

149 FERC ¶ 61,228
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Public Service Company of Colorado

Docket No. EL14-97-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued December 18, 2014)

1. On August 26, 2014, Public Service Company of Colorado (Public Service) filed a petition for a declaratory order (Petition) requesting that the Commission find that: (1) the City of Boulder, Colorado's (Boulder) acquisition of certain facilities currently owned by Public Service by condemnation requires prior Commission approval under section 203 of the Federal Power Act (FPA);¹ (2) the Commission, when exercising its section 203 jurisdiction, will apply its longstanding criteria that consider, among other things, the effect of the proposed transfer on rates, regulation, and other relevant factors; and (3) the Commission's exercise of its section 203 jurisdiction does not diminish the authority of the Colorado Public Utilities Commission (Colorado Commission) over the transfer of facilities that are the subject matter of the condemnation. In this order, we grant Public Service's Petition.

I. Background

2. Public Service currently serves retail residential, commercial, and industrial customers within Boulder. Public Service's current load in Boulder is approximately 240 MW, which represents approximately 4 percent of Public Service's total retail load. Public Service states that Boulder has filed a petition in state district court seeking to acquire by condemnation Public Service's electric system in the Boulder area, including a 115 kV transmission loop and associated 115 kV and 230 kV transmission substations (the Transmission Loop). Public Service states that the Transmission Loop is part of its integrated transmission system, which it uses to offer transmission service in interstate

¹ 16 U.S.C. § 824b (2012).

commerce under the Xcel Energy Operating Companies (Xcel) Open Access Transmission Tariff.

3. According to Public Service, Boulder is proposing to acquire the Transmission Loop as part of its plan to establish a municipal utility. Public Service states that the Transmission Loop has a net book value in excess of \$10 million, and prior approval by the Commission under section 203 is required before Public Service can transfer these facilities to Boulder.² Public Service also states that in July 2013, Boulder staff completed a report updating the municipalization plan, and while this report proposed that the municipal utility acquire the Transmission Loop, it did not mention that prior authorization by the Commission under FPA section 203 is required in order to transfer the Transmission Loop and other jurisdictional transmission facilities.³

4. Public Service states that it and Boulder have been involved in a dispute before the Colorado Commission regarding the Colorado Commission's authority to review and approve the proposed condemnation.⁴ Public Service states that in the course of those proceedings, Boulder relied on this Commission's jurisdiction over any reciprocal transmission service provided by Boulder to Public Service and this Commission's jurisdiction over the reliability of the bulk electric system under section 215 of the FPA to support its argument that the Colorado Commission lacks jurisdiction to review its condemnation proposal.⁵ Public Service also maintains that Boulder disagreed in state court proceedings in Colorado with Public Service's contention that section 203 of the FPA applied to the transfer of the Transmission Loop by condemnation and stated that "[t]he City's research has . . . failed to disclose the existence of any authority requiring that . . . the FERC make such decisions [regarding issues relating to the transfer of the Transmission Loop] pre-condemnation."⁶ Finally, Public Service states that Boulder's condemnation filing in state court does not reference the Commission's jurisdiction under section 203 of the FPA.⁷

² Petition at 2.

³ *Id.* at 9-10.

⁴ *Id.* at 12-14.

⁵ *Id.* at 14-15.

⁶ *Id.* at 15 (quoting *City of Boulder v. Colo. Pub. Utils. Comm'n*, No. 2014-CV-030047, City of Boulder's Response to Sur-Reply Briefs at 9).

⁷ *Id.* at 15-16.

II. Petition

5. The declaratory relief that Public Service seeks in its Petition is limited to legal issues regarding the applicability of the Commission's jurisdiction under section 203 of the FPA to the transfer of the Transmission Loop by condemnation. While Public Service does question in its Petition whether the proposed transfer of the Transmission Loop by condemnation would be consistent with the public interest for purposes of section 203, it seeks no findings regarding this issue. We thus focus here on those portions of the Petition relevant to the legal issues on which Public Service seeks declaratory relief.

6. Specifically, Public Service requests that the Commission find that: (1) Boulder cannot effectuate its condemnation of the Transmission Loop without prior Commission authorization under FPA section 203; (2) in exercising its section 203 jurisdiction, the Commission will apply the longstanding criteria that consider, among other things, the proposed transfer's effect on rates, effect on regulation, and other relevant factors (including the effect on reliability); and (3) the Commission's exercise of jurisdiction under section 203 does not diminish the authority of the Colorado Commission to review the transfer of facilities that are the subject of the condemnation.⁸

7. Public Service argues that there is no question that section 203 applies here, noting section 203(a)(1) of the FPA provides that:

No public utility shall, without first having secured an order of the Commission authorizing it to do so—(A) sell, lease or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000.⁹

Public Service asserts that this provision applies in the case of the condemnation of the Transmission Loop because it, Public Service, is a public utility, the Transmission Loop consists of jurisdictional facilities with a fair market value in excess of \$10 million, and Public Service would be disposing, albeit involuntarily, of these facilities through a condemnation.¹⁰

8. Public Service maintains that its requested relief is necessary for a number of reasons. First, Public Service argues that it is important to clarify for the Colorado courts

⁸ *Id.* at 17.

⁹ *Id.* at 23 (quoting 16 U.S.C. § 824b(a)(1)).

¹⁰ *Id.* at 23-24.

that Boulder's proposed condemnation requires prior Commission authorization.¹¹ Second, Public Service maintains that clarity is needed regarding the Commission's authority to review the rate impacts of condemning the Transmission Loop.¹² Third, Public Service asserts that a declaratory ruling is necessary to clarify that the Commission's exercise of its section 203 jurisdiction does not diminish the Colorado Commission's authority over the facilities at issue.¹³ Finally, Public Service maintains that the proposed transfer may raise reliability issues, and it argues that the Commission can consider such matters in a section 203 proceeding.¹⁴

9. Public Service argues that action on its Petition is appropriate because of the finality of the condemnation rulings that Boulder is seeking. Public Service states that under Colorado eminent domain statutes, once a jury or condemnation commission determines the just compensation to be paid for taking Public Service's property, Boulder may then deposit the award into the court registry. The condemnation court will then enter a Rule and Order, which immediately and automatically transfers the property to Boulder in the same manner that a deed or other document would transfer title in an ordinary private transaction.¹⁵

10. Public Service explains that Colorado condemnation cases follow a bifurcated process, and even before compensation is determined, the condemnation court will determine Boulder's right to condemn the facilities and other property rights it seeks from Public Service, including the Transmission Loop. According to Public Service, in the first phase of the case, the court determines whether Boulder has the legal authority to acquire the property and has met all other prerequisites to condemning the property.¹⁶

11. Public Service states that, after the first phase is resolved, the parties then move forward with the second phase, which consists of valuation litigation to determine the just compensation owed for the property. Public Service states that, absent an extraordinary writ or other unusual situation, there is no further opportunity during the pendency of the case for the parties to revisit the condemnor's authority to take the property. According

¹¹ *Id.* at 19.

¹² *Id.* at 27.

¹³ *Id.* at 34-36.

¹⁴ *Id.* at 32.

¹⁵ *Id.* at 21-22.

¹⁶ *Id.* at 22.

to Public Service, upon determination of the just compensation to be paid, the property is simply transferred pursuant to the court's Rule and Order. Public Service argues that it is therefore important for the Commission to make it clear to the condemnation court that Boulder must apply for and obtain transfer approvals under section 203 before the transmission and substation facilities can be condemned.¹⁷

III. Notice of Filing and Responsive Pleadings

12. Notice of Public Service's Petition was published in the *Federal Register*, 79 Fed. Reg. 52,645 (2014), with interventions and protests due on or before September 25, 2014, which the Commission subsequently extended to October 1, 2014. Motions to intervene were timely filed by Boulder and the American Public Power Association (American Public Power). Boulder and American Public Power also filed protests. On October 16, 2014, Public Service filed a motion for leave to answer and answer to the protests. On October 31, 2014, Boulder filed a motion for leave to answer and answer to Public Service's answer.

13. Boulder argues in its protest that there is no basis for the declaratory relief that Public Service seeks. It maintains that granting this relief would require a construction of FPA section 203 that is contrary to its plain language; the application of review criteria to disputed, hypothetical scenarios; and the fabrication of controversy where none exists.¹⁸

14. Boulder makes two arguments regarding the applicability of section 203. First, it objects to Public Service's contention that Boulder cannot effectuate its condemnation of the Transmission Loop without prior Commission approval under FPA section 203. Boulder states that it is a political subdivision of a State, and FPA section 201(f) exempts it from FPA section 203(a)(1)(A). Boulder argues that, as a political subdivision, it is not a public utility and has neither the right nor the obligation to make any application under section 203(a)(1)(A).¹⁹ Boulder asserts that "it has been this Commission's longstanding position that FPA Section 203 does not apply to utilities owned or operated by political subdivisions."²⁰ Similarly, American Public Power argues that section 203 applies to

¹⁷ *Id.* at 23.

¹⁸ Boulder Protest at 9.

¹⁹ *Id.* at 9, 14.

²⁰ *Id.* at 15 (citing *Nebraska Power Co.*, 5 FPC 8, 20 (1946); *Mid-Continent Area Power Pool*, 89 FERC ¶ 61,135, at 61,387-61,388 (1999); *Western Systems Power Pool*, 55 FERC ¶ 61,495, at 62,713 (1991); *UOP Energy Recovery Corp. of Pinellas*, 25 FERC ¶ 61,318, at 61,723 (1983)).

public utilities, and public utilities cannot impose the obligation to obtain Commission authorization on someone else.²¹

15. Second, Boulder argues that the exercise of its power of eminent domain, if successful, involves a taking of facilities by Boulder, not a disposition of facilities by Public Service, and section 203 does not contemplate the Commission's authorization in such circumstances. Boulder maintains that the initiation and prosecution of a state eminent domain proceeding does not cause Public Service to sell, lease or otherwise dispose of jurisdictional facilities that may implicate section 203(a)(1)(A), and no transaction will occur until it is authorized at the conclusion of the process. Boulder argues that as a result, the Commission lacks subject matter jurisdiction over Boulder's initiation and prosecution of its condemnation action.²² Boulder states that in its petition for condemnation it requested that, when the entry of a Rule and Order appears imminent, the Boulder County District Court direct Public Service to make such regulatory filings as may be necessary and appropriate to effectuate the transfer of ownership.²³

16. Boulder argues that the Commission should deny Public Service's request regarding the applicable criteria in a section 203 proceeding because there is no controversy concerning the applicability of those criteria to any verifiable facts. According to Boulder, because there is no section 203 application before the Commission here, the Commission's review criteria under section 203 are not in issue. Boulder argues that Public Service's allegations regarding the application of the Commission's review criteria to speculative hypothetical scenarios seek to create a controversy where none currently exists.²⁴ American Public Power agrees with Boulder on these points.²⁵

17. Finally, Boulder argues that the Commission should deny Public Service's request regarding the effect of Commission jurisdiction under section 203 on the authority of the Colorado Commission because there is no controversy over that question. Boulder asserts that there are controversies between it and Public Service over many other issues

²¹ APPA Protest at 4.

²² Boulder Protest at 10, 17.

²³ *Id.* at 19-20.

²⁴ *Id.* at 12, 22-23.

²⁵ APPA Protest at 6-7.

in ongoing state court litigation, but those controversies do not involve the impact of the Commission's section 203 jurisdiction on the jurisdiction of the Colorado Commission.²⁶

18. In its answer to the protests, Public Service maintains that while the protesters argue that its Petition should be denied, neither protestor concedes the questions that Public Service has presented to the Commission, and Boulder contends that section 203 does not apply to the transfer of the Transmission Loop. Public Service concludes from this that there is a clear dispute regarding the applicability of section 203 to Boulder's planned condemnation of the Transmission Loop.²⁷

19. In response to the arguments that Boulder is not a public utility and is therefore not required to make a section 203 filing, Public Service states that it "did not ask for a ruling on the *procedural* issue of *which entity* should file a section 203 application. [It] asked for a ruling on whether the Commission has *jurisdiction* over a transfer of the Transmission Loop."²⁸ Public Service nevertheless argues that, for a number of reasons, it is Boulder that must seek prior section 203 approval for the transfer of the Transmission Loop.²⁹

20. Public Service disputes Boulder's argument that condemnation of the Transmission Loop involves a taking of facilities by Boulder, not a disposition of facilities by Public Service, and Public Service disputes that section 203 does not contemplate Commission authorization in such circumstances. According to Public Service, the Commission has emphasized that "Congress' intent was to ensure that the Commission maintain oversight of *any transfer* of jurisdictional utility property."³⁰ Public Service maintains that the reference to "any transfer" shows that the statute does not distinguish between voluntary and involuntary transfers, and the Commission's application of section 203 to hostile takeovers confirms this point.³¹ Also, according to Public Service, the Commission has stated that narrow interpretations of terms such as

²⁶ Boulder Protest at 12-13, 30-32.

²⁷ Public Service Answer at 1-2.

²⁸ *Id.* at 3 (emphasis in original).

²⁹ *Id.* at 3-4.

³⁰ *Id.* at 6 (quoting *Cent. Illinois Pub. Serv. Co.*, 42 FERC ¶ 61,073, at 61,328 (1988) (emphasis in original)).

³¹ *Id.* at 9 (citing *Kansas City Power & Light Co.*, 53 FERC ¶ 61,097, at 61,283 (1990)).

“dispose” in section 203 “would result in a jurisdictional void in which certain types of power sales facilities and corporate transactions could escape Commission oversight.”³²

21. In addition, Public Service argues that Boulder cannot maintain its distinction between takings and dispositions, as Boulder acknowledges that the condemnation would effectuate a “transfer of ownership of jurisdictional [Public Service] facilities . . . [for] pay[ment] . . . of compensation due,”³³ which Public Service argues constitutes the definition of a sale. Public Service notes that courts have held that a condemnation is a sale, and as a result, there is no question that the proposed condemnation would effectuate a sale of the Transmission Loop or would “otherwise dispose” of it.³⁴ Public Service notes in this connection that the Commission has stated that jurisdictional facilities may not be transferred by condemnation “without prior approval from the Commission pursuant to Section 203 of the FPA.”³⁵

22. Public Service states that Boulder does not contest the statement that in applying section 203 to the transfer of the Transmission Loop, the Commission would apply its traditional public interest factors. Public Service states that Boulder instead argues that it is premature to apply those factors at this time. Public Service notes that in its Petition, it did not ask the Commission for such relief but rather provided certain examples that supported its position that the Commission should declare that the traditional criteria will apply. Public Service concludes that the Commission should grant its requested ruling on this point because it is uncontested.³⁶

23. Public Service maintains that Boulder does not offer a substantive objection to Public Service’s position that Commission jurisdiction under section 203 does not preempt Colorado Commission review of a transfer but argues instead that there is no current or likely future controversy on this point. Public Service states that this is technically true, but it is true only because Boulder does not believe either regulatory agency has jurisdiction over the transfer of the Transmission Loop by condemnation. Public Service argues that to provide certainty to the Colorado Commission and the condemnation court, and to remove the cloud created by Boulder’s statement that it is

³² *Id.* at 7 (quoting *Enova Corp.*, 79 FERC ¶ 61,107, at 61,489 (1997)).

³³ *Id.* at 7 (quoting Boulder Protest at 18).

³⁴ *Id.* at 7-8.

³⁵ *Id.* at 8 (quoting *City of Las Cruces, New Mexico v. El Paso Electric Co.*, 87 FERC ¶ 61,220, at 61,874 (1999) (*City of Las Cruces*)).

³⁶ *Id.* at 9-10.

only “likely” that Boulder will not contest this issue in the future, the Commission should grant the relief requested.³⁷

24. In its answer to Public Service, Boulder disputes Public Service’s arguments that Public Service cannot be compelled to make a section 203 filing to effectuate any eventual condemnation and maintains that none of the other arguments that Public Service has advanced demonstrate that section 201(f)-exempted entities must apply for FPA section 203 authorization to acquire transmission facilities from a public utility by condemnation.³⁸

25. Boulder argues that Public Service is incorrect in stating that Boulder does not contest that, in applying section 203 to the transfer of the Transmission Loop, the Commission would apply its traditional public interest factors. Boulder states that it had no need to address this aspect of Public Service’s claim and instead demonstrated that there is no present, actual controversy concerning application of the traditional public interest factors. Boulder maintains that Public Service has failed to show an appropriate basis for declaratory relief and failed to sustain its burden of establishing any present, actual controversy over the application of any standards of review. Boulder argues that on this issue and the issue of the effect that an exercise of Commission jurisdiction would have on the jurisdiction of the Colorado Commission, Public Service seeks a ruling on a potential hypothetical or academic question and has failed to demonstrate the existence of a present, actual controversy that establishes grounds for declaratory relief.³⁹

IV. Discussion

A. Procedural Matters

26. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

27. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or an answer unless otherwise

³⁷ *Id.* at 10.

³⁸ Boulder Answer to Answer at 5.

³⁹ *Id.* at 6-7 (citing *Committee of Certain Members of Cajun Elec. Coop., Inc.*, 87 FERC ¶ 61,129 (1999) (*Cajun Elec. Coop.*); *Phillips Petroleum Co.*, 58 FERC ¶ 61,290 (1992) (*Phillips Petroleum*)).

ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

Substantive Matters

28. We will grant Public Service's Petition. Rule 207(a)(2) of the Commission's Rules of Practice and Procedure provides that a party may file a petition for declaratory order "to terminate a controversy or remove uncertainty."⁴⁰ In issuing a declaratory order in this case, we are not exercising our jurisdiction under section 203 of the FPA, but rather our authority under rule 207(a)(2) and under section 554(e) of the Administrative Procedure Act, which provides that an agency in its sound discretion may issue a declaratory order to terminate a controversy or remove uncertainty.⁴¹

29. The pleadings in this proceeding show that a controversy exists regarding the applicability of FPA section 203 to the proposed condemnation of the Transmission Loop. Public Service contends that Boulder may not effectuate a condemnation of the Transmission Loop without prior Commission authorization under FPA section 203, whereas Boulder maintains that [203 doesn't apply and] "exercise of its power of eminent domain, if successful, involves a taking of facilities by Boulder, not a disposition of facilities by [Public Service]," and "[s]ection 203 does not contemplate the Commission's authorization in such circumstances."⁴² In light of this dispute, we find that it is appropriate for the Commission to exercise its discretion and issue a declaratory order that will terminate this controversy and thus remove uncertainty.

30. The other determinations that Public Service seeks, i.e., those regarding the applicable public interest criteria and the effect of Commission action on the authority of the Colorado Commission, are closely related to the applicability of section 203. Consequently, we [therefore] exercise our discretion and also address them in this order.⁴³

⁴⁰ 18 C.F.R. § 385.207(a)(2) (2014).

⁴¹ 5 U.S.C. § 554(e) (2012); *USGen New England, Inc.*, 118 FERC ¶ 61,172, at P 18 (2007); *Rocky Mountain Natural Gas Co.*, 90 FERC ¶ 61,246, at 61,811 (2000).

⁴² Boulder Protest at 10.

⁴³ Given the facts presented, i.e., the proposed condemnation of the Transmission Loop, and the generality of the determinations that Public Service seeks, i.e., the applicability of section 203 to those facts, including the applicable public interest criteria and the effect of Commission action on the Colorado Commission's authority, this is not a situation where there could be "markedly different" outcomes with respect to the

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31. We emphasize at the outset that we are addressing here only the legal issues on which Public Service seeks declaratory relief, and we make no findings or determinations here regarding whether the transfer of the Transmission Loop to Boulder by condemnation would be consistent with the public interest for purposes of section 203.⁴⁴ Public Service seeks no such findings or determinations, the record in this proceeding does not provide an adequate basis for making them, and this is not the appropriate proceeding for assessing such matters.

32. With regard to the first finding that Public Service seeks, section 203(a)(1) of the FPA specifies that “[n]o public utility shall, without first having secured an order of the Commission authorizing it to do so—(A) sell, lease or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000.”⁴⁵ Public Service is a public utility, and it represents that the value of the Transmission Loop exceeds \$10 million. This leaves only the question of whether the effectuation of a condemnation of the Transmission Loop constitutes a disposal of jurisdictional facilities for purposes of section 203. We find that it does.

33. A transfer by condemnation of facilities subject to the Commission’s jurisdiction under the FPA cannot be effectuated unless the Commission has authorized the transfer under section 203 of the FPA.⁴⁶ The Commission has found based on its consideration of

questions presented depending on subsequent developments, *Cajun Elec. Coop.*, 87 FERC ¶ 61,129 at 61,509, nor can one say that “[t]he petition does not present any issues that would affect any existing disputes concerning the Commission’s regulatory responsibilities. . . .” *Phillips Petroleum Co.*, 58 FERC ¶ at 61,932. Consequently, the precedent that Boulder cites does not support dismissal of Public Service’s Petition in whole or part.

⁴⁴Nor does the Commission make findings or determinations regarding which entity is obligated to file for Commission approval under FPA section 203. Although the parties dispute this issue in the pleadings, Public Service explicitly states that it is not seeking a ruling on this issue, and we therefore will not address it here. *See Avista Corp.*, 100 FERC ¶ 61,274, at P 52 (2002).

⁴⁵ 16 U.S.C. § 824b(a)(1) (2012).

⁴⁶ We note that to some degree Public Service and Boulder appear to argue past each other. Public Service seeks a finding that a condemnation may not be effectuated, i.e., put into effect through a transfer in ownership of the Transmission Loop, prior to Commission approval under section 203. On the other hand, Boulder asserts that “the Commission lacks subject matter jurisdiction over Boulder’s initiation and prosecution of its condemnation action,” Boulder Protest at 9, which we read as referring to those stages of a condemnation proceeding that occur prior to effectuation. We address here only the

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the legislative history of section 203 that “Congress’ intent was to ensure that the Commission maintain oversight of *any transfer* of jurisdictional utility property.”⁴⁷ The legislative history “indicates that the focus of section 203 is on the disposition of control of jurisdictional facilities, however such disposition might be effected (i.e., through sale, lease, merger, consolidation, or acquisition of securities, or otherwise).”⁴⁸ In particular, the Commission noted that the Senate Report, in its analysis of section 203(a), states that:

This section furnishes an essential check upon the development of the industry along uneconomic lines. It complements [the Public Utility Holding Company Act of 1935] by directing the Commission to prevent transfers or consolidations of property which would impair the ability of public utilities to render adequate service or impede, or tend to impede, the coordination in the public interest of facilities subject to the jurisdiction of the Commission.⁴⁹

34. This directive is the basis of the Commission’s determination that a term in section 203 such as “dispose” should not be read narrowly, as to do so “would result in a jurisdictional void in which certain types of power sales facilities and corporate transactions could escape Commission oversight.”⁵⁰ It is well established that voluntary transfers of jurisdictional facilities to non-jurisdictional entities require Commission approval under section 203,⁵¹ and there is no basis for finding that the involuntary nature of a transfer distinguishes it from this precedent and permits a jurisdictional void.

35. We thus see no grounds for concluding that transfers by condemnation are exempted from the scope of section 203 because they are involuntary on the part of the transferor. Such transfers can impact the operation of facilities subject to the Commission’s jurisdiction and the delivery of service through those facilities in the same

question of whether a condemnation of the Transmission Loop can be *effectuated* prior to the issuance of an approval under section 203.

⁴⁷ *Cent. Illinois Pub. Serv. Co.*, 42 FERC ¶ 61,073, at 61,328 (1988) (emphasis in original).

⁴⁸ *Enova Corp. & Pac. Enterprises*, 79 FERC ¶ 61,107, at 61,490 (1997).

⁴⁹ *Id.* at 61,490 (quoting S. Rep. No. 621, 74th Cong., 1st Sess. 50 (1935)).

⁵⁰ *Id.* at 61,489.

⁵¹ *See, e.g., Long Island Lighting Co.*, 82 FERC ¶ 61,129, at 61,462-66 (1998).

way as any other transfer, and exempting them from review under section 203 would create a jurisdictional void that Congress did not intend. A transfer by condemnation evidences essential attributes of a sale and has been treated by the courts as a sale.⁵² The Commission has previously affirmed that a transfer of a jurisdictional transmission line by condemnation would require Commission approval under section 203.⁵³

36. With regard to the second finding that Public Service seeks, section 203(a)(4) of the FPA requires the Commission to approve an application for a transfer of jurisdictional facilities under section 203 if it determines that the proposed transaction “will be consistent with the public interest. . . .”⁵⁴ In ruling on whether a transaction is consistent with the public interest, the Commission generally considers the framework established in the Merger Policy Statement.⁵⁵ This framework requires consideration of the transaction’s effect on competition, its effect on rates, and its effect on regulation; the Commission also considers whether the proposed transaction will result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company.⁵⁶ The Commission may also consider “other factors” on a case-by-case basis.⁵⁷ In short, as explained above, transfers by condemnation do not differ from other types of transfer with respect to the applicability of section 203, and as a result, in determining whether a transfer by condemnation is

⁵² See, e.g., *Hawaiian Gas Products v. Commissioner of Internal Revenue*, 126 F.2d 4, 5 (9th Cir. 1942); *Cent. Tablet Mfg. Co. v. United States*, 417 U.S. 673, 687-88 (1974).

⁵³ *City of Las Cruces*, 87 FERC ¶ 61,220 at 61,874.

⁵⁴ 16 U.S.C. § 824(a)(4) (2012).

⁵⁵ See *Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008) (Supplemental Policy Statement). See also *Revised Filing Requirements Under Part 33 of the Commission’s Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh’g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh’g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh’g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

⁵⁶ 16 U.S.C. § 824b(a)(4) (2012).

⁵⁷ 18 C.F.R. § 2.26(b) (2014).

consistent with the public interest, the Commission considers both its traditional criteria as well as any other factors it deems necessary to the determination of whether the proposed transaction is consistent with the public interest.

37. Finally, with regard to the third finding that Public Service seeks, the Commission's exercise of its authority under section 203 with regard to a transfer of the Transmission Loop would not diminish the authority of the Colorado Commission to regulate the transfer of any facilities that are subject to its jurisdiction. This principle is well-established and supported by precedent.⁵⁸

The Commission orders:

Public Service's Petition is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁵⁸ See *Duke Power Co. v. FPC*, 401 F.2d 930, 935 n.41 (D.C. Cir. 1968); *Commonwealth Edison Co.*, 91 FERC ¶ 61,036, at 61,138 (2000).