Decision No. C12-0159

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 11A-325E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE PAWNEE EMISSIONS CONTROL PROJECT.

ORDER ON EXCEPTIONS, SETTING ASIDE DECISION NO. R11-1257, AND GRANTING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Mailed Date: February 14, 2012
Adopted Date: January 25, 2012

TABLE OF CONTENTS

I. BY THE COMMISSION

A. Statement

1. Public Service Company of Colorado (Public Service or the Company) filed an Application for a Certificate of Public Convenience and Necessity for the Pawnee Emissions Control Project (Application) on April 11, 2011.

2. Public Service seeks a certificate of public convenience and necessity (CPCN) for certain emissions controls to be installed at the Pawnee electric generation station. The controls include a selective catalytic reduction (SCR) system for the reduction of NOx emissions, a lime spray dryer (LSD) for the reduction of SO_2 emissions, and sorbent injection controls for the reduction of mercury emissions.

1. Clean Air Clean Jobs Act

3. The Commission approved Public Service's emission reduction plan pursuant to the Clean Air Clean Jobs Act (CACJA) in Docket No. 10M-245E. With respect to Pawnee, the Commission approved the installation of the SCR, the LSD, and the sorbent injection controls as needed and in the public interest for emission reduction purposes. Decision No. C10-1328 at ¶123.

4. The Commission also found that the cost information provided in Docket No. 10M-245E was insufficient to be relied upon for ratemaking purposes:

> 149. Public Service has also requested that the Commission enter a finding that applications for CPCNs for the emission controls at Pawnee and Hayden not be required. We decline to grant this request because the cost estimates presented in this Docket are not CPCN quality. Moreover, the costs of these projects are substantial, and, as evidenced by HB 10-1365 itself, these projects are not in the Company's ordinary course of business. Accordingly, we also waive Rule 3205(b)(II), 4 CCR 723-3, which concerns pollution control system retrofits.
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> Decision No. C10-1328 at ¶149.

5. Therefore, the Commission instructed Public Service to file for a CPCN in a separate, follow-on proceeding "to focus narrowly on the Commission review and approval of detailed cost estimates and project schedules associated with the construction of the new generation plant." Decision No. C10-1328 at ¶148.

6. The Commission also expected to be able to consider establishment of a not-to-exceed maximum level of expenditures for these projects in the follow-on CPCN proceeding based upon more developed estimates. *See* Decision No. C10-1328 at ¶151.

2. State Implementation Plan

7. Public Service's emission reduction plan, including the Pawnee controls, was fully incorporated into the Regional Haze State Implementation Plan (SIP) adopted and approved by the Colorado Air Quality Control Commission on January 7, 2011. The SIP was approved by the Colorado General Assembly pursuant to House Bill 11-1291 and signed by Governor Hickenlooper in May 2011.

8. By this Order, the Commission takes administrative notice of the SIP, officially known as the Colorado Visibility and Regional Haze State Implementation Plan for 12 Mandatory Class I Federal Areas, Colorado Department of Public Health and Environment, Air Pollution Control Division.

3. Procedural History

9. By Decision No. C11-0594, issued May 27, 2011, the Application was referred to an Administrative Law Judge (ALJ).

10. The ALJ granted the interventions requested by Noble Energy, Inc. and EnCana Oil & Gas (USA) Inc.; Ms. Leslie Glustrom; Intermountain Rural Electric Association; the Colorado Mining Association; Ratepayers United of Colorado (RUC);

Colorado Renewable Energy Society, Alliance for Sustainable Colorado, Small Business Coalition of Louisville, Physicians for Social Responsibility, 350.Org, Eco-Justice Ministries, New Era Colorado, and Wild Earth Guardians (the Joint Intervenors); CF&I Steel, L.P. and Climax Molybdenum Company (CF&I and Climax); Western Resource Advocates; the Sierra Club; Holy Cross Electric Association, Inc. (also known as Holy Cross Energy); Colorado Independent Energy Association (CIEA); and Colorado Energy Consumers (CEC) by Decision No. R11-0650-I, issued June 13, 2011. By Decision No. R11-0597-I issued May 31, 2011, the ALJ granted the Colorado Department of Public Health and Environment *amicus curiae* status. The Colorado Office of Consumer Counsel (OCC) timely intervened of right.

11. By Decision No. R11-0649-I, issued June 13, 2011, the ALJ addressed the scope of this proceeding in accordance with the final Commission decisions issued in Docket No. 10M-245E. Specifically, the ALJ limited the scope to the consideration of detailed cost estimates, construction schedules, and other project details for the control technologies to be installed at Pawnee as set forth in Public Service's approved emission reductions plan. By Decision No. R11-0777-I, issued July 19, 2011, the requests of Ms. Glustrom to modify Decision No. R11-0649-I and for certification of issues to be immediately appealable via exceptions were denied.

12. By Decision No. R11-0758-I, issued July 13, 2011, the ALJ deemed the Application complete, established a procedural schedule, and scheduled an evidentiary hearing. The ALJ also extended the applicable statutory period for issuance of a Commission decision by 90 days to accommodate the procedural schedule and permit Commission deliberation.

13. The ALJ struck the pre-filed Answer Testimony of Ms. Glustrom and Ms. Betty A. Harris on behalf of RUC as being outside the scope of the proceeding by Decision No. R11-1010-I issued September 19, 2011.

14. The ALJ conducted an evidentiary hearing on October 17, 2011. Ms. Robin L. Kittel, Director of Regulatory Administration, and Mr. James R. Vader, Director of Regional Capital Projects, testified on behalf of Public Service. Hearing Exhibits 1 through 3, 5, 8, and 10 through 35 were identified, offered, and admitted into evidence. Hearing Exhibits 4C (JRV-1), 6C (JRV-3 and JRV-4), and 9C (GLF-20 from Docket No. 10M-245E) were identified, offered, and admitted into evidence as confidential exhibits in accordance with the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. Hearing Exhibit 34 was admitted for the limited purpose of identifying six enumerated water sources.

15. Pursuant to § 40-6-109, C.R.S., the ALJ issued Recommended Decision No. R11-1257 on November 22, 2011 and transmitted to the Commission, the record of this proceeding.

16. Paragraph 1505(a) of 4CCR 723-1, establishes a 20-day deadline for the filing of exceptions to a recommended decision. Paragraph 1505(a) further permits parties to file responses to exceptions within 14 days of the service of the exceptions.

17. Exceptions to Decision No. R11-1257 were timely filed on December 12, 2011 by Public Service and Ms. Glustrom. The Joint Intervenors filed exceptions one day late on December 13, 2011. CEC and CIEA; CF&I and Climax; and the Sierra Club each timely filed responses to Public Service's exceptions. Public Service timely filed responses to Ms. Glustrom's and the Joint Intervenors' exceptions.

18. Pursuant to § 40-6-109(2), C.R.S., the Commission may adopt, reject, or modify the findings of fact and conclusions set forth by an ALJ in a recommended decision. Alternatively, after examination of the record of the proceeding, the Commission may instead issue a final decision without regard to the findings of fact and conclusions of the assigned ALJ. *Id*.

19. Now being duly advised in the matter we grant Public Service a CPCN for the installation of the emission controls at Pawnee.

B. Discussion

1. Public Service

20. Public Service estimates the costs of the SCR and LSD at Pawnee to be $236.5 million in Docket No. 10M-245E. Public Service also includes the additional costs of the sorbent injection controls at Pawnee in its analysis of the total estimated cost and rate impacts of the Company's entire emission reduction plan pursuant to the CACJA.

21. Public Service explains that since Docket No. 10M-245E, the Company conducted additional review of the estimated costs and construction schedule for the Pawnee controls. Public Service maintains that the budget presented in Docket No. 10M-245E remains appropriate, as modified to include the sorbent injection controls, and is $238.6 million, plus or minus 20 percent, before escalation and Allowance for Funds Used During Construction.

22. In Supplemental Direct Testimony, Public Service witness Vader provides additional detail for the cost estimate, including estimated costs for each major piece of equipment or system comprising the project, each major activity such as engineering and construction, as well as internal Company costs for managing the project. These cost estimates appear to have been determined more than a year prior to the hearing in this proceeding.

23. Public Service witness Kittel explains that the 20 percent range of accuracy incorporated into the Company's cost estimate is reasonable, appropriate, and typical of the cost estimates the Company has provided in other CPCN proceedings. Public Service further argues that estimates within a plus or minus 20 percent range have been acceptable to the Commission in other CPCN proceedings.

24. With respect to the construction schedule for the Pawnee controls, Public Service appears to be progressing in accordance with the Company's expected timeline. At the time of the evidentiary hearing, the installation of the sorbent injection controls had neared completion and was anticipated to come in under budget. No equipment has been ordered and no contracts have been signed for the SCR and LSD.

2. Intervenors

25. CF&I, Climax, CEC, and CIEA argue that the Commission should not grant Public Service a presumption of prudence to the same cost estimate that the Company proffered in Docket No. 10M-245E.

26. For example, CEC and CIEA argue that including a range of accuracy of plus or minus 20 percent, in addition to a 9 percent contingency, is not reasonable in determining the prudent amount of expenditures. CEC and CIEA also argue that approximately $48 million of the budgeted amount is based upon unknown future events.

27. CEC and CIEA propose that, if the Commission nonetheless accepts Public Service's cost estimate as satisfying its order in Docket No. 10M-245E, the Company's budget of $238.6 million should serve as a cost cap. CEC and CIEA argue this figure already includes a 9 percent contingency. They further argue that Public Service should not enjoy a 20 percent "cushion" on top of the $238.6 million.

28. Alternatively, CF&I and Climax suggest that the Commission establish a cost cap of approximately $216.4 million to ensure the reasonableness of the cost for the project. CF&I and Climax derive this figure by adjusting the Company's estimate for the actual costs of the sorbent injection system and for the contingency amounts.

29. Public Service opposes the adoption of any cost cap, arguing that a cap is contrary to the CACJA.

30. The OCC argues that Public Service failed to establish the prudency of estimated costs. The OCC contends the Company should bear the burden to show prudency of actual expenditures in an appropriate rate proceeding without regard to the relationship of costs to estimates. According to the OCC, the Commission must find costs to be prudently incurred and be convinced that there is no double recovery of costs.

31. The OCC supports semi-annual project reporting by Public Service using various cost categories shown in the confidential exhibits to Mr. Vader's Direct Testimony. According to the OCC, the semi-annual reports would provide the budgeted amounts, the actually incurred expenditures to date, and the variances.

32. Public Service does not oppose such semiannual reporting of progress as to milestones, budget, and deviations from budget.

C. Findings and Conclusions After Examination of the Record of the Proceeding

33. Section 40-5-101, C.R.S., requires an electric utility to obtain from the Commission, a CPCN prior to the construction of certain new facilities.

34. The Commission's rules addressing CPCN filings require the utility to provide a cost estimate for the project. This cost estimate is thus a relevant consideration in determining whether a CPCN should be granted. Notwithstanding the consideration of this cost estimate,

the Commission need not make findings regarding the recovery of any specific amount of costs when granting a CPCN.

35. Likewise, a utility's CPCN filing does not require a demonstration of prudence. Prudence is instead an issue traditionally deferred to an appropriate rate proceeding. As Public Service and the intervenors make clear in their pleadings, this docket is not a rate case.

36. By Decision No. C10-1328 in Docket No. 10M-245E, we found the proposed controls at Pawnee to be needed and in the public interest for emission reduction purposes. Those same controls were then incorporated into the SIP. We therefore find good cause to grant Public Service a CPCN for the installation of SCR controls to reduce NOx emissions, LSD controls to reduce SO_2 emissions, and sorbent injection controls to reduce mercury emissions.

37. By granting a CPCN, we authorize the Pawnee emission controls project to move forward through construction. Public Service is therefore granted the right to invest capital in the emission controls and, upon completion of the construction, the amount of the investment found to be prudent will be placed into the Company's rate base.

38. There is no dispute that the CACJA entitles Public Service to full recovery of the costs prudently incurred to install these facilities. Section 40-3.2-205(3), C.R.S., provides that "[a]ll actions taken by the utility in furtherance of, and in compliance with, an approved plan are presumed to be prudent actions, the costs of which are recoverable in rates as provided in section 40-3.2-207."

39. Once Public Service is prepared to seek cost recovery for this project through a rate case, it will enter into that proceeding with a general presumption of prudence regarding its expenditures to install the emission controls at Pawnee. The issues surrounding prudence of the actual costs incurred will then be taken up during that particular rate case.

Accordingly, the presumption of prudence that flows from the granting of the CPCN does not obviate the requirement that Public Service present robust Direct Testimony that will enable the Commission to determine what portion of the actual costs incurred are properly chargeable to ratepayers.

40. Public Service fully carries the burden of proof that the Company acted in a prudent manner in constructing the facility. The general presumption of prudence that attaches to the CPCN is rebuttable. Hence, an intervenor challenging the construction costs may make a *prima facie* showing through Answer Testimony that the Company acted in some imprudent manner. Although such a prudence challenge is generally necessary for some amount of the actual costs incurred to be disallowed, fair and efficient rate case proceedings require that the Company not wait until the development and filing of Rebuttal Testimony in order to carry its burden of proof.

41. We find that the record in this proceeding does not support the establishment of a prospective, not-to-exceed maximum level of expenditures for the Pawnee project. Similarly, by this Order, we are making no findings or conclusions as to whether the cost estimate that Public Service has provided in this proceeding is the appropriate starting point against which the prudency of actual costs may be tested. We will also decline to require Public Service to submit semiannual reporting of progress as to milestones, budget, and deviations from budget.

D. Exceptions Filed by Public Service

42. We conclude that our findings regarding the granting of a CPCN for the Pawnee emission controls project adequately address the concerns Public Service raises in its exceptions to Decision No. R11-1257. These findings further address the responses to the Company's exceptions as filed by CF&I, Climax, CEC, CIEA, and the Sierra Club.

43. As we have elected to enter the above findings and conclusions in lieu of those set forth in Decision No. R11-1257, parties may request revisions to the findings and conclusions set forth above pursuant to § 40-6-114, C.R.S.

E. Exceptions Filed by Ms. Glustrom

44. Ms. Glustrom raises substantially different concerns with Decision No. R11-1257 as compared to Public Service, CF&I, Climax, CEC, CIEA, and the Sierra Club.

45. First, Ms. Glustrom requests that the Commission reconsider the deeming of the Application as complete. She argues that the Application had many deficiencies and that at the conclusion of the hearings in this proceeding, the Commission was not much further ahead than it was at the end of Docket No. 10M-245E.

46. Public Service responds that the purpose of determining whether an application is complete is to decide whether a case can go forward. According to the Company, no party, including Ms. Glustrom, raised a concern at the time when the ALJ deemed the Application complete. Consequently, according to Public Service, Ms. Glustrom is precluded from raising this issue now through briefs on exceptions.

47. We agree with Public Service and deny Ms. Glustrom's exceptions on this point. Ms. Glustrom's request is improper and untimely. The ALJ properly found that the Application was sufficient to allow the case to go forward.

48. Second, Ms. Glustrom requests that the Commission reconsider the ALJ's interim decisions on the scope of this proceeding, Decision Nos. R11-0649-I and R11-0777-I. She argues that changed circumstances since the close of Docket No. 10M-245E warrant additional examination of the need for emission controls at Pawnee.

Similarly, Ms. Glustrom requests oral argument to make her case against the controls project at Pawnee "given the lack of analysis" in Docket No. 10M-245E and "the large number of changed circumstances that have already occurred and the need to ensure that Xcel's Colorado ratepayers are protected from another large and expensive mistake related to investing in coal in the 21st century." Ms. Glustrom likewise requests that the Commission reconsider the interim order striking her Answer Testimony, Decision No. R11-1010-I. She argues that the ALJ erred in finding the testimony outside of the scope of the docket as delineated by Decision Nos. R11-0649-I and R11-0777-I.

49. In response to Ms. Glustrom's requests, Public Service argues that the ALJ correctly determined that the consideration of changed circumstances was beyond the scope of this proceeding and constituted a collateral attack on the Commission's orders in Docket No. 10M-245E. Public Service points out that Ms. Glustrom was a party to Docket No. 10M-245E and did not appeal the final orders that issued as a result of that proceeding. The Company further argues that Ms. Glustrom is precluded in this preceding from challenging the underlying Commission decisions to allow Public Service to go forward with the project.

50. We agree with Public Service and deny Ms. Glustrom's exceptions on this point. We further deny her request for oral argument. Ms. Glustrom is seeking an opportunity to attack the decisions reached by the Commission pursuant to the CACJA. The ALJ properly found that examination of the issues raised by Ms. Glustrom are beyond the scope and purpose of this CPCN proceeding, particularly since the need for the controls was fully determined in Docket No. 10M-245E. Therefore, we uphold Decision Nos. R11-0649-I, R11-0777-I, and R11-1010-I.

51. Finally, Ms. Glustrom requests that the Commission waive paragraph 1505(b) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1. She argues that a transcript of the proceeding is already available and all the documents in the docket are available on the Commission's website as well as in paper form in the Commission's offices. If the Commission determines that an additional transcript is needed, Ms. Glustrom respectfully requests that the costs of the transcript be waived as it would be burdensome for an individual to bear the costs related to the ordering of an additional transcript.

52. We agree with Ms. Glustrom that the transcript from the evidentiary hearing in this matter exists and is available as a non-confidential document in e-filings. We therefore find no grounds to grant the requested waiver and thus deny her exceptions on this point.

F. Exceptions Filed by the Joint Intervenors

53. As explained above, the Joint Intervenors late-filed exceptions to Decision No. R11-1257 on December 13, 2011. The Joint Intervenors filed no motion or other pleading seeking authorization to make a late filing. We shall therefore not consider these exceptions. The Joint Intervenors may instead avail themselves of § 40-6-114, C.R.S., and file an application for rehearing, reargument, and reconsideration to this Order.

II. ORDER

A. The Commission Orders That:

1. The Application for a Certificate of Public Convenience and Necessity for the Pawnee Emissions Control Project filed by Public Service Company of Colorado (Public Service) on April 11, 2011 is granted, consistent with the discussion above.

2. The findings and conclusions set forth in Decision No. R11-1257 are set aside.

3. The exceptions to Decision No. R11-1257 filed by Public Service on December 12, 2011, where such exceptions are contrary to the discussion above, are denied.

4. The exceptions to Decision No. R11-1257 filed by Ms. Leslie Glustrom on December 12, 2011 are denied, consistent with the discussion above. Ms. Glustrom's request for oral argument is also denied.

5. The exceptions to Decision No. R11-1257 filed jointly by Colorado Renewable Energy Society, Alliance for Sustainable Colorado, Small Business Coalition of Louisville, Physicians for Social Responsibility, 350.Org, Eco-Justice Ministries, New Era Colorado, and Wild Earth Guardians on December 13, 2011 will not be considered, consistent with the discussion above.

6. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the effective date of this Order.

7. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING January 25, 2012.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

MATT BAKER

Commissioners