

Decision No. C11-0121

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 10M-245E

IN THE MATTER OF COMMISSION CONSIDERATION OF PUBLIC SERVICE COMPANY OF COLORADO’S PLAN IN COMPLIANCE WITH HOUSE BILL 10-1365, “CLEAN AIR-CLEAN JOBS ACT.”

**ORDER ADDRESSING APPLICATIONS FOR
REHEARING, REARGUMENT, OR RECONSIDERATION**

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of Applications for Rehearing, Reargument, or Reconsideration (RRR) of Commission Decision No. C10-1328.

2. Decision No. C10-1328, issued on December 15, 2010, modifies and approves the emission reduction plan filed with the Commission by Public Service Company of Colorado (Public Service or Company) pursuant to House Bill (HB) 10-1365, commonly known as the “Clean Air – Clean Jobs Act.”

3. Applications for RRR were timely filed under § 40-6-114, C.R.S., on January 4, 2011 by Public Service; Peabody Energy Corporation (Peabody); the Colorado Mining Association (CMA) and the Associated Governments of Northwest Colorado (AGNC), jointly; the Colorado Office of Consumer Counsel (OCC); Chesapeake Energy Corporation, Noble Energy, Inc., and EnCana Oil & Gas (USA) (collectively, Gas Intervenors); Ms. Leslie Glustrom; and the American Coalition for Clean Coal Electricity (ACCCE).

4. On January 5, 2011, the Colorado Independent Energy Association (CIEA) filed a Motion for Leave for Acceptance of Late Filed Application of Reargument, Rehearing, or Reconsideration of Commission Decision No. C10-1328 (Motion).

B. Motion for Acceptance of Late Filed RRR Application

5. Section 40-6-114, C.R.S., sets forth the Commission’s RRR process. After the Commission issues a final decision, parties have 20 days within which to file applications for RRR. § 40-6-114(1), C.R.S. This RRR deadline may be extended by the Commission at its

discretion, so long as the motion for extension of time is received within that initial 20-day period. *Id.*

6. Decision No. C10-1328 was issued on December 15, 2010. Therefore, Applications for RRR were due on January 4, 2011.

7. On January 5, 2010, CIEA filed the Motion. In the Motion, CIEA claims that, due to the slowness of the Commission's e-filing system approaching 5 p.m. on January 4, 2011, there was confusion about whether its RRR was successfully filed. CIEA explains that it did not become aware its RRR was not successfully filed until January 5, 2011.

8. Rule 1211(d)(I) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, allows users experiencing technical difficulty to file a statement attesting to that technical difficulty. If a compliant notice of technical difficulty is submitted to the Commission within one day, the corrected filing shall be accepted *nunc pro tunc* to the date it was first attempted to be filed electronically. Rule 1211(e), 4 CCR 723-1.

9. The Commission's e-filing records indicate CIEA's RRR Application was successfully uploaded to the system prior to 5 p.m. on January 4, 2011 for final review and submission, but that the file was never submitted.

10. The Commission will deny the Motion because motions for extension of time within which to file RRR must be received within the 20-day time period established by § 40-6-114, C.R.S. Further, the Commission does not believe the situation involves a technical difficulty that would trigger the exceptions established by Rule 1211, 4 CCR 723-1. This appears to be an instance of user error that occurred too close to the filing deadline to be timely

resolved, rather than a technical problem with the Commission's e-filing system. The Commission therefore will not consider CIEA's untimely filed Application for RRR.¹

C. Due Process

11. Peabody, ACCCE, and AGNC/CMA allege they were not afforded due process. They raise eight arguments in support of their allegation, and ask that the case be dismissed.²

1. Reliance on *Public Service Co. of Colo. v. Colo. Pub. Utils. Comm'n*

12. In Decision No. C10-1328, the Commission discussed the due process arguments raised by parties over the course of these proceedings. ¶¶ 46-52. Specifically, the Commission discussed the Colorado Supreme Court case of *Public Service Co. of Colo. v. Colo. Pub. Utils. Comm'n*, 653 P.2d 1117 (Colo. 1982). In *Public Service*, the Colorado Supreme Court distinguished between procedural and statutory due process and went on to affirm the expedited procedures utilized by the Commission in an emergency rate proceeding. *Id.*

13. Peabody argues the Commission erred in relying on the reasoning of *Public Service* as support for the Commission's authority to "conform its procedures to the exigencies of the case before it." *Id.* at 1122. Peabody argues *Public Service* is inapplicable here, because the factual circumstances are distinguishable. In support of this contention, Peabody makes three arguments: (1) *Public Service* concerned an emergency rate proceeding, whereas this evidentiary hearing was mandated by a special purpose statute with a specific timetable, which is more significant and permanent than a rate proceeding, because rates may be subject to refund; (2) the

¹ Chairman Binz would have granted the Motion and considered CIEA's Application for RRR.

² Dismissal of the proceeding is the only specific form of relief requested by Peabody in its Application for RRR. The Applications for RRR filed by CMA and AGNC, jointly, and ACCE do not request any specific relief other than the granting of RRR. We presume that these parties seek reconsideration of the Commission's findings in favor of their arguments related to all components of the approved emission reduction plan except for emission controls on units that will continue to operate on coal.

hearing the Commission conducted was not “substantively complete and fair to all parties;” and (3) there are no emergency circumstances similar to those that existed in *Public Service* that would justify the procedural limitations that existed in this case. Peabody RRR, at 5-7. ACCCE and AGNC/CMA present a similar argument. ACCCE RRR, at 6-7; AGNC/CMA RRR, at 6-7.

14. Peabody, ACCCE, and AGNC/CMA are correct that there are factual differences between the HB 10-1365 proceedings and those of an emergency rate proceeding. However, *Public Service* stands for the principle, similarly applicable in all factual circumstances, that “[p]articipatory values are better served by allowing the commission to conform its procedures to the exigencies of the case before it.” 653 P.2d at 1122.

15. The Commission agrees that this proceeding is distinguishable from an emergency rate proceeding. However, we disagree that, since we may not apply the exact procedural mechanisms utilized in that emergency rate proceeding, there may be no crafting of procedures. The Commission therefore will not dismiss these proceedings for improper reliance on *Public Service*. As such, RRR on this issue is denied.

2. Commission Authority to Modify the Plan

16. In Decision No. C10-1328, the Commission discussed its authority to modify any proffered plan, as provided by § 40-3.2-205(2), C.R.S. *See, e.g.*, ¶¶ 14, 160.

17. Peabody argues that the Commission overstates its authority to modify the Company’s plan. Peabody reasons that “[i]f the Commission had the authority and all it needed to modify the August 13 plan when it was filed, there would have been no need for additional multiple rounds of testimony.” Peabody RRR, at 8. Peabody concludes that “the Commission’s discretion to modify is bounded by the Plan as timely submitted by August 15.” *Id.*

18. The Commission disagrees. The language of § 40-3.2-205(2), C.R.S., is plain and clear. It states, “[t]he commission shall review the plan and enter an order approving, denying, or modifying the plan by December 15, 2010.” *Id.* The only limitation on the Commission’s authority to modify is that “[a]ny modifications required by the commission shall result in a plan that the [CDPHE] determines is likely to meet current and reasonably foreseeable federal and state clean air act requirements.” *Id.* This provision of the statute indicates that, where the General Assembly intended to place limitations on the Commission’s authority to modify the plan, *it explicitly did so*. It is inappropriate and contrary to canons of statutory interpretation to impose additional limitations on the Commission’s authority to modify the plan in a way that conflicts with the statute’s plain language.

19. Further, adopting Peabody’s reasoning would lead to the untenable result of rendering the evidentiary hearing meaningless. If, as Peabody contends, the Commission’s discretion to modify the plan is bounded by the August 13, 2010 filing, the Commission would effectively have been precluded from considering any of the intervenor-presented alternative scenarios introduced after August 15, 2010. Such an evidentiary procedure would have unfairly limited the rights of intervenor parties.

20. For these reasons, the Commission declines to dismiss these proceedings on the basis that the Commission overstated its authority to modify the plan. Therefore, RRR on this issue will be denied.

3. Discovery Irregularities

21. The Commission addressed discovery disputes occurring in these proceedings in Decision No. C10-1328, at ¶¶ 241-42. This was in addition to Decision No. C10-1282, issued November 24, 2010, which specifically addressed the discovery disputes and their resolution.

22. Peabody contends due process violations occurred as a result of discovery irregularities. Peabody states, “the withholding of information and the Commission’s failure to respond to the withholding in anything but the most superficial terms is evidence of bias inherent in this proceeding.” Peabody RRR, at 9-10.

23. The Commission undertook significant consideration of the alleged discovery irregularities and, after reviewing all of the relevant material, found the delay in producing that material did not necessitate additional hearings or dismissal of these proceedings. Decision No. C10-1282. The Commission strongly rejects Peabody’s characterization of our consideration of this issue as “superficial,” and finds dismissal of these proceedings on this basis is unwarranted. RRR on this issue therefore will be denied.

4. Procedural Schedule

24. ACCCE and AGNC/CMA argue the procedural schedule adopted by the Commission violated their constitutional procedural due process rights. ACCCE RRR, at 3-4; AGNC/CMA RRR, at 6. ACCCE and AGNC/CMA, in identical footnotes, both state they have “consistently asserted the legally-cognizable interest at stake” for each of their respective associations, but they do not explain what those interests are, or how they trigger the constitutional protections that ensure no deprivation of life, liberty, or property without due process of law. ACCCE RRR, at 6, n.4; AGNC/CMA RRR, at 8, n.6.

25. Because neither ACCCE nor AGNC/CMA has articulated a liberty or property interest at stake in this proceeding, they have not demonstrated the applicability of constitutional procedural due process standards. Rather, they are entitled to statutory due process, which the Commission finds has been afforded in this case. Therefore, the Commission finds it would be

inappropriate to dismiss these proceedings based on a violation of procedural due process. RRR on this issue will be denied.

5. Sufficiency of Additional Procedures

26. Public Service filed supplemental direct testimony on October 25, 2010. *See* Decision Nos. C10-1135, issued October 22, 2010, and C10-1193 issued November 4, 2010. ACCCE states the additional procedures the Commission adopted after the supplemental direct testimony were insufficient because parties were not afforded time necessary to conduct a detailed review of the new scenarios, to verify the Strategist® modeling runs for the new plans, or to conduct discovery. ACCCE RRR, at 6. However, ACCCE does not articulate how it would have better been able to present its case if it were afforded additional time.

27. The Commission satisfied and exceeded minimum standards of statutory due process. The Commission is required to “conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice.” § 40-6-101(1), C.R.S. To evaluate the Company’s emission reduction plan, the Commission was required to conduct an evidentiary hearing, § 40-3.2-204(2)(b)(IV), C.R.S., at which it was required to permit all intervenors “to be heard, examine and cross-examine witnesses, and introduce evidence,” § 40-6-109(1), C.R.S. The Commission does not believe the procedures utilized here were so restrictive as to violate ACCCE’s statutory due process rights. *See* Decision Nos. C10-1265, issued November 23, 2010 at ¶¶ 26-32, and C10-1328, at ¶¶ 46-52 (describing the applicable standards of statutory due process); *see also Public Service*, 653 P.2d at 1120-21 (distinguishing between procedural due process and statutory due process). ACCCE was permitted an opportunity to heard, and was allowed to introduce written testimony and other evidence, *see*,

e.g., Ross Answer Testimony (Hearing Exhibit 62), as well as to cross-examine witnesses.³ Because the procedures crafted by the Commission satisfied all relevant statutory due process requirements, RRR on this issue will be denied.

6. Effect of Supplemental Direct Testimony

28. ACCCE and AGNC/CMA claim that Public Service failed to satisfy the August 15, 2010 filing deadline established by § 40-3.2-204(1), C.R.S., because it filed supplemental direct testimony on October 25, 2010 and parties were not afforded sufficient time to respond to that testimony in a meaningful way. ACCCE RRR, at 4-5; AGNC/CMA RRR, at 4-5. ACCCE implies that no modifications or new alternatives should have been considered by the Commission after August 15, 2010 because that date was specifically chosen in order to provide the minimum amount of process necessary.

29. Again, the Commission believes the parties were in fact offered sufficient time to satisfy all applicable due process standards. ACCCE states, in a conclusory manner, that it was not afforded sufficient time to participate in a meaningful way. ACCCE RRR, at 5. AGNC/CMA rhetorically asks why, if the supplemental direct testimony was only a modification to existing scenarios, additional discovery, testimony, and hearing days were undertaken. AGNC/CMA RRR, at 5. Besides these very surface level representations, neither party introduces any new arguments with regard to this issue. The Commission therefore will deny RRR on this issue.

³ Although ACCCE was afforded an opportunity to cross-examine any and all witnesses in this proceeding, it did not avail itself of that opportunity.

7. Satisfaction of the August 15, 2010 Filing Deadline

30. AGNC/CMA argue the Company's August 13, 2010 filing contained a single "plan" for which approval was sought: scenario 6.1E. AGNC/CMA RRR, at 5. AGNC/CMA argue the Company's supplemental direct testimony filed on October 25, 2010 contained "new plans" that were therefore untimely filed. *Id.* AGNC/CMA further contend the late filing of these additional scenarios deprived intervenors of sufficient time to engage in a meaningful review. *Id.*

31. The Commission considered these arguments in Decision No. C10-1265 and again in Decision No. C10-1328. The August 13, 2010 filing contained a number of scenarios that remained viable even after the Commission rejected the Company's original preferred scenario, 6.1E, because that scenario was determined to be inconsistent with the statutory requirements that the plan be fully implemented by December 31, 2017. AGNC/CMA present no new arguments as to why the August 15, 2010 deadline was not satisfied. The Commission therefore will deny RRR on this issue.

8. Access to the Long-Term Gas Contract

32. ACCCE and AGNC/CMA both argue the Commission violated the due process rights of coal interests by denying them access to the long-term gas contract between Public Service and Anadarko Energy Services Company. ACCCE RRR, at 8-10; AGNC/CMA RRR, at 7-10. ACCCE and AGNC/CMA both argue the Commission should have allowed coal intervenors *in camera* access by consultants and counsel, with no employees receiving access. *Id.*

33. We considered and rejected all of the arguments raised by ACCCE and AGNC/CMA in previous Decision Nos. C10-0957 issued August 30, 2010 and C10-1009 issued

September 13, 2010. Because ACCCE and AGNC/CMA present no new arguments on this issue, RRR on this issue will be denied.

D. Considerations in Evaluating the Plan

1. Cost of Fuel and Reasonably Foreseeable Emission Regulation

34. Peabody argues in its Application for RRR that the Commission ignored the evidence in this Docket that shows the approved emission reduction plan to be an inefficient, expensive, and unreliable solution for meeting reasonable foreseeable emission reduction requirements. Peabody RRR, at 15. Along these lines, Peabody argues that because the Commission made no assumptions about future natural gas prices and future costs of emissions, it could not reach any determination on the reasonableness of the potential costs of implementing the approved plan. *Id.*

35. For example, with respect to projected natural gas costs, Peabody argues that the Commission ignored substantial evidence that Public Service understated its gas transportation costs. Peabody further argues that the Commission failed to explicitly correct how the Company quantified expected savings from the long-term gas contract in the approved scenario vis-à-vis other scenarios including the all controls scenario (Benchmark 1.0). *Id.* at 16-17.

36. With respect to emissions costs, Peabody argues that the Commission erred by not using a cost of \$0/ton for carbon emissions. Peabody further argues that the Commission failed to recognize the costs associated with other reasonably foreseeable emission regulations. Peabody alleges that the Commission considered only the Strategist® model runs including a cost of carbon of \$20/ton. *Id.* at 17-18.

37. For these reasons, and others, Peabody asks the Commission to dismiss the proceeding. *Id.* at 21.

38. AGNC/CMA and ACCCE similarly argue that the Commission should have used different carbon prices and natural gas prices than what Public Service used in Strategist®. They argue that the cost information used by Public Service in its analyses is so flawed that it fails to satisfy the Company's obligations under HB 10-1365. AGNC/CMA RRR, at 15-17; ACCCE RRR, at 14-18.

39. AGNC/CMA and ACCCE allege that the Commission considered only Public Service's base case modeled costs, ignoring the Strategist® model runs in which alternative assumptions were used. They further imply that the Commission should have used more precise measures for fuel costs and emissions costs and been more specific regarding the Strategist® model outputs that are based on those other cost inputs. In sum, AGNC/CMA and ACCCE argue the Commission's conclusion that the approved emission reduction plan is less expensive than an all controls option is without merit. *Id.*

40. We deny RRR on these matters. Contrary to the allegations, the Commission carefully considered a range of potential fuel costs and emission costs based on the material evidence in the record. Moreover, HB 10-1365 requires the Commission to look decades into the future and, lacking a crystal ball, we must make judgment calls regarding different possible futures based on that evidence.

41. The Commission therefore rejected a formulaic approach to considering these costs that might have locked down single cost estimates for the future. Instead we considered a range of potential costs as well as the risk that these factors may deviate from base case projections. Using this approach, we identified the scenarios that appear to be robust in producing the required emission reductions at the best cost and least risk over the life of the projects included in the plan. We also sought scenarios that would result in a reasonable impact

on rates in the near term. In other words, we attempted to ascertain which scenario would perform best across a variety of plausible futures.

42. Ms. Glustrom requests that the Commission modify ¶ 86 of Decision No. C10-1328 to state that the coal price forecasts that Public Service used in its 2007 Electric Resource Plan (ERP) was incorrect. Glustrom RRR, at 27. Ms. Glustrom also requests that the Commission add an ordering paragraph to the Decision requiring Public Service to undertake “mine-specific analysis” of coal costs and supply issues for each of its coal-fired generation units, such that these studies are submitted to the Commission at least six months prior to the applications for Certificates of Public Convenience and Necessity (CPCNs) for controls at the Pawnee and Hayden facilities. *Id.* at 28.

43. We deny RRR on these matters. First, we find no need for the Commission to enter a finding in this Docket on the coal price forecast the Company used in Docket No. 07A-447E. Second, we find an assessment of future coal costs for Pawnee and Hayden is not required for the CPCN applications for emission controls on these plants. Paragraph 88 of Decision No. C10-1328 accurately describes how we addressed coal price forecasts in consideration of the proposed controls in the Company’s emission reduction plan. We were well aware of Ms. Glustrom’s views on future coal costs and supplies and fully considered her positions in reaching our decision to approve controls for Pawnee and Hayden.

2. Projected Costs and Rate Impacts

44. Peabody argues that the Commission cannot simultaneously conclude that certain information provided by the Company is sufficient for determining whether the costs of an emission reduction plan result in reasonable rate impacts while acknowledging that same cost

information is insufficient for purposes of ratemaking or the issuance of CPCNs. Peabody RRR, at 18-19. Peabody seeks that we dismiss the case on this basis.

45. We deny Peabody's request. We find that the record in this proceeding provides sufficient cost information for the Commission to make the determinations regarding future costs and rate impacts as required under HB 10-1365.

46. The type and quality of cost information the Commission considered in this Docket is akin to the data we consider when reviewing, modifying, and approving utility ERPs as well as utility plans for compliance with Colorado's Renewable Energy Standard (RES). Such information, including preliminary and generic cost estimates for new utility resources and modeled revenue requirements from Strategist®, is sufficient for comparing the relative cost profiles of various scenarios and for testing their sensitivities to changed assumptions. In the context of ERPs and RES compliance plans, we rely upon such information to reach findings regarding a reasonable course of action into the future (*i.e.*, a plan).

47. However, the Commission does not generally rely on that same source and type of information when it considers an application for a CPCN or approves utility rates. In those circumstances, we depend on more detailed and updated cost information based either on historic accounts and records or on near-term budgets and financial forecasts.

48. When the Commission considers competing resource portfolios, whether in the ERP or RES context, it is not feasible for the utility to negotiate the details of every potential project in each possible scenario in order to compare plans. Consistent cost estimates across the scenarios are sufficient for the purpose of comparing the portfolios to each other. On the other hand, when setting rates or issuing CPCNs, it is feasible and, in fact, it is our duty to require the utility to prepare more careful cost estimates that will be used to set consumer rates. At the

CPCN or the rate making stage, the focus has shifted to a single, well-defined generating plant or portfolio of assets. Therefore, we conclude it is entirely appropriate and consistent with our resource planning practices to approve utility plans based on cost information that is less refined and more uncertain than the cost information we use for other regulatory purposes, such as for the issuance of CPCNs or for the establishment of rates and charges.

3. Preservation of Reliable Electric Service

49. Peabody argues the Commission failed to meet the requirement in § 40-3.2-205(1)(g), C.R.S., that the emission reduction plan preserve the reliability of the Company's system. In support of its contention, Peabody points to the Company's concerns about the required sequencing of actions at the Cherokee site under the approved emission reduction plan as set forth in Public Service's Request for Clarification of Decision No. C10-1328 filed on December 17, 2010. Peabody also cites the Commission's requirement that Public Service submit a transmission study for the Denver-Boulder area as part of its next ERP filing. Peabody RRR, at 20.

50. We deny RRR on this point. Decision No. C10-1328 makes clear that we considered the potential reliability impacts of the approved emission reduction plan on the Company's system. In fact, the preservation of system reliability was a key factor in the determination of whether a plan was feasible, particularly with respect to the combinations of plant retirements and replacements. We also found that the approved plan would meet the service reliability criteria that Public Service proposed for Cherokee Station. The record further establishes that certain parties believe those reliability standards are especially cautious. *See e.g.*, Answer Testimony of Jeffrey Palermo (Hearing Exhibit 93); Answer Testimony of Keith Malmedal (Hearing Exhibit 106).

4. Identification of Associated Costs

51. Public Service acknowledges that the capital cost estimates for proposed emission controls projects or for new replacement generation as cited throughout Decision No. C10-1328 were derived from the testimony of the Company's witness Gregory Ford. The Company requests, however, that the Commission acknowledge in the Decision that these cost estimates are in 2010 dollars and exclude adjustments for the allowance of funds used during construction (Allowance for Funds Used During Construction (AFUDC)) or for "escalation to the time of expenditure." Public Service RRR, at 23-24.

52. We deny RRR on this matter. The Commission recognized that Mr. Ford's cost estimates were "overnight construction" estimates that were not seasoned enough for establishing revenue requirements for ratemaking purposes. Moreover, in reaching our findings regarding the approved emission reduction plan, we considered the revenue requirements of capital costs produced by Strategist®. It is our understanding that those revenue requirements account for the impacts that might not have been explicitly identified in Mr. Ford's testimony.

5. Economic Impacts

53. AGNC/CMA and ACCCE argue that there is substantial evidence in the record of the harm plant retirements and fuel conversion will cause to certain coal producing communities in Colorado. They further contend that Public Service's assumption that other demand for coal will replace the reduction in the Company's coal usage is pure speculation. AGNC/CMA and ACCCE also argue that an investigation into the potential funding of coal worker retraining is no substitute for meeting the Commission's obligations under HB 10-1365. In sum, they posit that the Commission erred in finding that the emission reduction plan will result in an overall positive net impact for Colorado. AGNC/CMA RRR, at 12-14; ACCCE RRR, at 11-14.

54. We decline to modify our finding in Decision No. C10-1328 that the overall economic impacts of the approved emission reduction plan will be positive for Colorado. As indicated in the Decision, our finding rests on the evidence in the record that the plan will result in construction related jobs as well as gas-industry jobs. The Decision also explains that by adopting a coordinated approach to emission reductions, Colorado will be at a competitive advantage vis-à-vis other states that address environmental requirements in a less cost effective manner.

55. As indicated at ¶ 245 of the Decision, we are concerned about the potential for job losses in the Colorado mining communities if sales of Colorado coal into other markets do not offset the sales that will decline as a result of plant retirements and fuel conversion. However, we reiterate our finding that the uncertainty surrounding future market demands for Colorado coal renders ambiguous the projected net economic impact of the approved plan on the state's mining communities at this time.

E. Plan Modifications and Approvals

1. Cherokee 1 and 2

56. Public Service suggests that the Commission may have overlooked the necessary sequencing of activities for the retirement of Cherokee 1 as set forth in the Company's testimony. The Company therefore seeks in its Application for RRR some flexibility in the retirement schedule and proposes an alternate retirement date for Cherokee 1. Public Service RRR, at 16-17.

57. Under the Company's proposed sequencing, Cherokee 2 would be retired no later than December 31, 2011 and Cherokee 1 would be retired no later than July 1, 2012. Public

Service states that these dates provide the Company with the flexibility needed to preserve system reliability.⁴ *Id.*

58. We grant Public Service's request and modify the retirement dates. Cherokee 2 shall be retired no later than December 31, 2011, and Cherokee 1 shall be retired no later than July 1, 2012. This change to Decision No. C10-1328 is reasonable in that it provides the Company with some flexibility to ensure the successful conversion of Cherokee 2 into a synchronous condenser for providing dynamic VAR support.

59. Ms. Glustrom argues in her Application for RRR that the Commission has not devoted enough attention to the reasons why the Company's system needs dynamic reactive power support such as would be provided by Cherokee 2 when converted into a synchronous condenser. Ms. Glustrom requests that the Commission order Public Service to conduct an assessment of the causes of dynamic reactive power needs to ensure that customer loads with low power factors are not unduly subsidized by general ratepayers. Glustrom RRR, at 26-27.

60. Ms. Glustrom further suggests that the Commission include an ordering paragraph to Decision No. C10-1328 requiring Public Service to undertake a study into VAR support needs on the Company's system. The study would address possible corrections for reactive power needs on the customer side of the meter and would include a review of how other state regulators address reactive power in ratemaking. This suggested study would be due at least three months before the Company's next base rate proceeding. *Id.* at 30.

61. We find that the record in this proceeding does not support Ms. Glustrom's request and therefore deny RRR on this matter. It is our general understanding that reactive

⁴ Public Service explains that the proposed retirement dates for Cherokee 1 and 2 are consistent with the dates in the Statement Implemental Plan (SIP) for regional haze adopted by the Air Quality Control Commission (AQCC).

power is required by the Company's transmission and distribution system and that customer power factors are well monitored and kept to a minimum by existing interconnection requirements. Therefore, we will not require Public Service to undertake a study into system reactive power needs along the lines suggested by Ms. Glustrom.

2. Cherokee 3

62. Public Service argues that by ordering the retirement of Cherokee 3 no later than December 31, 2015, the Commission will not afford Public Service the flexibility it needs to accommodate possible construction delays in the building of the natural gas-fired 2X1 CC replacement capacity or to address other "issues with early testing or tuning of the unit." The Company suggests that the Commission state in the Decision that Cherokee 3 shall be retired after the 2X1 CC is on-line and operating reliably, but in no case later than December 31, 2016.⁵ Public Service RRR, at 17-18.

63. In reaching our decision to retire Cherokee 3 by the end of 2015, we relied upon the evidence provided by Public Service regarding the feasibility of that deadline. We also recognized the emission reduction benefits of retiring Cherokee 3 in 2015 as opposed to 2017.

64. We also understand Public Service's request for flexibility and conclude that affording the Company up to 12 additional months will help the Company ensure system reliability as the new natural gas plant comes online. We therefore grant Public Service's RRR on this matter and approve retirement of Cherokee 3 no later than December 31, 2016. However, we also encourage Public Service to strive to retire Cherokee 3 as close to December 31, 2015 as possible so the emissions profile of the approved plan remains consistent with that of

⁵ Public Service explains that the proposed retirement date for Cherokee 3 is consistent with the date in the SIP for regional haze adopted by the AQCC.

scenario 6E FS. We therefore require Public Service to file notice in this Docket on or before July 1, 2015 indicating when the Company expects Cherokee 3 to cease operations.

3. Arapahoe 3 and 4

65. Ms. Glustrom makes the same arguments regarding the conversion of Arapahoe 3 into a synchronous condenser as she does for Cherokee 2. Glustrom RRR, at 30.

66. Consistent with our findings regarding Cherokee 2 above, we deny RRR on this matter. There is insufficient evidence in the record to support a finding that a study of dynamic reactive power needs is required before the filing of the Company's 2011 ERP.

67. Public Service states that Decision No. C10-1328 is unclear as to whether the Company is authorized to fuel switch Arapahoe 4 by the end of 2013 or if the Commission instead intends for the unit to operate on coal through 2014. Public Service RRR, at 18.

68. We clarify Decision No. C10-1328 by finding now that Arapahoe 4 shall no longer burn coal after December 31, 2013. The Company may begin using natural gas as the primary fuel at Arapahoe 4 before December 31, 2013, provided that the Company prudently manages the winding down of its coal transportation agreement at Arapahoe Station.

4. Valmont 5

69. In her application for RRR, Ms. Glustrom requests that the Commission explore additional options for the Valmont plant as part of Public Service's 2011 ERP proceeding. These options would include fuel conversion to natural gas prior to its approved retirement in 2017 or earlier retirement with or without fuel conversion. Ms. Glustrom argues such options received insufficient consideration during this proceeding. She further notes that Public Service may be in a position of having excess generation capacity on its system during some of the years when Valmont would continue to operate on coal. As a consequence of this excess capacity, she

contends that retirement or conversion of Valmont before 2017 may be a reasonable option. Glustrom RRR, at 25-26.

70. Accordingly, Ms. Glustrom requests that the Commission modify ¶ 119 of Decision No. C10-1328 to require Public Service to study alternatives for Valmont 5 in the Company's 2011 ERP filing such as earlier retirement or fuel switching before 2017. She also provides similar recommended language to the ordering paragraphs concerning Valmont. *Id.* at 28.

71. The Commission denies RRR on this matter. We were well-informed of Ms. Glustrom's recommendations for Valmont 5 when we reached our findings in Decision No. C10-1328. Ms. Glustrom makes no new argument in her Application for RRR on this issue.

5. Pawnee

72. Ms. Glustrom argues that the Commission should conduct more analysis of the costs and risks associated with the continued operation of Pawnee on coal. She argues that there was almost no testimony or analysis in the record regarding alternative options for Pawnee. She further disputes that ratepayers will experience savings from the continued operation of Pawnee on coal versus retirement for emission reduction purposes. She argues that rather than investing in Pawnee, the Company should instead invest in more renewable energy to drive system costs down. *Id.* at 20.

73. Consistent with Ms. Glustrom's testimony on the risk of much higher than expected coal costs, she posits that burning coal at Pawnee could add several hundred million dollars (if not billions) of costs to the future revenue requirements. For instance, she raises concerns about the environmental and cost impacts associated with the Eagle Butte Mine that supplies coal to Pawnee and similar concerns about potential replacement sources of coal if that

mine is closed. Ms. Glustrom also repeats her arguments in favor of using the pattern of significant coal price increases in recent years as a predictor of future coal price increases. She further raises general concerns about Public Service's ability to recover higher coal costs without risk through its Electric Commodity Adjustment rider and general concerns about carbon cost impacts on customer rates. *Id.*

74. Ms. Glustrom also argues that emission controls at Pawnee do not need to be part of the Commission's decision in this Docket, as consideration of this plant's emissions is not mandatory under HB 10-1365. *Id.*

75. Ms. Glustrom suggests additional language for ¶ 150 of Decision No. C10-1328 regarding the CPCN filing requirement for the controls at Pawnee. These changes would require Public Service to demonstrate that a reasonably priced supply of coal will be available for the plant and that continued operations of the plant with emissions controls is the "best alternative" as amounts of efficiency and renewable energy on the Company's system increase in the coming decades. Her suggested additional language would also require a "mine-specific analysis" of future coal supplies for the plant. *Id.* at 27-30.

76. The Commission denies RRR on this matter. When approving emission controls for Pawnee, the Commission considered both the economics associated with the continued use of coal at Pawnee and the overall fuel mix of Public Service's system resulting from this proceeding. In reaching our findings, we fully considered Ms. Glustrom's arguments regarding future coal costs and future coal supplies. We further conclude no additional studies regarding coal prices, coal supplies, or Pawnee's operations are necessary in any CPCN proceeding related to the emission controls.

77. We further note that the record in this Docket indicates all of the scenarios assessed by the Colorado Department of Health and Environment (CDPHE) include emission controls on Pawnee. The controls proposed for Pawnee are also identical to those that would be expected for the plant under a BART determination in the State Implementation Plan (SIP). Ms. Glustrom provides no new argument why the controls should not be part of the Company's coordinated approach for emission reduction. We therefore decline to modify Decision No. C10-1328, which approves controls at Pawnee as part of the Company's emission reduction plan under HB 10-1365.

6. Hayden

78. Ms. Glustrom posits the same types of arguments regarding the Commission's approval of emission controls at Hayden as for its approval of controls at Pawnee. *Id.* at 20-24. That is, she requests that the Commission require Public Service to demonstrate as part of the CPCN application for the controls at Hayden that a reasonably priced supply of coal would be available for the plant and that continued operations of the plant is the "best alternative." *Id.* at 27-30.

79. We deny RRR on this point consistent with our discussion above regarding Pawnee. We likewise conclude no additional studies regarding coal prices, coal supplies, or the units' operations are necessary in any CPCN proceeding related to emission controls at Hayden.

80. In addition, we note that Public Service does not fully own Hayden 1 and 2. Public Service explains in its Statement of Position (SOP) that the other owners of the Hayden plant did not agree with the Company concerning the appropriate BART determinations for the units. Given that there was no agreement on BART controls among the owners, we find that it is highly unlikely that other options for these units could have practically been considered in the

Company's BART Alternative Program. Although the SIP addresses Hayden outside of the Company's BART Alternative Program, we uphold our decision to include controls at Hayden in the Company's approved emission reduction plan under HB 10-1365, primarily because they are consistent with a coordinated approach to emissions reduction as contemplated by the statute.

81. In its Application for RRR, Public Service seeks explicit Commission approval of the installation of sorbent injection controls for mercury emissions at Hayden 1 and 2.

82. We correct this oversight and grant Public Service's request by modifying Decision No. C10-1328 to approve the sorbent injection controls at Hayden as part of its emission reduction plan.

7. Cherokee 4

83. Public Service argues the Commission found the "three-source principle must be observed at Cherokee" in Decision No. C10-1328. Public Service RRR, at 19. The Company requests that the Decision be further modified to state any change to running Cherokee 4 on natural gas, such as early plant retirement after 2017, also be required to meet the "three-source principle." *Id.*

84. We decline to modify Decision No. C10-1328 as requested by Public Service. The Commission recognized the centrality of Cherokee Station in the Company's transmission system serving the Denver-Metro area. The Decision thus acknowledges that the Company supported the "three source principle" for ensuring system reliability and explains that the approved plan satisfies the Company's standard for the Cherokee site. Decision No. C10-1328 does not include a finding that the "three source principle" is the minimum or optimal reliability standard for Cherokee Station. Rather, we are interested in learning more about alternative transmission system configurations, plant designs, and operational practices that also preserve

system reliability and have accordingly required the Company to complete a transmission study for the Denver-Metro area in §§ 234-36 of the Decision.

85. Peabody argues the Commission violated a requirement of HB 10-1365 that an emission reduction plan approved by the Commission must avoid a “piecemeal approach.” Specifically, Peabody argues that the Commission’s intent to reexamine the fuel-switching at Cherokee 4 amounts to the undertaking of “further actions” in the long term in violation of the requirement that the plan be fully implemented by December 31, 2017. Peabody RRR, at 13-15.

86. We deny RRR on this point. Pursuant to the approved emissions reduction plan, fuel conversion at Cherokee 4 will be fully implemented by December 31, 2017 and will enable the unit to meet reasonably foreseeable emission reduction requirements consistent with HB 10-1365. We reiterate our finding that fuel switching at Cherokee 4 is the appropriate action for a coordinated approach to emission reduction consistent with HB 10-1365.

87. Contrary to Peabody’s assertions, § 135 of Decision No. C10-1328 does not run counter to a coordinated emission reduction approach. Rather, we recognize that fuel switching offers flexibility to address changed circumstances in the future. HB 10-1365 does not preclude the Commission from approving additional actions at Cherokee 4, particularly if the same or more emission reductions can be achieved at a reasonable cost.

F. Future Filing Requirements

1. Applications to Modify CPCNs for Early Retirement

88. Public Service requests that the Commission clarify the filing deadlines for the applications containing cost information for the approved plant retirements. Public Service recognizes that the Commission intends for these filings to be submitted sufficiently in advance of rate case filings. To remove any ambiguity as to when these filings should be made, however,

the Company requests that the Decision clarify that the filings are required “at least three months before the Company files the base rate case in which it will seek to recover the retirement costs.” Public Service RRR, at 20-22.

89. Public Service is correct concerning our intent to review plant closure and decommissioning costs in advance of the relevant rate cases. We therefore grant Public Service’s request and modify Decision No. C10-1328 so that the application filings associated with plant retirements are submitted at least three months before the Company files the base rate case in which it will seek to recover the retirement costs.

2. CPCNs for Emission Controls at Pawnee and Hayden

90. Public Service wants the Commission to reverse its decision requiring applications for CPCNs for the planned emission controls at Hayden and Pawnee. Public Service argues that the Commission should instead follow its rules and accept the proposed pollution control installations at Hayden and Pawnee to be in the ordinary course of business and thereby exempt them from a CPCN filing requirement. Public Service argues that the Commission has already found these projects to be in the public interest and the Commission can otherwise review the associated costs through different means, including the filing of a report, Staff audit, or a rate case proceeding. *Id.* at 22-23.

91. We deny Public Service’s request on this issue. We find that the CPCN application proceedings contemplated by Decision No. C10-1328 are the best process for addressing the costs and other details of the projects at Pawnee and Hayden. We further note that these CPCN proceedings should not be lengthy affairs, given that the controls are included in the approved emission reduction plan and therefore the need for these controls has already been established.

3. Propriety of Cost Caps

92. In ¶ 151 of Decision No. C10-1328, the Commission states, “we expect that the applications for CPCNs required by this Decision will allow us to consider the establishment of a not-to-exceed maximum level of expenditures for these projects.”

93. Public Service argues it is inappropriate for the Commission to even consider the future imposition of cost caps associated with implementation of the plan because § 40-3.2-205(3), C.R.S., precludes the Commission from capping the prudently incurred costs associated with implementing the approved plan. The Company therefore requests that the Commission remove the language from the decision that suggests “an artificial limit” can be set on the recovery of prudently-incurred costs in future CPCN proceedings related to plan implementation. Public Service RRR, at 14.

94. Section 40-3.2-205(3), C.R.S., states, “[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.” Section 40-3.2-207(1)(a), C.R.S., goes on to state,

A utility is entitled to fully recover the costs that it prudently incurs in executing an approved emission reduction plan, including the costs of planning, developing, constructing, operating, and maintaining any emission control or replacement capacity constructed pursuant to the plan, as well as any interim air quality emission control costs the utility incurs while the plan is being implemented.

In other words, § 40-3.2-205(3), C.R.S., creates a presumption of prudence, but § 40-3.2-207(1)(a), C.R.S., establishes that the presumption is rebuttable and, if successfully challenged, costs may not be recovered. Public Service acknowledges as much, but still believes it would

violate § 40-3.2-205(3), C.R.S., to establish cost caps, whether hard or soft, for those actions undertaken to implement the approved plan.

95. The Commission does not believe HB 10-1365 prohibits the imposition of cost caps, and therefore will deny RRR on this issue. Reading §§ 40-3.2-205(3) and 40-3.2-207(1)(a), C.R.S., together indicates that HB 10-1365 allows full recovery of costs prudently incurred in implementing the approved plan. However, this not is synonymous with a prohibition against cost caps. At most, it addresses the permissible strength of those caps.

96. Decision No. C10-1328 does not state cost caps will be imposed, nor that they will be prohibitively hard. Rather, it states the Commission will “consider the establishment” of such caps in the future. The mere consideration of this issue in a future docket does not violate HB 10-1365. Therefore, RRR on this issue will be denied.

G. Satisfaction of Requirements Related to the CDPHE

97. Peabody, ACCCE and AGNC/CMA argue the Decision does not adequately address what they characterize as the CDPHE’s failure to meet its obligations.

1. Consultations Pursuant to § 40-3.2-204(2)(b)(I), C.R.S.

98. Peabody contends the CDPHE did not consult with the Company as required by § 40-3.2-204(2)(b)(I), C.R.S. Peabody states “[t]here is no evidence in the record that such consultations took place or, if they took place, were anything more than superficial.” Peabody RRR, at 10.

99. There are numerous representations in the record that such consultations occurred. *See, e.g.*, Public Service August 13, 2010 filing (Hearing Exhibit 2), at 25-26 (describing consultations with the CDPHE undertaken during plan development); Tourangeau Direct Testimony (Hearing Exhibit 33), at 2 (stating personal involvement in consultations with the

Company). The Commission believes Peabody has misrepresented the record and that dismissal of these proceedings on this basis is unwarranted. RRR on this issue will therefore be denied.

2. Sufficiency of CDPHE Findings

a. § 40-3.2-204(2)(b)(IV), C.R.S.

100. Peabody also argues the CDPHE did not make a finding that the plan is consistent with current and reasonably foreseeable emission reduction requirements as required by § 40-3.2-204(2)(b)(IV), C.R.S.

101. The CDPHE made a finding that scenario 6E FS, which is nearly identical to the approved plan from an air quality standpoint, is consistent with reasonably foreseeable emission reduction requirements. CDPHE SOP, at 12. *See also* Tourangeau Supplemental Testimony (Hearing Exhibit 200), at 4. Peabody acknowledges the CDPHE made this finding, but contends the Commission could not rely on the CDPHE's testimony regarding nearly identical emission reductions. Peabody RRR, at 11-12. Peabody implies that, by relying on the CDPHE's testimony concerning scenario 6E FS, the Commission improperly substituted its judgment for that of the CDPHE. Peabody RRR, at 12.

102. To accept Peabody's argument would lead to the unreasonable conclusion that the Commission's authority to modify the Company's plan is limited to approving only those specific scenarios which the CDPHE explicitly approved, even if the CDPHE testified the emissions reductions achieved by the modified plan would satisfy the statutory reductions. The Commission finds this is an attempt to impose artificial limitations on the Commission's authority to modify the Company's plan, as established in § 40-3.2-205(2), C.R.S. There is no question as to whether the CDPHE believes the approved plan is sufficient from an air quality standpoint. The CDPHE testified that the type of emissions reductions achieved by the approved

plan satisfy current and reasonably foreseeable emission reduction requirements. *See* Hearing Exhibit 200, at 4. In addition, the CDPHE, through the AQCC, has conducted its HB 10-1365 proceedings and integrated the plan into the SIP.

103. The Commission finds the CDPHE did determine the emissions reductions effectuated by the plan are sufficient, in accordance with § 40-3.2-204(2)(b)(IV), C.R.S. Further, we properly undertook consideration of this determination as one of the § 40-3.2-205(1), C.R.S., factors. Therefore, we believe dismissal of these proceedings is unwarranted and will deny RRR on this issue.

b. § 40-3.2-205(2), C.R.S.

104. Section 40-3.2-205(2), C.R.S., provides, “[a]ny modifications required by the commission shall result in a plan that the [CDPHE] determines is likely to meet current and reasonably foreseeable federal and state clean air act requirements.”

105. The CDPHE stated that the earlier units are shut down or repowered, the better the plan is from an air quality perspective. Tr. Oct. 26, 2010, at 221 (testimony by Mr. Tourangeau agreeing that “if there is any other scenario other than 6.1E, that would achieve greater emissions reductions and in a more quick fashion, the department would not object to that as a possible scenario that could be accepted by the [CDPHE]”); CDPHE SOP, at 12 (“the greater and timelier emission reductions that are provided in a plan, the more readily that scenario will meet current and reasonably foreseeable requirements”). The plan approved by the Commission achieves greater emissions reductions faster than scenario 6.1E. Therefore, according to the CDPHE’s own testimony, the Commission’s modifications will meet current and reasonably foreseeable federal and state clean air act requirements.

106. Peabody nonetheless argues the CDPHE failed to make its § 40-3.2-205(2), C.R.S., determination, because it did not specifically approve the modifications adopted by the Commission in Decision No. C10-1328 prior to its issuance. Again, Peabody contends the Commission is not permitted to rely on the CDPHE's testimony regarding what emission reduction levels are satisfactory and that the Commission improperly substituted its judgment for that of the CDPHE. Peabody RRR, at 11-12.

107. As explained above, the Commission believes Peabody's reasoning would place the Commission in an untenable position by prohibiting it from relying on reasoning presented by the CDPHE in modifying the plan. The CDPHE has not stated the modified plan, as approved by the Commission, fails to achieve the necessary emission reductions. Therefore, we believe dismissal of these proceedings on this basis is unwarranted and we will deny Peabody's RRR on this issue.

3. Considerations Required Under § 40-3.2-205(1), C.R.S.

108. Section 40-3.2-205(1), C.R.S., establishes nine factors the Commission must consider in evaluating the Company's plan. Peabody contends the Commission failed to adequately consider two of those factors.

a. § 40-3.2-205(1)(a), C.R.S.

109. Section 40-3.2-205(1)(a), C.R.S., requires the Commission to consider whether the CDPHE reports the plan is likely to achieve at least a 70 percent reduction in annual reductions in NOx emissions.

110. The CDPHE determined scenario 6E FS, which has an emissions profile nearly identical to the plan we approved, meets and exceeds the minimum standard for NOx reduction. Hearing Exhibit 200, at 2.

111. Peabody contends the CDPHE did not make the report, because the testimony presented in Hearing Exhibit 200 did not concern the exact plan we approved in Decision No. C10-1328. Peabody RRR, at 11-12. However, scenario 6E FS and the approved plan are nearly identical from an emission reduction standpoint. The Commission believes the requirements of § 40-3.2-205(1)(a), C.R.S., have been satisfied. As stated above, the Commission believes it may reasonably rely on the CDPHE's testimony regarding what types of activities will achieve sufficient emission reductions. Further, the Commission declines to interpret HB 10-1365 in a way that unnecessarily and unreasonably curtails its authority to modify any plan proffered by the Company. The Commission finds this argument does not warrant dismissal of these proceedings and, therefore, RRR on this issue will be denied.

b. § 40-3.2-205(1)(b), C.R.S.

112. Section 40-3.2-205(1)(b), C.R.S., requires the Commission to consider whether the CDPHE made a determination regarding the emissions rates of new or repowered facilities. This consideration is one of nine factors the Commission must consider in evaluating the plan. § 40-3.2-205(1), C.R.S.

113. In the Decision, we noted “the CDPHE does not seem to have made a specific finding as to the repowered units, Arapahoe 4 and Cherokee 4, which will be converted to run on natural gas. Nonetheless, this is only one factor among many the Commission must consider.” Decision No. C10-1328, at ¶ 173.

114. Peabody contends the CDPHE's failure to make this determination and the Commission's failure to take the lack of findings into consideration is a clear error. Peabody RRR, at 11.

115. Contrary to Peabody's arguments, the Commission did consider whether the CDPHE made this determination, as required by § 40-3.2-205(1), C.R.S. Decision No. C10-1328, at ¶ 173. Section 40-3.2-205(1), C.R.S., lists nine factors the Commission must "consider." The Commission did consider the CDPHE's determination by reviewing the record, finding the appropriate information, taking that information into account, and appropriately weighing that information as one of nine factors for the Commission's overall analysis.

116. Section § 40-3.2-205(1), C.R.S., does not state, as Peabody suggests, that failure to satisfy any one of those nine factors will render the plan fatally flawed. To accept Peabody's reasoning would impose this kind of harsh requirement, ignoring the plain language of this statutory subsection. There are other instances where the General Assembly places strong, explicit requirements on an approved plan, showing that, where such strict requirements were intended, they were explicitly included. Peabody's interpretation is contrary to the plain meaning of the statute and, as a result, does not require dismissal of these proceedings. Therefore, RRR on this issue will be denied.

4. Role of the CDPHE Under HB 10-1365

117. Peabody argues the Commission has decided the CDPHE's determination of current and reasonably foreseeable requirements is not subject to challenge and the Commission has no authority to review that determination. Peabody RRR, at 12. Peabody states that the Commission's decision is erroneous and, as a result, "parties in this proceeding have no recourse to address, to question or otherwise to challenge the CDPHE's reasonably foreseeable determinations." *Id.* Peabody characterizes the Commission's interpretation of the statute as "unreasonable," but does not offer an alternative statutory interpretation. *Id.*

118. As was fully explained in Decision No. C10-1164, issued October 27, 2010, the Commission reads HB 10-1365 as vesting the CDPHE with the discretion to determine which emission reduction requirements are reasonably foreseeable, as it is the state agency with technical and legal expertise in this area. *See* Decision No. C10-1164, at ¶¶ 39-40 (noting that, in HB 10-1365, all but one of the references to the phrase “reasonably foreseeable” specifically concern the CDPHE’s opinion regarding what is reasonable foreseeable). Therefore, RRR on this issue will be denied.

5. New Legal Standard

119. Peabody states the Commission “appears” to create a “new legal standard” by stating retirement of certain plants is necessary “for emission reduction purposes.” Peabody RRR, at 12-13.

120. HB 10-1365 requires certain emission reductions and identifies three ways a utility can achieve those reductions from coal fired power plants: installing controls, converting to an alternative fuel source, or early retirement. Using the phrase “for emission reduction purposes” does not create a new legal standard. Rather, it identifies the purpose behind the action. The Commission finds Peabody’s argument does not warrant dismissal of these proceedings and therefore, RRR on this issue will be denied.

H. Cost Recovery

1. Construction Work in Progress (CWIP)

121. In its Application for RRR, Public Service argues that the Commission failed to adopt an approach for the timely cost recovery of the construction costs necessary to implement the approved emission reduction plan. Specifically, Public Service argues the Commission’s rejection of CWIP recovery along the lines proposed by the Company runs counter to HB 10-

1365 and was done without explaining our reasoning. Public Service RRR, at 4. Public Service contends that the Commission improperly adopted a combination of traditional ratemaking with periodic roll-ins of CWIP and accumulated AFUDC contrary to the explicit language of the statute. *Id.* at 5. Public Service thus repeats its position that a rider mechanism is the method required under HB 10-1365 by which the Company is allowed to recover returns on CWIP, otherwise the recovery will not be “current” as required by § 40-3.2-207(3), C.R.S.⁶ *Id.* at 5-6.

122. The Company further argues that the statutory basis for CWIP recovery is distinct from the basis for the recovery of other “non-CWIP” costs under § 40-3.2-207(4), C.R.S., but the Commission instead conflates the standards in § 40-3.2-207(4), C.R.S., with those in § 40-3.2-207(3), C.R.S., concerning CWIP *Id.* at 7. The Company thus argues that ¶ 210 of the Decision places an inappropriate and inefficient procedural burden on the Company with respect to CWIP recovery, because the two triggers set forth in § 40-3.2-207(4), C.R.S., do not apply to CWIP recovery. *Id.* at 9-10. Public Service argues that the record in this Docket is sufficient and further litigation in the form of a preliminary, theoretical proceeding is unnecessary for CWIP recovery. The Company instead suggests that the Commission adopt the Emissions Reduction Adjustment (ERA) to recover earnings on CWIP on a current basis. *Id.* at 11.

123. We are not persuaded by Public Service’s arguments regarding § 40-3.2-207(3), C.R.S.,⁷ and do not accept that “current recovery” can be accomplished only through the use of a

⁶Public Service does not specifically contest the requirement in ¶ 202 of the Decision that cost recovery of CWIP earnings for a project included in the approved emission reduction plan shall begin only after a CPCN for that project has been issued.

⁷Section 40-3.2-207(3), C.R.S., provides: “Current recovery shall be allowed on construction work in progress at the utility’s weighted average cost of capital, including its most recently authorized rate of return on equity, for expenditures on projects associated with the plan during the construction, startup, and pre-implementation phases of the projects.”

cost adjustment mechanism or rate rider.⁸ The requirements of § 40-3.2-207(3), C.R.S., are satisfied by the approach adopted for CWIP recovery by Decision No. C10-1328, such that, in a rate proceeding, earnings on CWIP may be recovered from ratepayers for projects contained in the emission reduction plan before these investments go into service. This approach is consistent with the requirements of § 40-3.2-207(3), C.R.S., as it protects the Company from the financial harm this provision is designed to protect against. Moreover, we find that, the General Assembly, if it intended for current recovery on CWIP to be achieved only through an adjustment mechanism, § 40-3.2-207(3), C.R.S., would have explicitly prohibited other methods for CWIP recovery by mandating the adoption of a cost adjustment clause. *See, e.g.*, § 40-2-123(2)(f)(I), C.R.S. (“To provide additional encouragement to utilities to pursue the development of an IGCC project, the commission shall approve current recovery by the utility through the rate adjustment clause of the utility’s weighted average cost of capital, including its most recently authorized rate of return on equity, for expenditures on an IGCC project during the construction, startup, and implementation phases of the IGCC project.”). *See also* §§ 40-5-101(4), 40-2-124(1)(f), 40-3.2-103(2), and 40-3.2-104(5), C.R.S.

124. We also reject Public Service’s position that a rider used to recover CWIP under § 40-3.2-207(3), C.R.S., may not be subject to the triggers set forth in § 40-3.2-207(4), C.R.S. Rather, we find that the meaning of the two provisions is best interpreted together, particularly in view of the level of costs expected to be incurred by the Company over the course of the implementation of the emission reduction plan, where CWIP costs in the future will eclipse the

⁸Commissioner Matt Baker stands by his position announced in Decision No. C10-1328 that he would have accepted an approach to the current recovery on CWIP that looked more like the Transmission Cost Adjustment rider, so long as the project received CPCN-like approval. Commissioner Baker prefers this result for policy reasons, including its likely positive impact of demonstrating the feasibility of accounting and forecasting concepts that Public Service would use when setting rates based on a future test year.

“non-CWIP” costs, such as accelerated depreciation and removal costs, and in light of the incentive to the Company to take early actions prior to January 1, 2015.

125. We therefore decline to approve the Company’s proposed ERA, even if the ERA would be used only to recover CWIP after the required CPCNs have been issued. Accordingly, we shall not eliminate the requirement that the Company submit a future filing to address the mechanics of any special rate making mechanism or other approach to resolve the controversies indicated in this Docket. We also continue to find that it will be worthwhile for the Company to carefully review the procedural and technical criticisms of the proposed ERA along the lines suggested in Decision No. C10-1328. Public Service should consider rate making mechanisms other than a rate adjustment clause, including the use of a future test year, as outcomes that might be appropriate if it can be demonstrated that the triggers of § 40-3.2-207(4), C.R.S., have been met. However, while we still see many benefits to the application requirement set forth at ¶ 210 of the Decision, we will modify ¶ 210 of the Decision such that Public Service shall no longer be required to make this filing separately from a proceeding in which the result will be the recovery of actual costs from ratepayers.

126. Finally, in footnote 11 of its Application for RRR, Public Service takes issue with the statement in ¶ 210 in the Decision that adopts “deferred treatment accounting” as the default approach for CWIP dollars. We clarify here that the default approach for CWIP for Public Service is consistent with regulatory practice in Colorado when current earnings on CWIP are allowed: AFUDC will be allowed to accumulate on CWIP prior to the filing of a general rate proceeding. Further, when the Commission allows current earnings on CWIP to be included in rate setting prior to the facility entering into service, the CWIP balance and the accumulated AFUDC are placed into rate base without any offset to income.

2. Planning Costs Incurred Prior to December 15, 2010

127. Public Service argues it is entitled under HB 10-1365 to fully recover the planning costs it incurred prior to the issuance of Decision No. C10-1328. Public Service explains that these costs have been capitalized and, absent reconsideration by the Commission on this matter, these costs will need to be expensed. Public Service RRR, at 15.

128. We grant Public Service's request on this matter and allow for planning costs associated with the capital investments contemplated in the emission reduction plan to be capitalized as part of costs of the approved projects in the plan adopted by Decision No. C10-1328, even if these planning costs were incurred prior to December 15, 2010. For example, we find the plant design and engineering studies the Company commissioned in preparation of its August 13, 2010 filing were useful to our review of the expected costs and rate impacts of the emission reduction plan.

129. Before any such planning costs are recovered through rates, including returns on these capitalized costs as CWIP, we expect that stakeholders such as Commission Staff will have a sufficient opportunity to review them to ensure they are prudent and do not include resource planning costs or litigation costs incurred in the normal course of business, where such costs are recovered through base rates. We find the record in this Docket is not adequate to approve the \$346,923 of "Plan Development Costs" set forth in Exhibit SBB-7 of Company witness Scott Brockett's Supplemental Rebuttal Testimony (Hearing Exhibit 196).

I. Additional Long-Term Gas Contracts

130. The Gas Intervenors point out that, while ¶ 232 of the Decision requires Public Service to investigate additional long-term natural gas supply contracts, there was no corresponding ordering paragraph. They request the Commission specifically include such a

directive in the ordering paragraphs of Decision No. C10-1328 and offer suggested language that entails a requirement for competitive bidding and prudence evaluation. Gas Intervenors RRR, at 3-4.

131. We agree with the Gas Intervenors that an ordering paragraph regarding the investigation of additional long-term supply contracts would be useful in Decision No. C10-1328. Therefore, we modify the Decision by adding an ordering paragraph directing Public Service to submit a report in this Docket describing the results of its investigation into additional long-term natural gas supply contracts as described in ¶ 232 of the Decision by December 31, 2011.

J. Impacts on Coal Producing Communities

132. In ¶ 246 of Decision No. C10-1328, the Commission directed

relevant entities, which may include the Colorado Department of Labor, CMA, AGNC, and the OCC, among others, to design an approach to the questions of how to ascertain the impact on mining employment of the Company's approved emission reduction plan and how to efficiently dedicate appropriate ratepayer funds to the effort of retraining eligible coal miners.

To this end, Ordering paragraph 28 orders Staff of the Commission to consult with appropriate entities and then inform the Commission as to a recommended structure for such a plan.

133. The OCC argues that requiring ratepayers to pay for the retraining of mining workers is beyond the Commission's authority. The OCC argues the Commission is supposed to protect the right of customers to pay a rate that accurately reflects the cost of service rendered, and has a general responsibility to protect the public interest regarding utility rates. Because a charge related to retraining coal workers is not connected to the Company's cost of service, the OCC believes ordering such a charge is beyond the authority of the Commission. Nor does the OCC believe such authority was given to the Commission in HB 10-1365. OCC RRR, at 2-3

134. Ordering paragraph 28 does not require a worker retraining program, nor does it require ratepayer funds be used to support such a program. Rather, it directs Commission Staff to conduct an investigation and report to the Commission with recommendations as to the structure and funding of such a program. Therefore, the Commission finds the OCC's arguments concerning the Commission's authority are not yet ripe. No specific program or funding source has yet been proposed, let alone utilized.

135. However, we acknowledge the discussion in ¶ 246 makes specific reference to ratepayer funds, when a similar designation is not contained in the corresponding ordering paragraph. Therefore, we will grant RRR on this issue for the limited purpose of removing the word "ratepayer" from ¶ 246 of Decision No. C10-1328. This paragraph will therefore now read:

246. We direct the Staff of the Commission to consult with the relevant entities, which may include the Colorado Department of Labor, CMA, AGNC, and the OCC, among others, to design an approach to the questions of how to ascertain the impact on mining employment of the Company's approved emission reduction plan and how to efficiently dedicate appropriate funds to the effort of retraining eligible coal miners. Staff shall prepare and present a recommendation to the Commission before December 31, 2011.

K. Classification of Information as Highly Confidential

136. The Gas Intervenors request that the Commission amend its decision to include a determination that previous, specific determinations regarding highly confidential treatment of information in this Docket will not control in later proceedings or dockets. Gas Intervenors RRR, at 2.

137. Rules 1100-02, 4 CCR 723-1, address treatment of confidential and highly confidential information, as well as extraordinary protection of that information. Rule 1100(b)(IV), 4 CCR 723-1, states that resolution of a pleading asserting confidentiality or

requesting extraordinary protection will apply in all future proceedings as to the particular information for which confidentiality or extraordinary protection is asserted. As to categories of information—such as long term gas contracts, or Strategist® input files—nothing in the Commission’s Rules creates a presumption that the provision of extraordinary protection in one docket relieves the moving party from asserting confidentiality or extraordinary protection in a subsequent docket. However, it is also reasonable that commissions look to past action and experience for guidance as to what information warrants extraordinary protection in a particular circumstance.

138. The Gas Intervenors have not presented a sufficient rationale for their request. The Commission does not find the proposed amendment to be necessary at this time. Therefore, RRR on this issue will be denied.

139. In the alternative, the Gas Intervenors ask the Commission to undertake a rulemaking to clarify its confidentiality rules. The Commission is indeed interested in undertaking an examination of its confidentiality rules in the near future. However, an Application for RRR is not the appropriate venue in which to petition the Commission to undertake a rulemaking. Therefore, RRR on this issue will be denied.

L. Other Matters

140. The Commission modifies ¶ 228 of Decision No. C10-1328 to correct a wording error by replacing the phrase “replacement power” with “replacement gas.”

141. All other matters raised in Applications for RRR that are not expressly addressed by this decision are denied.

II. ORDER

A. The Commission Orders That:

1. The Motion for Leave for Acceptance of Late Filed Application of Reargument, Rehearing, or Reconsideration of Commission Decision No. C10-1328 filed by the Colorado Independent Energy Association on January 5, 2011 is denied.

2. The Application for Rehearing, Reargument, or Reconsideration filed by Public Service Company of Colorado on January 4, 2011 is granted, in part, and denied, in part, consistent with the discussion above.

3. The Application for Rehearing, Reargument, or Reconsideration filed by Peabody Energy Corporation on January 4, 2011 is denied, consistent with the discussion above.

4. The Application for Rehearing, Reargument, or Reconsideration filed jointly by the Colorado Mining Association and the Associated Governments of Northwest Colorado on January 4, 2011 is denied, consistent with the discussion above.

5. The Application for Rehearing, Reargument, or Reconsideration filed by the Colorado Office of Consumer Counsel on January 4, 2011 is denied, consistent with the discussion above.

6. The Application for Rehearing, Reargument, or Reconsideration filed by Chesapeake Energy Corporation, Noble Energy, Inc., and EnCana Oil & Gas (USA) on January 4, 2011 is granted, in part, and denied, in part, consistent with the discussion above.

7. The Application for Rehearing, Reargument, or Reconsideration filed by Ms. Leslie Glustrom on January 4, 2011 is denied, consistent with the discussion above.

8. The Application for Rehearing, Reargument, or Reconsideration filed by the American Coalition for Clean Coal Electricity on January 4, 2011 is denied, consistent with the discussion above.

9. 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.

10. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
January 26, 2011.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners