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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 **UTAH DIVISION OF PUBLIC UTILITIES' POST HEARING BRIEF**

The Utah Division of Public Utilities ("DPU") hereby submits its Post Hearing Brief. This brief discusses three issues raised at the hearing and explains why the Division's recommendation remains unchanged supporting approval of the request subject to the conditions set forth in DPU witnesses Matthew Croft's testimony.

Introduction

On March 7, 2013 the Public Service Commission of Utah ("Commission") held a hearing in this matter concerning Rocky Mountain Power Company's ("Company") voluntary request for approval of its resource decision to construct and operate Selective Catalytic

Reduction ("SCR") on units 3 and 4 of its Jim Bridger facilities as the lowest cost alternative to meet Wyoming DAQ standards. Parties submitted pre-filed testimony and witnesses provided direct and cross examination testimony at the hearing. At the hearing the Commission permitted parties to file post hearing briefs summarizing the parties' positions.

Discussion

During the course of the hearing the testimony primarily reflected that provided in the prefiled testimonies of the parties. The evidence presented does not change the DPU's recommendation that the Commission approve the construction of SCRs on units 3 and 4 of Jim Bridger with conditions as set forth in Matthew Croft's Surrebuttal Testimony.[1]

Three issues arose during the hearing that will be discussed in this brief. The Company presented a response from the Wyoming DEQ indicating that additional compliance time is unlikely to be granted.[2] Western Resource Advocates ("WRA") introduced a term sheet from an agreement reached by parties involved in a resource decision in New Mexico. And there were questions regarding the legal effect of Commission approval.

Wyoming DEQ Letter Confirms the DPU's Position.

The first new evidence filed the day prior to the hearing, admitted into evidence, and discussed at the hearing was the Company's March 6, 2013 filing including a letter from the Wyoming DEQ stating that it "continues to stand by its January 4, 2013 decision declining to extend the Settlement Agreement deadlines applicable to Jim Bridger Units 3 and 4." [3] This new evidence does not change the DPU's recommendation. The DPU's position in testimony and

[1] Croft Surrebuttal at 2-4.
[2] Exhibit CSW-5SR.
[3] *Id*.

prior briefing[4] has been that the Company is under an independent state level obligation to reduce NOx emissions on Jim Bridger units 3 and 4 by the dates set by the Wyoming DEQ. Absent information otherwise the DPU has considered these dates as binding. The DEQ response merely confirms the position relied upon by the DPU. Therefore the DPU's position has not changed as a result.

The New Mexico Term Sheet is Not Persuasive.

The second new evidence of note admitted during the hearing was a term sheet between the EPA, the Public Service Company of New Mexico ("PNM"), and the State of New Mexico ("Term Sheet") entered into evidence by WRA during the cross examination of DPU witness Matthew Croft. This document has not changed the DPU recommendation.

The Commission should give little weight to the Term Sheet as a potential lower cost alternative. The Term Sheet is presented as an indication of the possibility of other alternative options that may not have been considered by the Company or the parties. However through three rounds of pre-filed testimony there has been no testimony provided nor sufficient evidence or analysis entered in the record of this docket regarding the nature of the agreement made or whether a similar agreement might be feasible at Jim Bridger. Without having been involved in the crafting of the terms, knowing the history of the facility at issue, or the relevant regional haze concerns specific to the facility, the DPU cannot speculate as to whether partial SNCR and partial retirement would be a least cost alternative. Had a party reviewed this as an option and provided sufficient evidence to support it as a viable alternative for Jim Bridger, it might be more persuasive.

[4] *See* DPU Memorandum in Response to Sierra Club's Motion to Stay.

On its face, the Term Sheet seems unlikely to meet the Wyoming DEQ requirements. The agreement between the Company and the Wyoming DEQ upon which the current deadlines are based sets a maximum NOx limit at 0.07lb/MMBtu. In comparison the limits set out in the PNM Term Sheet for the remaining two operational coal units will be 0.23lb/MMBtu. That is more than three times the limit that the Jim Bridger units must meet. While we can only guess as to what permutations could result from various negotiations with the EPA, the Wyoming DEQ has set independent specific targets and associated deadlines which the Company must meet.

All evidence available should be considered and given due weight in this analysis. Based on the record of this proceeding the Commission should rely on evidence based on current known regulatory standards rather than a mere speculation that the Wyoming DEQ and the EPA might approve a similar agreement with much higher NOx emissions. The risk of not doing so is significant with respect to delaying construction and driving up construction costs.

Approval by the Commission is Subject to Prudent Action by the Company.

In addition to the new evidence addressed above, an issue that arose during the hearing was what SCR approval by the Commission means with respect to cost recovery. The specific implementation of cost recovery is not directly at issue in this docket and the Commission need not address the matter at this time. Nonetheless, it is important for the Commission to consider the rate recovery issue at this point though as it may influence the types and terms of the safeguards upon which the DPU requests that the Commission condition approval.

Cross examination questions, primarily from WRA, asked witnesses about whether there is a difference between planning prudence and operational prudence and the relationship between

them and approval in this docket.[5] The DPU does not view the issues as necessarily fitting precisely in one category or the other, but the terms do provide categories useful in simplifying discussion of the issue. While not defined with specific meaning in the Utah code; planning prudence in this context generally refers to the choice of SCR technology as opposed to other options and operational prudence would refer to prudence in contracting, constructing, and using the SCR facilities. The Company remains required to act prudently in both respects going forward. Approval in this docket, therefore, would not entirely exclude prudence review of either planning or operational prudence.

That is not to say that approval in this docket is meaningless however. While prudence review challenges may remain available, approval by the Commission is significant and meaningful. Without preapproval of a resource decision the utility seeking rate recovery bears the burden of proving its planning and operation was prudent.[6] Approval grants a presumption of prudency – at least with respect to planning – and denial of recovery requires a finding that "utility's actions… are not prudent."[7] While the preapproval statute references using the same prudence standards found in Utah Code Ann. § 54-4-4, the requirement of a finding of non-prudence indicates a change in burden as compared to affirmative finding of prudence. Therefore the ability to seek preapproval of significant resource decisions offers meaningful risk protection to the Company, and gives the Commission and various parties the opportunity to be proactively involved in those decisions at the time the decisions are made.

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[5] *See e.g*. Transcript of Hearing p. 145 lines 14-16.
[6] *See* Utah Public Serv. Comm'n Order in Docket Nos. 03-057-05, 01-057-14, 99-057-20, and 98-057-12, Aug. 30, 2004 at p. 11 ("holding Questar Gas to its burden of establishing that its decision to enter into the contract and the costs it agreed to were prudent") citing to *Committee of Consumer Services v. Public Serv. Comm'n*, 75 P.3d 481, 486 (Utah 2003).
[7] Utah Code Ann. § 54-17-403(2)(a)

The Energy Resource Procurement Act ("Act") provides for resource decision review prior to construction. Utah Code Ann. § 54-17-402(4) states in relevant part that if a resource decision is approved "the commission shall, in a general rate case or other appropriate commission proceeding, include in the energy utility's retail rates, the state's share of the costs…incurred by the energy utility in implementing the approved resource decision..." The plain language of the statute can only be reasonably interpreted to mean that rate recovery for implementation of the approved resource decision, at least up to the amount of the projected costs, is presumptively approved. This is essentially planning prudence approval.

Approval is not absolute. The statute goes on to provide that "the commission may disallow some or all of the costs incurred if the… utility's actions in implementing an approved resource decision are not prudent because of new information or changed circumstances…"[8] The Company retains the duty to act prudently going forward with implementation of the resource decision which may require deviation from the approved resource decision if circumstances diverge from those upon which approval was granted.

While it may seem to indicate primarily operational prudence, the statute contemplates more. Specifically implementation is more than simply construction. It also includes the choice to continue with implementation in light of new or changed circumstances as the project progresses. The choice to continue with implementation is partially a planning prudence issue when changed circumstances demand a change in course of action possibly requiring termination of implementation.

[8] *Id.*

In this docket approval of SCR installation over alternatives would be deemed to be prudent as of the order date and would be presumed to be prudent going forward so long as the circumstances do not materially change from those predicted. As contemplated by the statute, risks remain and circumstances may change. For example, an EPA imposition of a NOx limit of 0.04 lb/MMBtu during the process of construction, or a federal bill passing in 2014 imposing an immediate $60/ton CO2 tax might warrant review and change of course. In such scenarios it may be imprudent to continue on with construction of the SCRs. These are matters of planning prudence post approval. The Company retains the duty to continually evaluate new developments and act accordingly with respect to both planning and operation.

For approval to be meaningful, the ongoing prudence duty must be distinguished from allowing review of any possible alternative plan at the next rate case. Identifying an alternative at a future rate case that the Company should have considered now is inappropriate, absent material misrepresentation or concealment by the Company. [9] The time for such a discussion is now. The purpose of the Act is to compare and challenge the alternatives before the costs are incurred. Any other interpretation would render the pre-approval process without meaning and inappropriately elevate hindsight. What benefit would be gained by review and hearing on the decision to install SCRs now only to re-argue the merits and prudence of that decision at the next rate case?

It is undisputed that the Company retains the duty to act prudently in its operations and construction of the SCR units. Approval of the projected costs does not absolve the Company of this duty. Similarly with planning prudence, if the market conditions change such that new,

[9] Utah Code Ann. S 54-17-403(3).

cheaper construction methods or materials become available the Company must review those and act appropriately if it wishes to recover.

In addition to the general protection inherent in the duty of prudence the Commission has authority to impose specific conditions to approval. The DPU has set forth the conditions targeted at specific risks that must be addressed. Those include conditions upon a review of the impacts of the EPA's emissions limit re-proposal, review of a fully executed engineering, procurement, and construction contract, rate payer protections being included in the contract with respect to non-compliance due to Company or Contractor's failure to meet the emission limit deadlines, cost overruns or deviations remaining subject to full review, and actual costs remaining subject to prudence review as discussed in Matthew Croft's Surrebuttal Testimony. With those conditions attached, the DPU favors approval of the Company's Application.

Conclusion

The evidence presented by the parties during the March 7, 2013 hearing has not changed the recommendation of the DPU. Based on the available information SCRs are the projected lowest cost alternative to comply with the Wyoming DEQ regulations. The DPU recommends that the Commission conditionally approve the request as explained herein.

Respectfully submitted this _27th__ day of March, 2013.

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