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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of: **THE VOLUNTARY REQUEST OF ROCKY MOUNTAIN POWER FOR APPROVAL OF RESOURCE DECISION TO CONSTRUCT SELECTIVE CATALYTIC REDUCTION SYSTEMS ON JIM BRIDGER UNITS 3 AND 4**	Docket No. 12-035-92 **ROCKY MOUNTAIN POWER'S RESPONSE TO WESTERN RESOURCE ADVOCATES' REQUEST FOR REHEARING**

Comes now, Rocky Mountain Power (the "Company") with its response to Western Resource Advocates' Request for Review or Rehearing (the "Request"). In support of its response, Rocky Mountain Power states as follows:

INTRODUCTION

On June 10, 2013, Western Resource Advocates ("WRA") filed a Request for Review or Rehearing with the Public Service Commission of Utah (the "Commission"), together with the

affidavit of Nancy Kelly, and a letter to the United States Environmental Protection Agency (the "EPA") Region 8 Director, Shaun McGrath.

The Request attempts an end-run around the Commission's hearing process and well-reasoned determination that it was appropriate to approve the Company's Request for Voluntary Approval by reiterating an issue raised at hearing and restated in argument in WRA's post-hearing brief regarding a repowering/Selective Non-Catalytic Reduction System ("SNCR") alternative for Bridger Units 3 and 4 that, as discussed below, was previously rejected by the Commission relating to the San Juan Generating Station in New Mexico. The Request and Ms. Kelly's affidavit merely raise an equally unpersuasive example of the issue previously rejected by this Commission by stating EPA Region 9's indication, after Arizona Electric Power Cooperative asked it to, that it would reconsider its Selective Catalytic Reduction ("SCR") requirements at the Apache coal plant in Arizona (similar to the San Juan Generating Station example raised at hearing), and instead consider repowering one unit with natural gas and installing SNCR at the second unit. Additionally, WRA cites a newspaper article as proof that EPA may initiate similar cooperative approaches with states to develop a "reasonable alternative." In this case, the reasonable alternative has already been determined by the Commission to be installation of SCR at Jim Bridger Units 3 and 4 and WRA's petition should not change the Commission's approval or its rejection of the previously considered issue.

The Request argues that the public interest would somehow be served if the Commission, based on Ms. Kelly's affidavit, a generic letter to the new EPA Region 8 Administrator, a newspaper article and an example in another EPA region, reconsiders its May 10 decision and denies preapproval of the installation of SCR controls and Jim Bridger Units 3 and 4. As discussed below, WRA's request is an overreach and precluded by law.

ARGUMENT

The Commission should deny WRA's Request for several reasons.

First, WRA concedes in its Request, as it must, that the Commission previously heard WRA's argument that the EPA would consider an alternative to installing SCR on the Bridger Units during the public hearings in this Docket, and in the WRA's post-hearing brief. As WRA states, this was an issue of "particular importance" to it. In making this argument, WRA erroneously characterizes statements made by Rocky Mountain Power witness Mr. Chad Teply at the hearing. Mr. Teply did not state that the WRA's proposal to convert one unit to natural gas and install SNCR on the other would not meet the requirements of the Clean Air Act. Mr. Teply did state that the Company reviewed a number of alternative scenarios, just not the particular one WRA referenced.[1] WRA would also have this Commission believe that the examples cited in Arizona and New Mexico are done deals and have already been finally approved by EPA – that is also not the case as these alternatives have yet to go through public comment.

WRA had an opportunity at the hearing to introduce evidence or testimony supporting this "particularly important" argument. But, as the Commission noted in its Report and Order, WRA *failed to do so*. WRA cannot now ask the Commission to re-consider its argument. WRA's contention that this information is new and the Commission should consider "recent events and developments" because there was a newspaper article post-hearing on an issue clearly considered by this Commission is disingenuous. Further, WRA could have submitted testimony supporting a repowering/SNCR alternative at the public hearing or in prefiled testimony – however, it did not do so. WRA is, then, barred, based on principles of issue and/or claim preclusion, from raising the issue after the fact. The record in this proceeding is closed, and the

[1] Tr. at 57.

attempt to introduce new evidence should not be allowed. In order to warrant rehearing or reconsideration once the Commission has issued a final order, WRA would need to show some essential legal or factual error by the Commission, or that previously undiscoverable evidence has been located that would support a different outcome.[2] WRA cannot meet this burden by restating evidence that was, or should have been, presented to the Commission during the course of this proceeding.

Second, the Commission *rejected* the arguments WRA is attempting to restate regarding the cost of retirement or conversion of Bridger Units 3 and 4 to natural gas. The Commission expressly stated:

> We are not persuaded by Sierra Club or WRA that further adjustments to address the foregoing issues are reasonable or would cause the results of the Company's economic analysis to swing in favor of natural gas conversion or early retirement. We note the Company's economic analysis not only demonstrates the Project is favored in six of nine cases, but substantially so. We find no compelling evidence, arguments, or analysis shifting the economics to favor to an alternative strategy to comply with the Wyoming SIP requirements.

(Report and Order at 32.) WRA presents nothing in its Request would alter these conclusions. The economic case on which the Commission determined that the SCR Project move forward remains unscathed.

Finally, the mere possibility that the EPA "would … be open to considering a SNCR/repowering alternative," is not a legitimate ground to second-guess the Company's decision making, nor is it a basis for reopening the record or the Commission's decision based on the facts as they were presented at the time they were presented. As we have seen already in

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[2] *Garner v. Thomas*, 78 P.2d 529, 530 (Utah 1938) ("As a general rule courts will not grant rehearings to consider questions which could have been urged in the first hearing but were not") (Wolfe, J., Concurring). *See also* Utah R. Civ. P. 60(b) "On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

this case, what decisions the EPA may make in the future, and in what timeframe, is pure speculation. As it has done through its Request in this matter, WRA's letter to EPA similarly attempts to circumvent the public process by requesting action by EPA in an open rulemaking docket – effectively amounting to an ex parte communication that precludes public input. Moreover, even if the SNCR "alternative" were approved in this EPA Region – which it is not – it would be only that: an alternative. By imposing one alternative for another that this Commission has already found to be in the public interest would be tantamount to the Commission intruding upon the role of utility management. As this Commission is well aware, it is black letter law that utility commissions are not empowered to do so. *See Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Comm'm,* 262 U.S. 276, 289 (1923) ("The Commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation.") (quotations omitted); *Utah Dep't of Admin. Services v. Public Service Comm'n,* 658 P.2d 601, 618 (Utah 1983) ("[T]he Commission is normally forbidden from intruding into the management of a utility.").

CONCLUSION

For the reasons stated above, the Commission should deny the WRA's Request for Review or Rehearing.

DATED this 25th day of June, 2013.

Respectfully submitted,

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