

FOR BOARD ACTION

Agenda Item # 5.

Meeting Date:

5/30/06

SUBJECT:

Air Permit Settlement Agreement

PREPARED BY:

Joe Hensel, Director of Field Services

ITEM DESCRIPTION:

A major amendment of the Silver Lake Plant Air Permit that allowed the construction of the RPU/Mayo steam system was approved by the Minnesota Pollution Control Agency (MPCA) on June 27, 2003. Following permit issuance the Minnesota Center for Environmental Advocacy (MCEA) filed a petition for review to the U.S. Environmental Protection Agency (EPA) Environmental Appeals Board (EAB) on the grounds that the Clean Air Act requires the installation of Best Available Control Technology (BACT) for a PSD project involving a major modification. The EAB denied the petition for review and affirmed the issuance of the permit on August 3, 2004. MCEA then filed an appeal with the U.S. Court of Appeals for the Eight Circuit.

RPU Management and attorneys from Van Ness Feldman (VNF) have been negotiating with MCEA to resolve the legal challenge of the permit. During negotiations a settlement agreement was drafted and revised numerous times to deal with issues and concerns of both parties. MCEA's attorney recently informed VNF that the settlement agreement had finally been agreed to by their client. Follow-up review by MPCA, Minnesota AG office, DOJ and U.S. EPA was also satisfactorily concluded.

The settlement agreement essentially obligates RPU to proceed with the emission control project for Silver Lake Plant Unit 4. The cost for emission control is in the range of \$29-\$34 million based on a refined cost estimate prepared by Utility Engineering. This proposed project was reviewed by the Board at the July 2005 meeting and the Board directed staff to proceed with design, engineering and permitting. An update will be provided to the Board on the project, including costs and schedule.

It is our understanding that execution of the settlement agreement will be a definitive action and no further administrative or legal appeals of permit issuance would be available. The final version of the agreement has been review by the City Attorney. A copy of the agreement is provided for Board review.

UTILITY BOARD ACTION REQUESTED:

It is recommended that the Board approve the settlement agreement and request Common Council approval, and settlement agreement execution by the Mayor and City Clerk.


General Manager


Date

SETTLEMENT AGREEMENT

WHEREAS, on January 12, 2005, Minnesota Center for Environmental Advocacy (“MCEA”) filed a petition for judicial review of the August 3, 2004 order of the Environmental Appeals Board of the United States Environmental Protection Agency (“EPA”), which denied MCEA’s petition for review of the June 27, 2003 order of the Minnesota Pollution Control Agency (“MPCA”) approving issuance of Air Emissions Permit Number 10900011-003 to the Rochester Public Utilities (“RPU”);

WHEREAS, MCEA raises issues regarding whether MPCA and EPA erred by approving issuance of Air Emissions Permit Number 10900011-003 – a Prevention of Significant Deterioration pre-construction permit – without requiring application of the best available control technology (“BACT”) to control emissions of sulfur dioxide (SO₂), nitrogen oxides (NO_x), and particulate matter at Unit 4 of RPU’s Silver Lake Plant;

WHEREAS, MPCA, EPA, and RPU respond that Air Emissions Permit Number 10900011-003 was issued in compliance with all applicable statutes and regulations;

WHEREAS, MCEA’s petition for judicial review was filed in the United States Court of Appeals for the Eighth Circuit and assigned docket number 05-1113 (“this Action”);

WHEREAS, RPU has been committed to a proactive approach to ensure that the Silver Lake Plant not only provides low cost power to the City of Rochester but also protects public health and the environment;

WHEREAS, consistent with RPU’s proactive approach on public health and the environment, RPU commissioned Utility Engineering Corporation to conduct a study of RPU’s options for installing additional air emissions control technologies at the Silver Lake Plant Units 3 & 4;

WHEREAS, the results of the Utility Engineering Corporation study were presented at a public meeting on March 29, 2005, and RPU staff presented a recommendation to the RPU Board of Directors at the July 25, 2005 Board meeting;

WHEREAS, based on the RPU staff recommendations, the RPU Board of Directors resolved, at its July 25, 2005 meeting, to direct staff to proceed with the design, engineering and permitting of emissions control projects that will achieve reductions of emissions of SO₂, NO_x, and mercury from Silver Lake Plant Unit 4;

WHEREAS, installation and operation of such emissions control projects will result in substantial reductions in air emissions rates at Silver Lake Plant Unit 4;

WHEREAS, EPA in February 2005 issued a report, entitled "Control of Mercury Emissions from Coal Fired Electric Utility Boilers: An Update" and this report confirmed that flue gas desulfurization (FGD) technology identified for installation at Silver Lake Plant Unit 4 (spray drayer absorber and fabric filter baghouse) is capable of achieving a very high (over 95%) level of co-benefit mercury reduction for bituminous coal-fired boilers;

WHEREAS, RPU has a strong economic incentive to optimize NO_x reductions achieved by the NO_x emission reduction system required to be installed on Silver Lake Plant Unit 4 under this Settlement Agreement (the "Agreement") based on the NO_x allowance deficit expected for that unit and the projected market price of NO_x allowances;

WHEREAS, RPU also has a strong economic incentive to optimize the SO₂ and mercury reductions achieved by the installation of the pollution control equipment required to be installed on Silver Lake Plant Unit 4 under this Agreement to minimize the use of SO₂ and mercury allowances;

WHEREAS, at RPU's request, Utility Engineering contacted Cormetech and Haldor Topsoe regarding potential catalysts for a Selective Catalytic Reduction ("SCR") systems for the reduction of NO_x emissions from Unit 4 of the Silver Lake Plant;

WHEREAS, Utility Engineering concluded that operation of a conventional SCR is not feasible at Silver Lake Plant Unit 4 due to the flue gas temperature and expected conversion of sulfur trioxide to ammonium sulfate and ammonium bisulfates;

WHEREAS, MCEA, MPCA, and RPU ("the Settling Parties") wish to resolve this matter;

WHEREAS, it is in the interest of the public, the Settling Parties, and judicial economy, to resolve this Action without further litigation;

WHEREAS, the Settling Parties consider this Settlement Agreement to be a just, fair, adequate and equitable resolution of this Action;

NOW, THEREFORE, the Settling Parties by and through their respective counsel, agree as follows:

I. INSTALLATION AND OPERATION OF CONTROL TECHNOLOGIES

1. RPU shall promptly take steps to obtain all approvals and authorizations needed to install and operate on Silver Lake Plant Unit 4:
 - a. A spray dryer absorber and fabric filter that is designed to achieve at least an 85% reduction in boiler exit emissions of SO₂ (the "FGD system"); and
 - b. A NO_x emission reduction system that is designed to achieve at least a 0.15 lbs/MMBtu emission rate for NO_x (the "NO_x emission reductions system"). For purposes of this Agreement, a NO_x emission reduction system may consist of a selective catalytic reduction system or, in the alternative, any combination of combustion and post-combustion technology or techniques for lowering NO_x

emissions from Silver Lake Plant Unit 4, so long as the NO_x controls are designed to achieve the 0.15 lbs/MMBtu emission rate for NO_x.

2. By no later than July 1, 2010, subject to RPU receiving all needed approvals and authorizations, RPU shall install and commence operation of the FGD system on Silver Lake Plant Unit 4, consistent with technological limitations, manufacturer's specifications, and good engineering and maintenance practices.

3. By no later than July 1, 2009, subject to RPU receiving all needed approvals and authorizations, RPU shall install and commence operation of the NO_x emission reductions system on Silver Lake Plant Unit 4, consistent with technological limitations, manufacturer's specifications, and good engineering and maintenance practices.

4. RPU shall operate the FGD system and NO_x emission reductions system at Silver Lake Plant Unit 4 to achieve substantial co-benefit reductions of mercury, which could exceed 80 to 90%.

5. RPU shall provide MCEA with an annual report of the SO₂, NO_x, and mercury emissions from Silver Lake Plant Unit 4 for calendar years 2010 through 2014. In the case of SO₂ and NO_x, each annual report shall provide a quantification of the total emissions from Silver Lake Plant Unit 4 that are required to be measured and reported for that calendar year under the Clean Air Interstate Rule (CAIR), as published in *70 Fed. Reg. 25,162* (promulgating Final Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Revisions to Acid Rain Program; Revisions to the NO_x SIP Call) (May 12, 2005). In the case of mercury, each annual report shall provide a quantification of the total emissions from Silver Lake Plant Unit 4 that are required to be measured and reported for that calendar year under the Clean Air Mercury Rule (CAMR), as published in *70 Fed. Reg. 28,606* (promulgating final rule establishing "Standards

of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units”) (May 18, 2005). RPU shall submit each annual report to MCEA within 30 business days of the applicable submittal deadline for reporting SO₂, NO_x, and mercury emissions from Silver Lake Plant Unit 4, as set forth in the final rules for CAIR and CAMR for that particular calendar year.

6. RPU shall take all necessary steps to ensure that it receives all needed approvals and authorizations to comply with the dates established in Paragraphs 2 to 4 of Article I.

7. RPU shall take all necessary steps to ensure that the FGD and NO_x emissions reduction systems are incorporated into the Title V Operating Permit for the Silver Lake Plant through a written notice or an application for a minor permit amendment in accordance with Minnesota Rule 7007.1150. RPU shall submit such notice or application for permit amendment within 30 business days from the execution of the contract for fabricating the FGD or the NO_x emissions reduction system to be installed and operated pursuant to Paragraph 1 of Article I.

8. MCEA shall not oppose the efforts of RPU to obtain all necessary approvals and authorizations for the installation and operation of the FGD and NO_x emissions reduction systems required under Paragraph 1, including those changes to the Title V Operating Permit for the Silver Lake Plant that are specified under Paragraph 7. Nothing in this Paragraph shall be construed to limit MCEA’s right to oppose any approvals or authorizations other than those necessary to comply with Paragraphs 1 and 7 of this Agreement.

II. ENFORCEMENT OF THIS SETTLEMENT AGREEMENT

9. The Settling Parties agree that RPU’s commitments set forth in Article I of this agreement are enforceable obligations for which MCEA may seek specific performance pursuant to the terms of this Agreement.

10. If RPU fails to perform the technology control commitments set forth in Paragraph 1 of Article I pursuant to the dates established in Paragraphs 2 and 3 of Article I and MCEA prevails in a judicial action for specific performance, RPU shall be required to apply any savings realized through such delayed compliance to a supplemental environmental project selected by MCEA. RPU shall not be subject to a judicial action for specific performance if the delayed compliance resulted from a failure to receive a necessary approval or authorization in cases where RPU has taken all necessary steps to obtain such an approval or authorization, or if the delayed compliance resulted from other circumstances that the court deems to be beyond the control of RPU.

III. USE OF THIS SETTLEMENT AGREEMENT

11. This Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of any Settling Party.

12. This Agreement constitutes the entire agreement of the Settling Parties concerning the terms and obligations discussed herein and subject to this Action. No other agreement shall govern the rights and/or obligations of the Settling Parties with respect to the matters resolved by this Agreement, except in accordance with the terms stated herein.

IV. TERMINATION

13. The Settling Parties agree jointly to move the Court to dismiss MCEA's Petition for Review with prejudice, but without costs within fourteen (14) days after the effective date of this Agreement.

V. RELEASE

14. This Agreement constitutes a complete and final settlement of the claims asserted by MCEA in this Action.

VI. MUTUAL DRAFTING

15. The Settling Parties agree that this Agreement was jointly drafted by them.

Accordingly, the Settling Parties agree that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Settlement Agreement.

VII. EFFECTIVE DATE

16. The Settling Parties understand that RPU, as a division of the City of Rochester, conducts its operations subject to the oversight and authority of the City of Rochester Common Council pursuant to the City of Rochester Home Rule Charter.

17. This Settlement Agreement shall become effective upon the date it has been signed by the Settling Parties and upon approval of the City of Rochester Public Utility Board and Common Council.

VIII. NOTICE AND CORRESPONDENCE

18. Any notice, including correspondence, required to be made with respect to this Agreement, shall be in writing, effective upon receipt, and sent to the following persons, or to such other person or persons as the Settling Parties may subsequently identify to the other parties:

For Minnesota Center for Environmental Advocacy:

Beth Goodpaster
Minnesota Center for Environmental Advocacy
26 East Exchange Street, Suite 206
Saint Paul, MN 55101

For Minnesota Pollution Control Agency:

Kathleen Winters
Assistant Attorney General
State of Minnesota
445 Minnesota Street, Suite 900
Saint Paul, MN 55101-2127

For Rochester Public Utilities:

Sam Kalen

Stephen Fotis

VAN NESS FELDMAN, P.C.

1050 Thomas Jefferson Street, N.W., Seventh Floor

Washington, D.C. 20007

IX. COUNTERPARTS

19. This Settlement Agreement may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original agreement, and all of which shall constitute one agreement. The execution of one counterpart by any Settling Party shall have the same force and effect as if that Settling Party had signed all counterparts.

X. REPRESENTATIVE AUTHORITY

20. Each undersigned representative of the Parties to this Settlement Agreement certifies that he or she is fully authorized by the Settling Party he or she represents to enter into and execute the terms and conditions of the Settlement Agreement, and to legally bind such Settling Party to this Settlement Agreement. By the signatures below, the parties consent to entry of this Settlement Agreement.

Dated: 5/24/06

By: [Signature]

Charles N. Nauen #121216
William A Gengler #210626
David J. Zoll #0330681
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
Facsimile: (612) 339-0981
**ATTORNEY FOR PETITIONER
MINNESOTA CENTER FOR
ENVIRONMENTAL ADVOCACY**

Dated: 5/24/06

By: [Signature]

Kathleen L. Winters
ASSISTANT ATTORNEY GENERAL
445 Minnesota Street, Suite 900
Saint Paul, MN 55101-2127
Telephone: (651) 297-8756
**ATTORNEY FOR RESPONDENT
MINNESOTA POLLUTION CONTROL
AGENCY**

Dated: 5/23/06

By: [Signature]

Sam Kalen
Stephen Fotis
Kyle Danish
VAN NESS FELDMAN, P.C.
1050 Thomas Jefferson Street, N.W.
Seventh Floor
Washington, D.C. 20007
Telephone: (202) 298-1826
Facsimile: (202) 338-2416
**ATTORNEY FOR INTERVENOR
ROCHESTER PUBLIC UTILITIES**

Dated: _____

ROCHESTER PUBLIC UTILITIES

General Manager

CITY OF ROCHESTER

Mayor

Attest:

City Clerk

Reviewed By:

City Attorney



RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, that the Common Council of the said City is requested to approve an air permit settlement agreement with the Minnesota Center for Environmental Advocacy (MCEA), and that the Common Council authorize the Mayor and the City Clerk to execute the agreement for

Air Permit Settlement Agreement
Silver Lake Plant Unit 4
(Air Emissions Permit Number 10900011-003)

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 30th day of May, 2006.

President

Secretary