Colo. App. 1992); *see also Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223–24 (7th Cir. 1993) (“wholly legitimate concern for wise judicial administration” justified dismissal of parallel litigation).

V. ARGUMENT

Boulder cannot maintain two lawsuits at the same time, commenced in the same judicial district, seeking to condemn PSCo's electric distribution system in Boulder.⁵ So long as the Second Action remains pending, this Court should dismiss this Third Action without prejudice so that the Court, PSCo, and other parties and potential intervenors are not subjected to duplicative, expensive, and prejudicial litigation. Alternatively, the Court should, at a minimum, stay the Third Action until the Second Action is resolved.

A. The Court Should Dismiss this Duplicative Condemnation Action.

Courts should not entertain duplicative lawsuits. *See, e.g., Adams v. Cali. Dep't of Health Servs.*, 487 F.3d 684, 688 (9th Cir. 2007) *overruled on other grounds by Taylor v. Sturgell*, 553 U.S. 880, 904 (2008) (“Plaintiffs generally have no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant.” (quotation and citation omitted)); *Serlin*, 3 F.3d at 223 (“As a general rule, a federal suit may be dismissed for reasons of wise judicial administration ... whenever it is duplicative of a parallel action already pending in another federal court.” (quotation and citation omitted)); *see also Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, (1976) (“As between federal district courts ... though no precise rule has evolved, the general principle is to avoid duplicative litigation.”). This is especially true when a party brings duplicative litigation in the same venue or jurisdiction: “The irrationality of tolerating duplicative litigation ... is all the more pronounced where, as here, two ... judges sitting on the same district court are devoting scarce judicial

⁵ PSCo expressly reserves all other defenses (which are set forth in its contemporaneously filed Answer).

resources to the adjudication of the same charges by essentially the same plaintiffs against the same defendants.” *Serlin*, 3 F.3d at 224 (quotation and citation omitted).

This commonsense rule promotes judicial efficiency and protects defendants from “the vexation of concurrent litigation over the same subject matter.” *Adam v. Jacobs*, 950 F.2d 89, 93 (2d Cir. 1991) (quotation and citation omitted); *see also Kerotest Mfg. Co. v. C–O–Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952) (the power to dismiss duplicative lawsuits fosters the “comprehensive disposition of litigation”). Indeed, some courts even find that the filing of duplicative lawsuits is abusive. *See, e.g., Adams*, 487 F.3d at 688 n.1 (“[T]he filing of a duplicative complaint was abusive”); *cf. McWilliams v. State of Colo.*, 121 F.3d 573, 574 (10th Cir. 1997) (holding that repetitious litigation of virtually identical causes of action may be dismissed as frivolous or malicious).

Here, Boulder—after filing two premature condemnation actions before it completed the required PUC proceeding—has filed the Third Action while its Second Action remains pending and is being actively litigated on appeal. As discussed above, the Third Action is subsumed within the Second Action. It is more than reasonable for PSCo to insist that it be subjected to a single action at a time to condemn its electrical distribution system in Boulder. And it is more than reasonable for the Court to insist that its scarce resources not be wasted on two condemnations, the second of which includes property entirely subsumed in the first. Since the existence and pendency of the duplicative condemnation actions rests solely in Boulder’s discretion and control (*i.e.*, this is not an instance where duplication arises from a race to the courthouse between competing parties), and the cases will be heard in the same judicial district applying the same governing law, Boulder should choose the lawsuit with which it will proceed or face dismissal of

the later-filed Third Action. Allowing the Third Action to proceed would prejudice PSCo and the Court, creating significant and unnecessary uncertainty and expense.

Specifically, the only supposed⁶ difference between the Second Action and the Third Action is that Boulder has now removed substation assets and related real property from the list of property it seeks to acquire. Thus, all of the property Boulder seeks to condemn in the Third Action is already the subject of the Second Action. If this Third Action is allowed to continue, this Court will need to consider PSCo's multiple other initial legal challenges, the parties will engage in discovery, and both the parties and the Court will begin work necessary to value over 1,500 pages of facilities plus all of the real property interests associated with those facilities predicated upon the more limited scope of the taking identified in the Third Action. Since substation facilities and real property have been removed from the Third Action, the appraisers will need to evaluate impacts to PSCo's remaining property in a different manner than if the substations were being acquired as proposed in Boulder's Second Action. But if the Second Action were ultimately reversed, that case would be remanded back to this Court and the First Amended Petition seeking to condemn the substations would be reinstated. That would moot this action in its entirety. The work by the Court, the parties, and the expert witnesses would be wasted, and everyone involved would be forced to start over with new legal challenges, property identification, discovery, and expert witness analysis and expense.

⁶ Boulder's Petition claims that it has removed the substation assets and real property it sought to acquire in the Second Action from what it seeks in the Third Action. Boulder, however, has still not served the full confidential exhibits attached to the Petition in the Third Action. PSCo assumes that Boulder is not seeking to condemn the assets or real property the PUC prohibited it from condemning in its Order dated September 30, 2019.

The Third Action should be dismissed. *See Utils. Bd.*, 171 Colo. at 458, 468 P.2d at 37 (court erred by failing to grant motion to dismiss for lack of subject matter jurisdiction targeting duplicative lawsuit involving same issues and parties); *see also In re Marriage of Mowrer*, 817 P.2d 612, 613–14 (Colo. App. 1991) (“[A] Colorado court has discretion to decline to address an issue that could easily and efficiently be addressed by the out-of-state court.”); *cf. People in Interest of L.M.*, 416 P.3d 875, 882 (Colo. 2018) (“But when, as here, the State or guardian ad litem has already commenced a termination proceeding, it is difficult to discern a purpose to be served by the filing of a second, duplicative petition to terminate.”). Indeed, the fact that the lawsuits at issue are condemnation actions amplifies the need to dismiss the Third Action. Rather than authorizing a condemnor to prosecute duplicative condemnation actions at the same time, rules prohibiting successive condemnations mandate that a condemnor discontinue an earlier condemnation action prior to commencing a duplicative action: “If a condemnor which has instituted proceedings for the condemnation of property *causes the proceedings to be discontinued* before any award as been made, the condemnor may *subsequently* institute new proceedings to condemn the same property.” *See* 6 Nichols on Eminent Domain § 26D.01 (emphasis added).

B. In the Alternative, the Court Should Stay the Case.

PSCo believes that dismissal is the most appropriate remedy here. *See Adams*, 487 F.3d at 692 (“Dismissal of the duplicative lawsuit, more so than the issuance of a stay or the enjoinder of proceedings, promotes judicial economy and the comprehensive disposition of litigation.” (quotation omitted)). But in the alternative, Colorado precedent concerning the “priority rule” for jurisdiction supports, at a minimum, the issuance of a stay until the Second Action is finally

resolved. *Town of Minturn v. Sensible Hous. Co.*, 273 P.3d 1154, 1159 (Colo. 2012) (when two cases involving the same parties and same subject matter have been filed, the court has the discretion to stay the second action). Issuing such a stay would help protect the Court, PSCo, and other parties and intervenors from the undue prejudice and expense occasioned by duplicative litigation.

VI. CONCLUSION

For the reasons set forth above, Boulder's Petition in Condemnation should be dismissed or, in the alternative, stayed.

DATED this 27th day of January, 2020.

FAEGRE BAKER DANIELS LLP

s/John R. Sperber

John R. Sperber, Atty. Reg. No. 22073

Attorneys for Respondent

Public Service Company of Colorado

CERTIFICATE OF SERVICE

The undersigned certifies that on January 27, 2020, a copy of the foregoing **MOTION TO DISMISS PETITION IN CONDEMNATION OR, IN THE ALTERNATIVE, STAY ALL PROCEEDINGS** was served on all counsel of record by the methods listed below:

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