BEFORE THE AIR QUALITY CONTROL COMMISSION
STATE OF COLORADO

MOTION TO RECONSIDER, REOPEN THE RECORD OR IN THE ALTERNATIVE, TO NOTICE ADJUDICATORY HEARINGS OF THE CITY OF COLORADO SPRINGS AND COLORADO SPRINGS UTILITIES, PLATTE RIVER POWER AUTHORITY, PUBLIC SERVICE COMPANY OF COLORADO d/b/a XCEL ENERGY, AND TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

IN THE MATTER OF ADOPTING A NEW REGULATION NUMBER 23 AND MAKING CHANGES IN REGULATION 3 AND THE REGIONAL HAZE STATE IMPLEMENTATION PLAN


The Utilities respectfully request the Air Quality Control Commission (“AQCC”) re-open the record and reconsider its November 20, 2020 preliminary decision to partially adopt the alternate proposal of National Parks Conservation Association and Sierra Club (“Alternate Proposal”). Upon reconsideration, the Air Pollution Control Division’s (“Division”) revised proposal should be adopted.²

The AQCC’s decision to mandate involuntary closures as part of the Regional Haze rulemaking is unprecedented.³ It exceeds the AQCC’s authority to mandate controls and violates Utilities’ due process and property rights. For these reasons alone, the AQCC should reconsider. But if the AQCC decides to proceed with final adoption of its preliminary decision, the AQCC must at a minimum afford due process by holding future adjudicatory hearings for each individual source that would be subject to an involuntary closure, prior to final AQCC action.

Summary

Ahead of this rulemaking, each Utility voluntarily announced plans to permanently retire their coal-fired power generation sources well before the end of each unit’s remaining useful life. The closure decisions were based on careful analysis of a number of factors, including the need to

¹ Although PSCo does not have any units directly affected by this decision (because Hayden Units 1 and 2 will be addressed in the Phase II proceeding), PSCo joins this motion as a party to this proceeding and because of the importance of the issues at hand.

² The Utilities ask that the AQCC adopt the Division’s revised proposal as of November 19, 2020.

³ By “unprecedented” the Utilities literally mean with no precedent. Contrary to assertions made by the Alternate Proposal proponents, the Utilities have been unable to identify a single example where a facility has been forced to shut down solely to meet Regional Haze requirements, as described further below.
maintain reliable service at affordable costs. Additionally, each of the Utilities is developing comprehensive plans to transition to renewable energy resources in support of the state’s greenhouse gas goals and clean energy objectives.

Resource planning efforts that dramatically increase renewable resources are already underway. Colorado Springs Utilities’ and Platte River’s municipal decision-making boards completed their extensive resource planning update processes, culminating in the adoptions of their respective comprehensive energy resource plans on June 26, 2020 (Colorado Springs Utilities) and on October 29, 2020 (Platte River). Tri-State’s Electric Resource Plan was submitted to the Colorado Public Utilities Commission (“PUC”) on December 1, 2020. PSCo’s plan will be submitted to the PUC in March 2021.

The Air Pollution Control Division (“Division”) proposed Regulation No. 23 and revisions to the state’s Regional Haze State Implementation Plan (“RH SIP”) that incorporated the announced retirement dates, consistent with the Utilities’ comprehensive resource plans. The Division’s proposal would make the voluntary retirement dates enforceable. These closures were incorporated into the proposal only because the utilities volunteered the retirement dates. Had the Utilities thought these voluntary retirement dates would be subject to change by the AQCC, they may not have offered them for inclusion under the Regional Haze program or for inclusion in the SIP. The Regional Haze program and state law do not allow the state to force an owner/operator to permanently shut down its operations. Despite incomplete discussions and misrepresentations in the Alternate Proposal, action requiring involuntary closures is unprecedented.

The AQCC’s November 20, 2020 preliminary action, if finalized, would accelerate source closures. During the hearing, the Utilities explained how the impacts of forced early closures were not adequately assessed and identified deficiencies in the analysis supporting the Alternate Proposal, which will not be repeated here. Suffice it to say, the AQCC’s preliminary decision is problematic in many ways— including for its legal flaws and significant adverse policy impacts.

**Legal Defects**

1. **The AQCC acted outside of its authority by requiring owner/operators to retire their sources by dates that were involuntary and that were neither supported by factual or technical information nor justified for air quality purposes.**

No statute authorizes the AQCC to impose involuntary source closures. The Utilities’ Rebuttal Statements and accompanying Exhibit 001, as well as the Division’s Rebuttal Statement, addressed the lack of legal authority and absence of source-specific technical support for the

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4 Because these retirements shortened the useful life of each of the units, the Utilities voluntarily agreed to include those retirement dates in the state’s plan as the input for the cost of controls analysis factor in determining reasonable progress in achieving visibility goals. This was done pursuant to federal regulations in the Regional Haze Rule, 40 C.F.R. § 51.308, and EPA guidance.
AQCC’s preliminary decision. To be clear, state-ordered closure is an unprecedented action in the context of the Regional Haze program.

The Utilities urge the Commission to reopen the record to hear additional comments from the Division and parties on the unprecedented nature of compelling earlier source closures through Regional Haze. There was incomplete and inadequate information and discussion on that key topic leading up to and during the hearing.

For example, information regarding the closures of the TransAlta Centralia facility in Washington and the Boardman facility in Oregon was critically incomplete. Centralia’s shutdown in Washington’s RH SIP was pursuant to an agreement reached by the source and the state in March 2011 to shut down the Centralia coal-fired units in 2020 and 2025. After the agreement was reached, in April 2011, the governor signed a bill amending the state’s greenhouse gas emission performance standards for coal-fired plants. See Wash. Rev. Code § 80.80.040(3)(c). The State incorporated the agreed upon shutdown dates in the state’s RH SIP, which EPA later approved.

Likewise, Boardman’s closure in Oregon’s RH SIP was based on a decision by the source. In July 2009, the state agency conducted a Regional Haze Best Available Control Technology (“BART”) analysis and determined the installation of expensive emission control technology, including selective catalytic reduction (“SCR”), was required. In 2010, the source announced it was willing to retire in order to avoid having to install expensive controls (e.g., SCR). The state applied the announced voluntary unit closure in the Regional Haze four-factor analysis to shorten the remaining useful life of SCR, which made SCR not cost effective. In approving the Oregon RH SIP, EPA noted that the Boardman owner submitted comments supporting EPA approval of the revised BART determination for Boardman with the source’s chosen closure date of December 31, 2020. (Thus, the source in Oregon did not oppose the closure date; in our case, the sources oppose the Alternate Proposal’s closure date.) EPA further noted: “As [the Oregon state agency,
ODEQ explained, closure of the plant is not, by itself, considered BART. Rather, the closure date establishes the remaining useful life of the plant which is used to determine the cost effectiveness of the various control technologies. Additionally, EPA stated that ODEQ had considered an earlier closure date for Boardman, but did not adopt it “because ODEQ has no authority to require a facility to shut down by a certain date under the BART Rule absent a commitment by the source to do so.”

The Centralia and Boardman examples do not support the AQCC’s preliminary action – just the opposite. Additionally, in both the Centralia and Boardman cases, the closure dates were after the end of the Regional Haze planning period that the SIP addressed (i.e., the first planning period, ending in 2018).

The Alternate Proposal muddies the water by alleging that the Division could have mandated earlier closures but instead decided to accept the Utilities’ chosen dates. This misconstrues the role of closures in the Regional Haze analysis. The Division is obligated to evaluate potential control technologies over the useful life of the unit (or the life of the control technology, if shorter). Therefore, if a unit will operate for 20 more years, the Division evaluates the costs of potential control technology against that 20-year span. If a unit will only operate for nine years because it will voluntarily close early, the cost of the control technology will be evaluated for that nine-year interval, which typically results in the control being too expensive and thus not required. The Utilities’ voluntary decisions must be enforceable to be used in this evaluation, but never was voluntary closure proposed or contemplated as a “control.” The Boardman example is consistent with this – the source’s decision to close was factored into shorten the remaining useful life of the unit, and was not considered a “control.” As EPA noted, the state had no independent authority under the Regional Haze program to order a closure.

Lastly, in the draft final rule materials posted online along with the AQCC’s December 2020 meeting materials, the Statement of Basis and Purpose (“SOBP”) to Regulation No. 23 lists statutory citations that purportedly authorize the AQCC’s decision; however, as described by the Utilities, the statutes do not authorize the AQCC to mandate early involuntary closures. Additionally, we noted oversights in the materials, such as statements suggesting the 2028 closure date was announced by the sources (which is inaccurate) and a part of the Division’s analysis (also inaccurate).

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11 Id.

12 Id. at 39,003.

13 There are other legal issues that also warrant further examination and were incompletely addressed in the November proceeding. For example, in the absence of data indicating a source’s contribution to visibility impairment (i.e., emissions preventing progress on the visibility glidepaths), is it “reasonable” under the Regional Haze rules to order that source to shut down (if shut down were otherwise a legal option)? The present proceeding and unprecedented decision did not have the benefit of the full updated Regional Haze modeling analysis to inform any “reasonable progress” decisions of such magnitude.
2. **The AQCC’s action could result in an arbitrary and unreasonable taking of property rights.**

   Forced early closure causes each Utility to lose at least one year, if not more, of operational life for their units. Each year of operations has substantial economic value. Forced closure confiscates this economic value and strips the units’ owners of the productive use of their property. This kind of regulation – destroying economic value and productive use of private property – constitutes a taking under the federal and Colorado constitutions.\(^{14}\)

   The Colorado Air Pollution Prevention and Control Act, 25-7-117(1)(a), C.R.S., expressly contemplates that an air emission control regulation could result in an arbitrary and unreasonable taking, depriving a source owner/operator of its property rights, and would therefore be subject to revision. The AQCC’s preliminary decision requiring involuntary early source closures goes far beyond an emission control regulation; it forcibly closes operational units that represent, collectively, hundreds of millions of dollars in economic value. This would inflict an arbitrary and unreasonable taking of the Utilities’ rights and property interests in the useful life of those units.

3. **The AQCC overstepped by making decisions about energy resources (costs/rates, reliability and transmission/distribution feasibility) which are clearly outside the expertise and jurisdiction of the Division and AQCC.**

   The AQCC’s action encroaches on and undermines the authority of the PUC and local utility boards. By introducing involuntary closure dates, the Alternate Proposal required the AQCC to make source-specific, utility-specific findings and determinations as to whether earlier retirement dates for each individual source are feasible and the impacts and implications of the earlier dates. The generalizations and assumptions (such as assuming the Utilities will be able to figure it out) fail basic due process requirements.

   A closure decision requires unit-specific determinations on issues such as:

   - Feasibility of 2028, as it relates to electric reliability, costs, transmission and distribution resources.\(^{15}\)
   - Energy costs and impacts on customer rates. (Costs are most certainly passed on to ratepayers.)
   - Availability of transmission and distribution resources.

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\(^{14}\) *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (“When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”); *Animas Valley Sand and Gravel, Inc. v. Board of Cty. Comm. of La Plata*, 38 P.3d 59 (Colo. 2001) (evaluating regulatory takings under both the U.S. and the Colorado constitution).

\(^{15}\) As the November 20, 2020 rebuttal testimony of Doug Lempke (Tri-State) established, the studies associated with the Alternate Proposal did not address reliability and transmission costs, but used generalities and assumptions instead. In fact, the reports specifically state that transmission costs were not considered.
• Availability of reliable and resilient replacement energy resources and demand modeling.
• Availability of market forward power purchases to supplement renewable energy generation and energy storage deficits.  

The AQCC has no statutory authority to make decisions and findings on energy resource planning, nor may it act outside of its, or the Division’s, technical expertise. Only the Utilities, the PUC and local utility boards have the expertise and authority for this kind of planning in Colorado.

4. The AQCC’s action will violate the Utilities’ due process rights. Adjudicatory hearings must be held to make individual source-specific decisions.

As explained above, the AQCC lacks authority to mandate involuntary closures. But even if it had the authority, such source-specific decisions may only be made through adjudicatory hearings that afford adequate procedures to consider facts and evidence specific to each individual source.

State law, AQCC regulations and case law require an adjudicatory hearing to afford due process to the source owner/operator when the rights or obligations of a particular source are determined. An adjudicatory proceeding entails additional procedural safeguards and specific fact finding, using trial-like procedures (e.g., discovery, protective orders) that are not involved in a rulemaking. “In general, agency proceedings that primarily seek to or in effect determine policies or standards of general applicability are deemed rule-making proceedings.” By contrast, “[a]gency proceedings which affect a specific party and resolve particular issues of disputed fact

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16 Even if energy resource planning were within the province of the AQCC, the burden is on the Alternate Proposal to establish these facts – not make assumptions. And, if the AQCC decides to adopt the Alternate Proposal’s mandatory early closure dates, then it must do so in an adjudicatory proceeding.

17 See C.R.S. §§ 24-4-102, 105 (setting forth procedures to assure that all persons entitled to an adjudicatory hearing are accorded due process); AQCC Procedural Rules, 5 CCR 1001-1:III.B., VI.; e.g., HCA-HealthONE LLC v. Colorado Dep’t of Labor & Employment, Div. of Labor, 474 P.3d 162, 174 (Colo. App. 2020).

18 C.R.S. § 24-4-105; AQCC Procedural Rules, 5 CCR 1001-1:VI.

by applying previously determined rules or policies to the circumstances of the case are deemed
adjudicatory proceedings. 20

The AQCC’s preliminary action (if finalized) will determine the rights of specific
individual entities – the four Utilities. It will apply to only a few sources specifically listed in the
rule (while there are thousands of stationary air emission sources in Colorado). The decision
involves application of the EPA Regional Haze Rule’s four factors 21 to specific facts about each
of the affected sources. 22 Despite the glib perspective in the Alternate Proposal, the closure date
of a source is not a “one size fits all” decision. The decision necessitates findings as to source-
specific costs and feasibility, such as transmission, replacement power, reliability and rate impacts
that are fundamental to electric resource planning. These are directly implicated by the Alternate
Proposal and must be determined for each particular source. 23

In proceedings when there has been a voluntary agreement or settlement involving the
source owner/operator, it also inherently entailed a source waiver of their right to an adjudicatory
hearing as to unit-specific requirements. The Utilities are not waiving their due process rights here.

20 Douglas Cnty. Bd. of Comm’rs, 829 P.2d at 1307 (quoting Mountain States Telephone & Telegraph Co., 816 P.2d at
284); AQCC Procedural Rules, 5 CCR 1001-1:III.B. (an adjudicatory proceeding determines the “rights and
obligations of individual persons or sources”).
21 40 C.F.R. § 51.308; 42 U.S.C § 7491(g)(1).
22 The adoption of individualized requirements in Regulation No. 23 will also directly impact the sources’ air permits.
During Title V Operating Permit renewal processes, any “applicable requirements” including those in state
regulations, are placed in the source’s Title V Operating Permit. 5 CCR 1001-5:3C.III; 40 C.F.R. §§ 70.6(a);
70.7(a)(1)(iv). A source owner/operator has a right to seek an adjudicatory hearing to challenge terms and conditions
in a permit (in accordance with C.R.S. § 25-7-114.5(8)), which ability is limited if such permit conditions are drawn
directly from a regulation adopted in a rulemaking proceeding instead of an adjudicatory proceeding. The proceeding
in which the source-specific regulation is adopted, therefore, must include adjudicatory procedures to safeguard the
owner/operator’s due process and property rights.
23 The AQCC has a duty to fully understand and analyze the economic impacts of its actions. C.R.S. § 24-4-101.5
(recognizing the significant impacts agency decisions can have on businesses and the owner/operator’s due process
rights, and the responsibility of agencies to analyze the economic impact of their actions); C.R.S. § 25-7-109(1)(b)
(requiring the AQCC to fully evaluate economic and other impacts of any emission control regulation – which
evaluation is even more important for a regulation that goes far beyond an emission control requirement, such as a
compelled source shutdown regulation, an inherently more extreme regulation); C.R.S. § 25-7-110.5(4)(a) (requiring
an economic impact analysis (“EIA”) for any proposal). Here, the AQCC has not met its obligation to evaluate
particularized impacts of an involuntary 2028 closure requirement on each source and Utility. The Alternate
Proposal’s EIA was flawed and did not include “all in” costs. The rulemaking procedures did not afford adequate
examination of source- and utility-specific economic impacts. The AQCC’s failure to adequately evaluate impacts of
the Alternate Proposal further deprives the Utilities of their due process and property rights.
Major Policy Concerns

The AQCC’s preliminary decision raises major policy concerns that would have significant impacts for years to come:

A. The AQCC lacks any experience or expertise in evaluating an electric utility’s resource plans that are painstakingly developed to ensure affordability and reliability while also making the transition to a clean energy future. Neither does the AQCC have the experience or the expertise to evaluate things like whether sufficient transmission will exist to enable a faster transition to clean energy resources.

B. Another type of agency has the responsibility – and the specific authority – to weigh those factors in approving utilities’ future resource plans, including transmission constraints, affordability, and reliability. That is the job of the PUC and local utility boards, not the AQCC. The PUC and local utilities boards routinely deal in those complex decisions. The AQCC clearly stepped outside of its bounds.

C. The AQCC’s preliminary decision would send a clear signal of the possibility of revisiting the closure dates again in the future, unreasonably creating uncertainty for utilities that must ensure the lights stay on, and complicating resource planning. This imposes intolerable risk on the Utilities, which are also obligated to provide reliable electricity at reasonable rates.

D. Making the AQCC’s preliminary decision final interferes with the process intended by H.B. 19-1261 for reducing statewide emissions by removing the incentive for utilities to voluntarily submit a Clean Energy Plan; it would render meaningless the so-called “safe harbor” provision in state law.24

E. By unilaterally accelerating the dates for source closures, the AQCC would shorten the time for affected communities, the state, and utilities to lay the foundation for just transitions while utilities progress to a clean energy future. The socio-economic impacts to local communities have not been documented and considered. Utilities that file Clean Energy Plans with the PUC that include accelerated retirement of existing generating resources must explain their plans for worker and community transition assistance.25 That statutory requirement highlights the careful analysis and consideration utilities must make based on their proposed resource plans and planned retirement dates.

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24 C.R.S. § 25-7-105(1)(e)(VIII)(C), providing that if CDPHE determines a utility’s Clean Energy Plan will achieve at least an eighty percent reduction in greenhouse gas emissions, the AQCC shall not mandate that the utility reduce greenhouse gas emissions more than is required under the Clean Energy Plan or impose any direct, non-administrative costs on the utility’s emissions that remain after the reductions are achieved and the Division verifies the Clean Energy Plan will achieve at least a seventy-five percent reduction in emissions (the so-called safe harbor).

The Utilities are gravely concerned with the AQCC’s preliminary decision and the impacts it will have even beyond this proceeding. The Utilities are committed to transitioning to clean energy resources and doing their part to improve visibility at national parks and wilderness areas and to reduce emissions to achieve the state goals.

We urge commissioners to each reconsider their preliminary action, to reopen the record, and to adopt the revised proposal the Division submitted at the start of the AQCC’s hearing. In the alternative, if the AQCC intends to finalize the preliminary action, the Utilities urge the AQCC to issue notices for adjudicatory hearings for each unit that would be subject to forced early closure.

Respectfully submitted this 11th day of December, 2020.

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MOTION TO RECONSIDER, TO REOPEN THE RECORD, OR FOR ADJUDICATORY HEARINGS
REG. NO. 3 AND REG. NO. 23 RULEMAKING
REGIONAL HAZE STATE IMPLEMENTATION PLAN

CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of December, 2020, the foregoing
MOTION TO RECONSIDER, REOPEN THE RECORD OR IN THE ALTERNATIVE, TO
NOTICE ADJUDICATORY HEARINGS OF THE CITY OF COLORADO SPRINGS AND
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