BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09A-324E

IN THE MATTER OF THE APPLICATION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., (A) FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE SAN LUIS VALLEY-CALUMET-COMANCHE TRANSMISSION PROJECT, (B) FOR SPECIFIC FINDINGS WITH RESPECT TO EMF AND NOISE, AND (C) FOR APPROVAL OF OWNERSHIP INTEREST TRANSFER AS NEEDED WHEN PROJECT IS COMPLETED

DOCKET NO. 09A-325E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO (A) FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE SAN LUIS VALLEY TO CALUMET TO COMANCHE TRANSMISSION PROJECT, (B) FOR SPECIFIC FINDINGS WITH RESPECT TO EMF AND NOISE, AND (C) FOR APPROVAL OF OWNERSHIP INTEREST TRANSFER AS NEEDED WHEN PROJECT IS COMPLETED

WESTERN RESOURCE ADVOCATES' REPLY STATEMENT OF POSITION

Western Resource Advocates, ("WRA"), by its counsel, files its Reply Statement of Position, pursuant to Rule 1503 of the Colorado Public Utilities Commission's ("Commission") Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1-1503, in the above-captioned proceeding.

WRA responds to the February 25, 2010 Statements of Position of Public Service Company of Colorado ("Public Service" or "the Company") and the Office of Consumer Counsel ("OCC").

1. Public Service will retain negotiating leverage with bidders.

WRA requests that the Commission adopt the following condition when granting the CPCN: "Before construction begins, the Applicants shall demonstrate that at least 280 MW of Section 123 concentrating solar thermal with thermal energy storage resources, that were approved in the Commission's Phase II Decision in Docket No. 07A-447E,[1] will be developed and interconnect with the proposed transmission facilities."

According to Public Service, substantial negotiating leverage with bidders will be lost if this condition is adopted. WRA does not believe that to be the case. The Company's 120-Day Report in the most recent electric resource planning docket quantifies that the Company has 3,400 MW of solar bids to choose from.[2] In a robust response to the RFP, 28 solar (PV and Thermal) bids with a combined nameplate capacity of 2,150 MW, as well as 8 solar (PV and Thermal) with storage or gas backup bids with a combined nameplate capacity of 1,250, were received. Clearly, WRA's condition does not tie individual bids to the power line. The quantity of viable bids alone – this information is publicly available and one can assume known to bidders – provides the Company with powerful leverage in negotiations with individual bidders.

The bidders are still competing with each other. The negotiation dynamics with bidders are complex and competitive, and should not be characterized in a simplistic fashion. Given the competitive paradigm in which these negotiations are being held, bidders may be more motivated to close the deal sooner rather than later. In other words, some timing pressure to complete negotiations could work in ratepayers' favor. WRA's

[1] Decision No. C09-1257, pages 17-21, Docket No. 07A-447E. And see Exhibit 56, the amended public version of the Public Service Company of Colorado 120-Day Report, page 79. Docket No. 0A7-447E.

[2] Exhibit 56. the amended public version of Public Service's 120-Day Report, page 10, Table 2. Docket No. 07A-447E.

condition does not affect the symbiotic relationship between generation and transmission, which developers are fully aware of.

It is reasonable, and in the best interests of ratepayers, for the Commission to require a legal commitment to the interconnection of Section 123 concentrating solar thermal with thermal energy storage resources prior to construction of this transmission facility.

2. The Colorado Commission has jurisdiction over the resource acquisitions of Colorado utilities.

WRA requests that the Commission adopt the following condition when granting the CPCN: "The Commission will apply a rebuttable presumption in a future CPCN application against a finding of need for a non-renewable resource that would interconnect with the proposed transmission facilities."

Public Service argues this rebuttable presumption is in conflict with FERC jurisdiction. This is an unduly restrictive interpretation of state commission authority. FERC does not regulate what kind of generation resources a Colorado public utility procures. Pursuant to the Company's position, FERC jurisdiction would reach to a core aspect of how the Colorado Commission regulates Colorado utilities. Legally, FERC's open access rules do not supersede the Colorado Commission's power to determine which resource acquisitions are in the public interest, nor which conditions are most appropriately placed on a facility. WRA's proposed condition is far removed from federal transmission access regulatory requirements.

The Company also raises a concern that the rebuttable presumption condition is a rule rather than a condition specific to this certificate of public convenience and necessity for

this particular transmission facility. As explained, in WRA's Statement of Position, the Commission has broad authority and responsibility to place conditions that are in the public interest on a facility. The rebuttable presumption condition proposed by WRA is narrowly tailored to the specific purpose and need of the power line, and the specific applicants in this case. Additionally, there is no legal requirement that generators potentially affected by this condition have privity of contract with Public Service or notice of this CPCN proceeding. The Commission's constitutional and statutory authority to place conditions on a facility for the protection of the public, and the regulated utilities' obligation to comply with those conditions is independent of contract law requirements.[3]

[3] See *Pennsylvania Public Utility Commission, Insurance Coverage Requirements for Motor Carriers*, M0004186, Pennsylvania Public Utility Commission, Entered May 23, 2005 2005 WL 1876133 (Pa. P.U.C)., pages 1 and 6. The Pennsylvania Commission was asked to limit the effect of its order to "not reach beyond the traditional privities of contract in insurance arrangements." The Commission responded, "We agree with PPA's observations that…the Form E filed by the insurer on behalf of the motor carrier trumps the insurance policy between the parties when in [sic] comes to the responsibility to the public of the insurer to meet the obligations set forth in our standards." *Illinois Bell Telephone Company*, Docket No. 01-0614, Illinois Commerce Commission, March 23, 2005, 2005 WL 1902105 (Ill. C.C.), page 59. "Ameritech asserts that in such a case it must be the seller of the portion of the platform that allows such service to be provided and must stand in privity of contract with the IXC. There is simply no such limitation in the Act." *Duke Manufacturing Co. v. McLeodUSA Telecommunications Services, Inc.,* Missouri Public Service Commission, Issue date March 11, 2008, Effective date March 21, 2008, 2008 WL 1794935 (Mo. P.S.C.) page 4. "However, the idea that Duke is limited to a breach of contract claim against McLeod and that McLeod must necessarily answer for the conduct of AT&T Missouri is manifestly erroneous, since it ignores the plain language of Section 392.200.1, which imposes, independent extra-contractual statutory obligations on both McLeod and AT&T Missouri to 'furnish and provide with respect to [their] business such instrumentalities and facilities as shall be adequate and in all respects just and reasonable'." *Tari Christ dba ANJ Communications et al. v. Southwestern Bell Telephone Company, L.P. dba Southwestern Bell Telephone Company*, Case No. TC-2003-0066, Missouri Public Service Commission, February 4, 2003. 2003 WL 21276361, page 4. "The language of this statute does not condition its application upon whether or not the litigant was a party to the prior proceeding or in privity with such as party."

3. Visual impact mitigation measures are generally accepted in the field of landscape architecture.

WRA requests that the Commission adopt the following condition when granting the CPCN: "When routing, siting and designing the line, Applicants will employ the principles and tools provided by WRA witness Dean Apostol in his Answer Testimony, and the environmental protection impact avoidance and mitigation measures recommended by the environmental consultant firms hired by Public Service for this project."

Public Service acknowledges that visual impact mitigation measures are generally accepted within the field of landscape architecture, yet objects to this condition because, "[t]heir application should be left to the landscape architecture professionals that the Companies have retained to apply them in consultation with the engineering and other professionals responsible for construction on the line."[4] Based on the foregoing, it is not clear why the Company objects to the condition. If a particular avoidance or mitigation measure causes a problem, the Company may request a variance from the Commission.

This condition goes to the heart of the need issue for this transmission line. A need determination ultimately is a cost/benefit balancing test. For example, if a power line were proposed to be sited through Rocky Mountain National Park, it is unlikely that the proponent of the line could demonstrate a need great enough to overcome the environmental impacts. Whereas, if a line were to be routed through an industrial park, the need threshold would be much more easily met. In this San Luis Valley docket, given the outstanding landscape features that will be impacted, the public (and the future public) is entitled to an officially stated condition requiring these protective measures.

[4] PSCo February 25, 2010 Statement of Position, p. 36.

Leaving implementation to the unrestricted discretion of the utility engineers is not adequate assurance.

OCC has a "strong public policy concern" with a cost recovery presumption of prudence for this condition because the visual impact mitigation principles and tools are, in OCC's parlance, subjective and undefined. First, adverse environmental impacts are a very real cost to ratepayers and the state of Colorado. The vistas and ambiance of the area through which the line will pass is an important resource belonging to the people of Colorado, and worthy of protection. Second, as Mr. Dean Apostol testified, as acknowledged by Tri-State's witness, Ms. Nicole Korbe, and as stated in Public Service Company's Statement of Position, these principles and tools are generally accepted in the field of landscape architecture. Contrary to the OCC's characterization, the recommendations of Mr. Apostol are tangible, facility-specific and objective. Third, the costs associated with visual impact avoidance and mitigation measures are negligible when compared to the plus or minus **30%** cost range of this project, amounting to an uncertainty of between $234 million and $126 million in ratepayer funds.[5] Yet, the OCC focuses on the relatively small uncertainty associated with the cost of visual impact avoidance and mitigation, while at the same time ignoring this vast $108 million range of discretion. Fifth, the applicant's are not motivated to overspend. Tri-State has no financial incentive to "goldplate" the line. For Public Service, the Commission has built-in regulatory review processes to retroactively review the prudence of the costs incurred. Public Service faces the risk of cost disallowance. Sixth, understanding and mitigating the environmental impacts of a transmission line is a typical, unexceptional area of

[5] Exhibit 8, Direct Testimony of Mr. Stellern, page, 15, line 20. "The Project is estimated to cost $180 million."

investigation for a state commission in a transmission line CPCN docket. This is standard practice, not an unusual, unprecedented issue. The Commission's focus should be on the one and only opportunity we have right now to ensure these protective measures are implemented, rather than on the relatively small cost uncertainty.

Additionally, the OCC raises a concern that the Commission cannot monitor and enforce the application of these principles. While it is true the Commission cannot, and should not, monitor and enforce these principles during design and construction, WRA believes the applicants, **with the guidance from Mr. Apostol's recommendations, and the assistance of the professional landscape architect firm**, will make competent, good decisions.[6]

4. Implementation of energy efficiency programs in the San Luis Valley will enhance the capacity of the line.

WRA requests that the following condition be placed on the CPCN: "Within three months of receiving the Nexant and Cadmus report on the demand-side management potential in its service territory, Tri-State will report to the Commission its plan on how it will implement the cost-effective measures and programs in the San Luis Valley that are identified in that study. Tri-State will annually update the San Luis Valley report, to ensure that end-use efficiency and other demand-side management efforts are being implemented in the Valley."

WRA agrees with the description in the Company's Statement of Position that, "To the extent demand side management and other measures are successful in the San Luis Valley, their success would **increase** the need for the line because it would mean

[6] Re-direct of Mr. Darin. Vol. 5, page 68, line 22– page 69, line 17.

additional power could be exported out of the Valley."[7] Effective energy efficiency programs in the San Luis Valley will free up capacity so that more solar energy can be developed and exported. This will improve the usefulness of the facility, especially given the potential capacity constraints. Therefore, WRA's condition should be adopted.

On the basis of the evidence presented, the arguments in WRA's Statement of Position, and this Reply Statement of Position, WRA urges the Commission to adopt all four conditions. The conditions are consistent with the public interest and Colorado energy policy.

DATED this 8th day of March, 2010.

Respectfully submitted,

WESTERN RESOURCE ADVOCATES

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[7] Public Service Company Statement of Position, page 36.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2010, the original and 7 copies of **WRA's Reply Statement of Position** were sent to Doug Dean, Director, Colorado Public Utilities Commission, 1560 Broadway Suite 250, Denver CO 80202 and a copy was e-mailed to each of the following:

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