

# **Bond Case Briefs**

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## **FERC Declares the City Of Boulder Must Seek FERC Approval in Order to Condemn Xcel Transmission Facilities.**

On December 18, 2014, FERC granted a Petition for Declaratory Order filed by the Public Service Company of Colorado ("PSCo") which requested certain clarifications regarding the application of FERC's prior approval jurisdiction under section 203 of the Federal Power Act ("FPA") in the context of the assertion of eminent domain by a political subdivision of a state over the transmission assets of a public utility. In granting the Petition, FERC clarified that transfers by condemnation, regardless of the fact that they are involuntary, are appropriately within the domain of FERC's 203 prior approval authority.

Currently, PSCo serves the City of Boulder, Colorado ("Boulder") under the Xcel Energy Operating Companies ("Xcel") Open Access Transmission Tariff. In 2011, voters in Boulder approved two separate measures relating to the creation of a municipal electric utility with the goal of eventually separating the portion of the distribution system that serves Boulder from Xcel's larger system. Xcel has refused to sell the assets used to serve Boulder, and to proceed without Xcel's consent, Boulder will have to condemn the assets through a public domain process. See Nov. 7, 2011 edition of the WER. According to the pleadings, Boulder has maintained that as a political subdivision of the state, it was not included in the definition of a public utility as set out in FPA section 203, and was therefore exempt from seeking FERC approval to consummate the condemnation of Xcel's transmission facilities. Further, Boulder argued that a taking of facilities through eminent domain does not qualify as a disposition of the facilities as set out in the language of FPA section 203.

FERC disagreed with Boulder's arguments, explaining that "[i]t is well established that voluntary transfers of jurisdictional facilities to non-jurisdictional entities require Commission approval under section 203, and there is no basis for finding that the involuntary nature of a transfer distinguishes it from this precedent and permits a jurisdictional void." FERC further explained that, under FPA section 203, FERC in its determination of whether the transfer is in the public interest will continue to consider both its traditional criteria as well as any other factors it deems necessary, as transfers by condemnation are no different from other types of transfers. FERC reiterated that its own exercise of its authority under FPA section 203 would not diminish the authority of the Public Utilities Commission of the State of Colorado to also regulate the transfer of any facilities that are subject to its jurisdiction.

In issuing the decision, FERC explicitly made no determinations regarding whether the transfer of Xcel's assets to Boulder by condemnation would be consistent with the public interest for purposes of section 203.

To view the order, click [here](#).

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