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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 POST-HEARING BRIEF RELATING TO EPA ACTION** **CONFIDENTIAL VERSION**

INTRODUCTION

PacifiCorp dba Rocky Mountain Power (the "Company") respectfully submits this *Post-Hearing Brief Relating to EPA Action* in support of its Voluntary Request for Approval of Resource Decision (the "Request") to add selective catalytic reduction ("SCR") systems on Units 3 and 4 of the Jim Bridger steam electric plant (the "Bridger Plant" or the "Plant"). Collectively, the SCR upgrade project at Bridger Units 3 and 4 are referred to herein as "the Project".

The issue that was to be addressed by the parties in this second round of briefing was what impact, if any, the EPA's proposed new rule would have on the Project that might be relevant to this Docket. But, the EPA once again deferred its proposed rulemaking, this time until May 23, 2013. Thus, whether the EPA will propose changed standards is unknown.

Although there is no EPA action to report on, the EPA's ***inaction*** speaks volumes. The EPA has deferred its decision on several previous occasions, and there is no guarantee that it won't do so again. The Project is much too important, too time-sensitive, and too resource-intense for this Commission to delay action pending the EPA's timetable. Based on the best information available today, the Company cannot delay the Project due to the EPA action, and neither should the Commission.

ARGUMENT

I. The EPA Has Again Deferred Its Decision Making Regarding the Plant.

In the case *WildEarth Guardians v. Lisa Jackson as EPA Administrator*, 1:11-cv-00001 (Fed. D. Ct. Colo.) (the "WildEarth Litigation"), the EPA has been under a court-ordered deadline, issued pursuant to a Consent Decree, to issue notices of proposed and final rulemaking on the Wyoming Regional Haze 309(g) State Implementation Plan (the "Wyoming SIP"),

including or pertaining to Bridger Plant Units 3 and 4. However, these deadlines have been moving targets because the parties to the WildEarth Litigation continue to extend them.

- The original deadlines in the Consent Decree were April 15, 2012 for proposed rulemaking, and October 15, 2012 for final rulemaking. (Dock. No. 67.)

- On January 10, 2012, the deadline for proposed rulemaking was extended (by stipulation) to May 15, 2012. (Dock. No. 68 at 2.)

- On October 3, 2012, the deadline for final rulemaking was extended (by stipulation) to December 14, 2012. (Dock. No. 69 at 2.)

- On December 13, 2012, both deadlines were again modified (by stipulation), until March 29, 2013 for re-proposed rulemaking and September 27, 2013 for final rulemaking. (Dock. No. 71.)

- Then, on March 25, 2013, just days before the March 29 deadline was to expire, the litigants stipulated yet again to extend the dates, this time to May 23, 2013 and November 21, 2013. (Dock. No. 72.) [1]

With this track record, whether the EPA will, in fact, issue its proposed rulemaking by May 23, 2013 remains unclear. What is clear, however, is that the Commission should not – and need not – continue to wait for the EPA's proposed rulemaking before resolving this Docket.

[1] The Consent Decree does not suggest that the EPA will allow five years from November 2013 to install controls. Rather, if the recent stipulation is approved, the Consent Decrees will provide that the "EPA will propose to determine, for each source subject to BART, the period of time for BART compliance that is as expeditious as practicable, as required by 42 U.S.C. § 7491." (WildEarth Dock. No. 72, at 2.) Moreover, any suggestion that the Company has five years after EPA takes final action on the Wyoming SIP is contrary to the Sierra Club's public comments filed in the EPA's Regional Haze docket where Sierra Club (and others) concluded that "because EPA's initial proposal to require BART installation by 2016 best complies with the statutory requirement that BART be installed and operated 'as expeditiously as practicable,' 42 U.S.C. § 7491(b)(2)(A), we support EPA's proposal over the alternative for Jim Bridger Unites 3 and 4." (http://www.regulations.gov/#!documentDetail;D=EPA-R08-OAR-2012-0026-0056.)

The Company has standing state regulations that it must satisfy irrespective of when the EPA makes a final rule.

II. The Company Has Impending Environmental Obligations Which It *Must* Satisfy.

The Commission should approve the SCR Project because, while the parties in the WildEarth Litigation continue to extend deadlines, the State of Wyoming is not. To the contrary, the State of Wyoming has imposed environmental standards on the Company which limit the amount to NOx emissions at the Bridger Plant and set forth express deadlines by which those limits must be achieved. As this Commission knows, in November 2010, the Company and the Wyoming Department of Environmental Quality ("WDEQ") entered into the "BART Settlement Agreement." In order to achieve the required NOx emission limits, the BART Settlement Agreement (which is enforced via an Order issued by the Environmental Quality Council) requires the Company to install SCR systems or alternative add-on NOx control systems on Unit 3 by the end of 2015 for Unit 3 and the end of 2016 for Unit 4 (the "Deadlines"). The Wyoming SIP includes the same requirements – including the Deadlines by which NOx-reducing control systems must be installed.

The Deadlines are binding and the State of Wyoming is unwilling to postpone them. Indeed, when the Company approached the WDEQ before the hearing in the matter to request that the WDEQ delay the Deadlines to "five years after EPA's approval of the Wyoming SIP or FIP issuance," the WDEQ said no. The WDEQ concluded that it "continues to stand by its . . . decision declining to extend the Settlement Agreement deadlines applicable to Jim Bridger Units 3 and 4." (Exhibits CSW-4SR & CSW-5SR at 2.) Then, on March 26, 2013, after the EPA stipulated to extend its rulemaking deadlines in the WildEarth Litigation, the Company again approached WDEQ to "inquire as to whether this recent development changed any of the

deadlines that are currently in the [BART Settlement Agreement] and binding on Bridger Units 3 and 4." (Wy. Hearing Tr., Test. of C. Woollums, 3/27/13, at 261: 6-8, attached as Exhibit A.) The WDEQ again "indicat[ed] that no [D]eadlines will change" regardless of the EPA's action. (*Id*. at 262:12-13; *see also* 261:10-11.)

III. The EPA's Action (or Lack Thereof) Does Not Change Wyoming's Discretion to Establish and Implement Its Regional Haze SIP and State Regulations.

While the intervenors in this case attempt to argue that EPA's final action on the Wyoming SIP is a prerequisite to Wyoming's implementation of its state-established plan, that is not the case. The WDEQ has an independent obligation to protect and enhance air quality. *See* Wyo. Stat. Annot. § 35-1-102. This independent obligation, as reflected in part in the Wyoming SIP, is not contingent on review or approval by the EPA. Moreover, the EPA frequently fails to take action on SIPs submitted by states addressing a myriad of air quality issues. In those cases, if states were required to wait on EPA to approve submitted SIPs before the SIPs were to become effective, air quality improvements deemed important by a state would forever be delayed. In one egregious case of EPA's inaction on a state SIP, the State of Texas waited almost 16 years for EPA to take action on its SIP revision to address the air quality permitting of small emission sources. *See Texas, et al. v. EPA*, 690 F.3d 670 (5th Cir. 2012).[2] In the case of the Wyoming SIP, the EPA has delayed and continues to delay taking action. The result of the EPA's delay is not to render the Wyoming SIP ineffective, but only to postpone its own secondary, administrative task of reviewing the SIP. Moreover, the Sierra Club's view that approval should not be granted until the EPA takes final action potentially places the Company and its customers

[2] In *Texas, et al. v. EPA*, 690 F.3d 670 (5th Cir. 2012), the State of Texas submitted a SIP revision in 1994 to address minor sources of emissions after the Texas Commission on Environmental Quality adopted the program and the Texas Legislature incorporated the program into the Clean Air Act. Despite the Clean Air Act's mandate that the EPA approve or disapprove a SIP revision within eighteen months of its submission, the EPA delayed formal consideration of the Texas permit program for more than a decade. Industry petitioners brought a mandatory duty suit compelling the EPA to "approve or disapprove, in whole or in part" the permitting program. In 2009, EPA proposed to disapprove the program and issued final disapproval the following year.

at risk of noncompliance if the EPA, as expected does approve the installation of SCR by the current deadlines.

The EPA's authority to disapprove a SIP is limited to assuring the SIP complies with federal law. 42 U.S.C. § 7410(k). It is extremely unlikely that EPA would conclude that the WDEQ's determination that installation of SCR at Jim Bridger Units 3 and 4 as expeditiously as practicable (i.e., by the Deadlines of December 31, 2015 and December 31, 2016) does not comply with federal law. The EPA has, in fact, proposed to require a deadline sooner than the five year maximum deadline for the installation of SCR in a BART determination. In June 2012, EPA proposed to approve the installation of SCR on Naughton Unit 3 by December 31, 2014 (just over two years from the anticipated final action in October 2012). *See* 77 Fed Reg. 33037-33038 & 33058 (June 4, 2012). Likewise, EPA has previously proposed to approve "the State's compliance schedule and emission limit of 0.07 lb/MMBtu for Jim Bridger Units 3 and 4 as meeting the BART requirements." *See* 77 Fed. Reg. 33036.

IV. The Commission Should Not Delay Its Resolution Because the EPA's Final Action – If and When It Comes – Will Not Avert the Need for the SCR Project.

The Commission should also approve the SCR Project without waiting for EPA rulemaking because the rulemaking is not expected to materially impact the proposed SCR Project. The BART Settlement Agreement requires NOx limits of 0.07 pounds per million British thermal units ("lb/mmBtu) be achieved on Units 3 and 4, which, as stated above, is identical to the emission rate which the EPA proposed in its original rulemaking. (*See 77 Fed. Reg. 33036.*) With the EPA's announcement in December 2012 that it was going to re-propose rulemaking, however, some parties suggest that the EPA may establish a more restrictive standard.

While some intervenors point to the "uncertainty" of what the EPA may ultimately do, the only uncertainty that exists is what the EPA's emission limits will be, ***not*** the technology to be used. In other words, the EPA's delayed review is focused on assessing emission limits for Bridger Units 3 and 4 emissions controls – not the requirement to apply SCR technology.[3] Moreover, while the ultimate EPA emission standards are unknown, there is no indication that that the NOx standard will be set below 0.05 lb/mmBtu. If the EPA's rulemaking were to move the limit toward the 0.05 lb/mmBtu level, such a limit could be accommodated in the Company's ongoing contract negotiations and ultimate SCR Project design.[4] (*See* Teply Surrebuttal at 2-3.) The Company would also incorporate new emission limits into its contractual emissions-performance guarantees. Thus, because the EPA rulemaking will not render the SCR systems unnecessary, and any likely change to emission limits could be incorporated in the SCR design, there is no practical reason to wait for the EPA's proposed or final action.

V. Continued Delay Will Increase the Cost to Customers.

Delay to the SCR Project will negatively impact the Company's customers. If the Company were to delay action until the EPA rulemaking is final (currently slated for November 2013), timely implementation of the Jim Bridger Unit 3 SCR within the Deadlines may not be practicable – or perhaps even possible – and would certainly incur additional costs. Under such circumstances, the Company would have to attempt to complete the Project under an exceedingly accelerated implementation cycle.

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[3] *See* 77 Fed. Reg. 72512-14(Dec. 5, 2012) (EPA, relating to action on the Arizona Regional Haze SIP, issued a FIP establishing NOx emission rates for BART-eligible units between 0.055 and 0.070, which for all the units "are achievable with SCR."

[4] Nonetheless, the Company believes that the existing emission limits are appropriately established and would oppose EPA efforts to lower the emission rates. In fact, regardless of whether the EPA issues its final determination in November 2013, it is likely to be litigated, which is yet another reason that waiting for final results from EPA should not be used to justify delayed action in this docket.

However, assuming the Company could achieve such results, the increased costs would be significant, and could reach into the millions of dollars. For example, delaying the release of the contractor until year-end 2013 could result in a project-cost increase from [redacted]. (Wy. Hearing Tr., Test. of C. Teply, 3/26/13, at 59, attached as Exhibit B.) This projection is based primarily on an expected [redacted] increase in the EPC contract price associated with the increased manpower and accelerated work plans that result from a compressed project schedule, as well as an increase in replacement power costs due to shifting tie-ins of the SCRs from planned Spring major maintenance outages to planned Fall outage schedules. (*Id*.) Those increased costs and the additional risk of contractor nonperformance under such an accelerated schedule would have to be fairly borne by the Company's customers – costs and risks that could be avoided with timely approval of the SCR Project.

VI. Further Delay Would Circumvent the Purpose of the Review Statute.

Given that the Company cannot wait for EPA rulemaking without incurring significant costs, and potentially failing to meet the Deadlines, any delay in this Docket would frustrate the very purpose of Utah Code Ann. § 54-17-401 et seq (the "Review Statute"). The purpose of the Review Statute is to set forth an avenue for providing meaningful stakeholder review and a level of certainty on prudence and ratemaking for a resource-decision before significant work commences. The Company has filed testimony that Spring 2013 is the latest time in which it can commence the Project and meet the Deadlines in the most economical manner. (Teply Direct at 9:199-200.) If the Commission were to wait to make its decision in this docket for final EPA action, the Company will likely have no alternative but to continue planning, preparing, and installing the SCR systems at the Bridger Plant.[5] Thus, any delay on account of the EPA would

[5] This assumes that the Company obtains a Certificate of Public Convenience and Necessity from the Wyoming Public Service Commission.

have the practical effect of denying the Company the opportunity to have its decision reviewed under the Statute prior to starting the work.

The Commission should reject this outcome. As the evidence demonstrates, the Project is in the public interest. Thus, the Commission should not invite a situation in which it cannot approve the Project in time for the Company to meet the Deadlines in the most cost effective way.

VII. The Parties Expect that the Wyoming Public Service Commission Will Soon Render A Decision on Whether It Will Approve the Project.

As this Commission knows, the Company is undertaking the SCR Project to comply with environmental obligations imposed by the State of Wyoming – the BART Settlement Agreement and the Wyoming SIP. Indeed, given that the Plant is in Wyoming, the Wyoming Public Service Commission ("WPSC") is currently considering whether to issue a Certificate of Public Convenience and Necessity ("CPCN") required for the SCR Project to begin.

The parties anticipate that the WPSC will be deliberating and rendering a decision in the CPCN docket on April 10, 2013, including whether the EPA's delayed rulemaking should likewise delay the Project. Once the WPSC issues its decision, the Company will then know whether it must move forward with the Project to comply with the Deadlines.

If the WPSC concludes that the EPA's delay in rulemaking warrants a delay in issuing a CPCN, or otherwise denies the CPCN, then the Project could not proceed in its current form or on its current schedule. However, if the WPSC determines that the SCR Project should go forward despite the EPA's delayed rulemaking – which the Company anticipates will be the case -- this Commission likewise has before it all of the facts and arguments to approve the Project.

CONCLUSION

For the reasons stated above, the Commission should not wait for further action by the EPA. Instead, the Commission should find that that the SCR Project is in the public interest and approve it pursuant to Utah Code Ann. § 54-17-402.

DATED this 5th day of April, 2013.

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