



received a telephone call from legal counsel for Rocky Mountain, Mr. Daniel Solander, and senior executive Mr. Ted Weston offering to respond to CAPAI's outstanding discovery Request No. 6(b) if CAPAI promised that it would immediately withdraw its Motion to Compel, prior to receiving and reviewing the discovery response. The undersigned declined to withdraw the Motion until CAPAI received the discovery response and had a reasonable amount of time to ensure its compliance with the request. The undersigned indicated that, so long as the Company fully responded to the discovery in good faith, that the Motion to Compel would be withdrawn.

At this point, Messrs. Solander and Weston stated that that the employee responsible for responding to the subject discovery request at issue (No. 6(b)), Ms. Joelle Steward, the same employee who prepared the same type of information on behalf of PacifiCorp in Washington in response to identical discovery requests of a different low-income advocate (the actual data obtained in Washington is not the same as will be produced in Idaho and is of no value in this case), was already working on a response and it was either completed or very close to it. After listening to CAPAI's point of view from the undersigned, Messrs. Solander and Weston then altered their initial proposal and agreed, unconditionally, that the Company would promptly submit the discovery response to CAPAI. In return, the undersigned promised a prompt review of that discovery response and, if warranted, a prompt withdrawal of the Motion to Compel.

The next day, August 2, 2013, the undersigned received another telephone call from Mr. Solander who informed the undersigned that, "after talking with management," the Company was renegeing on its agreement and would not respond to the discovery unless CAPAI not only withdrew the Motion to Compel, but actually executed the Settlement Stipulation as well. Requiring CAPAI to withdraw its Motion and join in the settlement would, of course, result in a complete waiver of CAPAI's full parties' rights and, therefore, constitute a heavy "price" to pay

for an otherwise lawful and legitimate discovery request already completed by the Company. Thus, the Company reneged not only from its agreement of the previous day, but took an even harder line position. Though CAPAI endeavored to reach resolution with Rocky Mountain in this dispute, it finally became apparent to CAPAI that Rocky Mountain, even in May when Mr. Weston had repeatedly promised a response to request No. 6(b), has been deliberately stalling and using a response to the discovery as leverage to compel CAPAI to join in the settlement. This is why the matter now remains in dispute before the Commission and quite late in the process.

In response to this surprising turn of events, the undersigned requested, during the August 2, 2013 telephone call from Mr. Solander, that he put the Company's refusal to respond to the discovery in writing and in the context of CAPAI's pending Motion to Compel. Mr. Solander agreed to do this. Once again, however, the Company reneged on the representation of its legal counsel and, on August 2, 2013, Mr. Solander emailed the undersigned with a Word Document attachment setting forth the Company's position with respect to the Motion to Compel. A true and correct copy of Mr. Solander's email and the Word document attachment are included as Exhibits "A" and "B" to the Second Affidavit of Brad M. Purdy filed contemporaneously herewith.<sup>1</sup>

Rather than putting the Company's response in the context of the Motion to Compel as promised (i.e., a Response to Motion to Compel in pleading format) the Word attachment is an extremely unusual, confusing and self-contradictory document that fails to satisfy Procedural Rules regarding motions and responses thereto. The essence of the Response, however, leaves no room for doubt as to the Company's final and unqualified position regarding the Motion to

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<sup>1</sup> Exhibit B purports to be "confidential" but, for the reasons clearly articulated herein, is not confidential nor privileged under any conceivable legal or factual basis.

Compel and, therefore, it qualifies as such. The email from Mr. Solander to the undersigned and the attached Word document are attached to the Second Affidavit of Brad M. Purdy as Exhibits "A" and "B" in their entirety and original form.

### **III. ARGUMENT**

#### **A. No Legal Basis for Refusal to Comply With Discovery.**

Rocky Mountain still has not, to this day, even offered a legal basis for its refusal to respond to CAPAI's discovery, the same discovery that PacifiCorp provided to another entity similar to CAPAI in its pending general rate case in Washington and the same type of information provided by AVISTA to CAPAI in that utility's 2012 general rate case.

As noted in CAPAI's first brief supporting its Motion, Rocky Mountain gave numerous assurances in the month leading up to the execution and filing of the settlement stipulation in this proceeding that it would fully respond to CAPAI's discovery requests. It never did so and, as the target deadline for filing the stipulation approached, Rocky Mountain applied increasing pressure on CAPAI to join in the settlement, but always offering excuses as to why request No. 6(b) had not yet, but would be, responded to. In fact, just as it did in early June, Rocky Mountain continues to use a meaningless offer of an undefined "collaborative effort" and/or "Technical Workshop" (discussed below) as a means of forcing CAPAI to waive all parties' rights and sign the settlement.

The Company's behavior since receipt of CAPAI's Motion to Compel seems designed to waste even more time and resources as the August 16, 2013 deadline for Staff and Intervenor testimony rapidly approaches. CAPAI has repeatedly informed Rocky Mountain that it needs the information contained in request No. 6(b) early enough prior to the filing deadline to determine whether the testimony is warranted and, if so, how the information produced by the Company

might affect that testimony. In spite of this, or because of it, Rocky Mountain continues to ignore CAPAI's discovery without any stated legal basis and has now created a situation requiring either expedited treatment of CAPAI's Motion or a complete rescheduling of this case.

**B. Rocky Mountain Response is Not a Confidential Document-CAPAI is Not Seeking "Cost of Service" Studies.**

As stated above, Rocky Mountain titled its informal Response (Exhibit B) to CAPAI's Motion to Compel as "confidential" and a "term sheet resolving motion to compel and Idaho rate plan." This characterization and claim of confidentiality are a transparent attempt to avoid revelation of Rocky Mountain's tactics regarding the Motion to Compel. Exhibit B, in no way, relates to settlement negotiations nor is there any legal basis for the contention that it is protected from disclosure.

Regarding Rocky Mountain's apparent reliance on Rule 408 of the Idaho Rules of Evidence, this illustrates a profound misunderstanding of Idaho's evidentiary rules. Rule 408 pertains to settlement or mediation processes and has no bearing on discovery requests that seek information not otherwise privileged. In fact, the rule ends with the sentence: "[c]ompromise negotiations encompass mediation."

CAPAI's discovery requests and Rocky Mountain's refusals to respond to them were not discussed during the two settlement conferences conducted in this case and do not involve any confidential information or party position statement that was presented during those conferences. The discovery requests seeks low-income consumption data and the impacts of theoretical alternative rate designs on low-income customers' monthly bills. There is absolutely nothing about the nature of such information as to protect any dispute over whether the Company will turn the information over to qualify it as "confidential." The information contained in Exhibit B

to the Second Affidavit of Brad M. Purdy is, therefore, simply not protected by law from disclosure on the basis of confidentiality.

Exhibit B contains statements that are bewildering and simply wrong. For example, the document begins with the following statement: " The Company's position is that we have no duty to perform a study on the cost of service information." CAPAI's discovery request No. 6 was already included in its initial brief in support of its Motion to Compel. Nowhere in that request, or any other request, does CAPAI request a "cost of service study." To the best of the undersigned's knowledge, CAPAI has never requested a cost of service study from PacifiCorp.

Exhibit B further states:

- The Company is, however, willing to spend Company personnel time and resources to complete the data request response provided we obtain some value in return.

- Accordingly, the Company proposes:

(1) that in return for the Company completing the cost of service study requested in Data Request 6(b) and providing the results to CAPAI as well as making appropriate Company personnel available to discuss the study and results, CAPAI agrees to withdraw its Motion to Compel and further agrees not to oppose the rate plan stipulation; and

(2) the Company will agree to hold a collaborative process to further discuss and review the cost of service issues that have been raised by CAPAI in this proceeding, and to discuss what action the Company should take or propose for Commission approval as a result of the cost of service studies.

Again, no such request for "cost of service" studies or information has ever been made by CAPAI. The undersigned has had numerous discussions with Messrs. Solander and Weston and confidently states that they are well aware that CAPAI seeks low-income consumption data and a better understanding of how varying rate designs affect the poor. It is simply not believable that these two educated and experienced gentlemen misunderstood CAPAI's request. Rocky

Mountain's tactic, sadly, is pure gamesmanship and an attempt to create some type of buffer protecting the Company to do what it admitted on August 1, 2013, that it had already done, which is perform algebraic equations based on a low-income proxy group and calculate the impact to low-income customer monthly bills. This has nothing to do with cost of service.

**C. Position Statement Response Violates Numerous Commission Procedural Rules.**

As is immediately apparent, Rocky Mountain's Response set forth in Exhibit B, fails to comply with the Commission's Rules of Procedure, IDAPA 31.01.01.000 in terms of its form. Specifically, the Response violates Procedural Rule 62(b) in that it fails to contain the case caption and title of the document. It also fails to contain the required personal information of the attorney as required by Rule 62(c). Furthermore, the undersigned has inquired as to whether the Response was formally filed with the Commission as was CAPAI's Motion and related pleadings. Rocky Mountain's Response has not been filed with the Commission in violation of Procedural Rule 61 nor has it, to the best of the undersigned's knowledge, been served on any other party to this proceeding, in violation of Procedural Rule 63.

**D. Notwithstanding its Procedural Infirmities, Rocky Mountain Response set forth in Exhibit B Constitutes a *De Facto* Response to CAPAI's Motion to Compel.**

Among the numerous tactics employed by Rocky Mountain in this case is its refusal to treat the matter as a rate case even though, as fully articulated in CAPAI's initial brief, it is so titled and characterized frequently throughout the Rocky Mountain's pleadings that initiated this case. Nonetheless, Rocky Mountain has repeatedly contended to CAPAI that this proceeding is "not a rate case" even though it has resulted in a proposed general rate increase. Rocky Mountain has obviously slipped a rate case in through the door under the transparent disguise as an informal "investigation" into various rate case procedural options. Oddly, the settlement

stipulation is completely devoid of any list of "alternatives" to a general rate case procedure. It is simply a settlement of a general rate case processed under a misleading title and in violation of law. Again, what came out the end of the settlement pipe was a general rate increase. Labels are meaningless when they contradict substance and, contrary to the apparent beliefs of some, procedure does matter and this entire proceeding is a compendium of procedural violations.

Rocky Mountain has also treated CAPAI and its discovery request with the same misguided indifference and lack of accurate characterization. The Company treats the discovery issue and resulting Motion to Compel as though this case were informal and being processed under modified procedure, which it is not. Rocky Mountain has fully responded to numerous discovery requests from the other parties but has treated CAPAI's discovery and the Motion to Compel through informal telephone calls and emails rather than through a respectful adherence to the Commission's Rules of Procedure.

Rocky Mountain has been urged by CAPAI to fully respond to the discovery since May yet defiantly refused. CAPAI waited to file its Motion to Compel as long as possible to grant the Company time to provide the requested information. Even now, Rocky Mountain refuses to take the matter seriously and refuses to file a proper response to that Motion and, instead, continues to file informal position statements or "proposals" to respond to the discovery, referring vaguely to "collaboration," only if CAPAI waives all of its rights as a party. It is simply unconscionable to condone this type of behavior and allow it to continue. Regarding the position statement set forth in Exhibit B, this too is indicative of Rocky Mountain's treatment of CAPAI's Motion to Compel in a dismissive fashion. Regardless of the informal formatting of Rocky Mountain's position statement, there is no doubt that it is the Company's final position on the Motion to Compel and that any further attempt by CAPAI to resolve this dispute is pointless. The

Company has made it clear that it has no intention of filing a formal pleading with the Commission in response to the Motion. Thus, the position statement in Exhibit B should be treated as Rocky Mountain's Response to the Motion.

**E. Rocky Mountain's Proposed "Collaborative Effort/Technical Workshop" Pointless.**

Incidentally, Rocky Mountain, through Messrs. Solander and Weston, has referred to their solution to the discovery dispute as both a "Collaborative Effort" and a "Technical Workshop." The Company has never offered a single detail or piece of information regarding what either of these terms means in a practical sense so it matters not what they call it.

There has never been any definition provided by Rocky Mountain as to what this collaborative effort would entail, when it would occur, how long it would last, what the outcome of it would be, or any other single relevant fact. Because the information sought by CAPAI has already been completed or is near completion and because an offer of a vague collaboration is completely unnecessary considering that the information sought has been provided with ease by the Company's Washington division and in Idaho by Avista, and because CAPAI does not possess the information sought or the ability to calculate the impact on low-income customer bills of varying rate designs, there is simply nothing to collaborate on. CAPAI can bring nothing to the table in terms of "collaboration." Thus, it would be redundant, and a needless waste of CAPAI's very limited time and resources to agree to this arrangement and would require CAPAI to waive any and all rights to differ from the other parties' proposed settlement.

**F. Rocky Mountain Actions Have Created Situation Requiring Extraordinary Relief.**

The record is already clear that Rocky Mountain gave CAPAI false assurances throughout the end of April and month of May that it would respond to all of CAPAI's discovery, including request 6(b). It wasn't until June that Rocky Mountain first declined to provide the

information and claimed that it was too busy with rate cases in other jurisdictions. CAPAI endeavored in good faith to reach resolution on this matter for nearly 3 months and when it became apparent that the Company was simply stalling and using its response to discovery as a leverage tool to force CAPAI into settlement, the Motion to Compel was filed. The Company, well aware of the August 16, 2013 testimony deadline, has done nothing more than to waste more of CAPAI's time and resources and burn precious time as the testimony deadline approaches.

As stated in the Second Affidavit, the undersigned has been informed that the Commissioners will be unavailable for oral argument the entire week leading up to the testimony prefile deadline (August 12-16, 2013). This requires CAPAI to seek expedited relief pursuant to Procedural Rule 256. Although CAPAI believes that the Company's position statement should be treated for what it is, a response to CAPAI's Motion to Compel, it is imperative that CAPAI receive the response with enough advance time to make use of it. Rule 256 allows for expedited relief in less than fourteen (14) days time under appropriate circumstances. As stated, it is CAPAI's position that Rocky Mountain has responded to the Motion to Compel and this Reply completes the motion process such that Rule 256 expedited treatment is not required. In that regard, CAPAI seeks oral argument on its Motion to Compel at any time this week, August 6-9, 2013.

In the event, however, that the Commission determines that Rocky Mountain still has fourteen (14) days from the date CAPAI filed its Motion to Compel to file a proper response (i.e., August 13, 2013) and the Commission issues an immediate Order requiring Rocky Mountain to immediately provide the already-completed response to request 6(b), then CAPAI would have sufficient time to process the response and incorporate it into testimony, or possibly

choose not to file testimony. Regardless, because the Commission is unavailable to hear oral argument and presumably to rule on the Motion to Compel at any point during the week of August 12-16, this presents a dilemma created by Rocky Mountain and that requires some type of adjustment of the existing schedule.

Should the Commission choose to not hear oral argument this week, and if it is in fact unable to rule on the Motion next week, then CAPAI proposes that all dates and deadlines already established in this case be delayed by a period of time no less than three (3) weeks. A three week delay would result in the following schedule:

Friday, September 6, 2013	Deadline for Staff and Intervenor Testimony & Exhibits
Friday, September 20, 2013	Deadline for Company Rebuttal Testimony & Exhibits
Wednesday, October 2, 2013	Technical Hearing
Tuesday, October 22, 2013	Deadline for Post-Hearing Briefs

CAPAI submits that the foregoing three week extension is the minimum time necessary for several reasons. Rocky Mountain's posture and behavior with respect to this dispute has been erratic, unpredictable, misleading and the Company has already reneged on its agreements to provide the requested information. Thus, it is reasonable for CAPAI to assume that, even if the Commission grants CAPAI's Motion to Compel, any response the Company gives might well be factually and legally insufficient requiring even more motions, briefing and a waste of time and resources for all involved.

#### **IV. PRAYER FOR RELIEF**

1. CAPAI requests that the Commission schedule the Motion to Compel for oral argument to take place sometime prior to Friday, August 9, 2013 and issue a ruling on said Motion with a complete, good faith response due from the Company to CAPAI no later than Tuesday, August 13, 2013.

2. In the event that the Commission does not grant Request No. 1, then CAPAI requests that the Commission extend the current schedule in this case by three (3) weeks as set forth above.

3. That the Commission issue an award of sanctions as well as costs, fees and expenses incurred as a result of the Company's actions, pursuant to Rule 37(a)(4) of the Idaho Rules of Civil Procedure and Title 61, Chapter 7 of the Idaho Code against the Company in a fair and reasonable amount to be determined by way of a separate filing following the issuance of the Commission's Order.

DATED, this 6<sup>th</sup> day of August, 2013.

  
Brad M. Purdy

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 6th day of August, 2013, I served a copy of the foregoing document on the following by electronic mail and U.S. Postage, first class.

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