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IDAHO PUBLIC  
UTILITIES COMMISSION

September 9, 2013

Jean Jewell  
Secretary, Idaho Public Utilities Commission  
472 W. Washington St.  
Boise, ID 83702

Re: Case PAC-E-13-04 - Community Action Partnership Association of Idaho's Response to Rocky Mountain's Motion to Strike.

Dear Ms. Jewell:

Enclosed are an original and seven (7) copies of Community Action Partnership Association of Idaho's Response to Rocky Mountain's Motion to Strike in the above-captioned proceeding.

Given the late nature of the Motion to Strike and the scheduling of the hearing this Wednesday, CAPAI's response will only be sent via email.

Sincerely,

  
Brad M. Purdy



In the event, however, that the Commission, after evaluating CAPAI's objection as to the untimely nature of the filing, still wishes to proceed to oral argument, and because Rocky Mountain already fully briefed its motion, CAPAI also includes in this response all of the grounds for its objections to the motion, including those not related to timeliness.

## **II. ARGUMENT**

CAPAI asserts that the Company's motion is completely without merit in fact or law. Rather, it is an attempt to impugn the credibility of CAPAI's only witness to this case and to make arguments more appropriately addressed through cross-examination at hearing. Further, the motion is a transparent attempt to conceal from the evidentiary record certain critical facts proving the contentions made by CAPAI that the abbreviated ratemaking procedure in this case provides fertile ground for gamesmanship.

### **A. Motion is Untimely**

As stated, the motion was filed on September 3, 2013. It was not served on CAPAI by email until the end of the business day and CAPAI was not even aware it had been filed until September 4, 2013. Rocky Mountain does not cite a single Commission procedural rule, any Idaho Court Rules, or any legal doctrine in support of its motion. Furthermore, Rocky Mountain fails to specifically seek expedited treatment of its motion and to provide the necessary information supporting such a request pursuant to Rule 256(2)(a).

Regardless, Rule 256 of the Commission's procedural rules contains a very detailed explanation of the procedure by which motions are to be handled. Rule 256(2) states that a motion requesting substantive relief on fewer than fourteen (14) days notice will not be acted upon on fewer than fourteen (14) days notice unless it states a) the facts supporting its request to act on shorter notice; and b) that all parties have been properly notified of the motion. Subpart 3

of Rule 256 states that motions seeking procedural relief must satisfy the requirements regarding substantive motions (1) facts supporting the request and 2) proper notice is made to the parties). Finally, subpart 4 of Rule 256 states the normal procedure providing parties responding to a motion fourteen (14) days to respond to the motion.

1. Rocky Mountain's motion was filed late in the day only 8 days prior to hearing. The motion seeks to strike critical and substantial portions of the testimony of CAPAI's only witness to this proceeding, Ms. Christina Zamora, based either on unstated grounds, or on grounds that are substantive in nature. Thus, the motion is primarily substantive in nature and, technically, pursuant to Rule 256(4), CAPAI should be given until September 17, 2013, fourteen days from the date of filing, to respond. The only reason that CAPAI files this response now is because it was informed by Staff legal counsel that the Commission intends or "anticipates" hearing oral argument on Rocky Mountain's motion on Wednesday, prior to the expiration of the 14 day response period. Just the same, CAPAI does not waive its right to a full fourteen day response period.

2. Rocky Mountain also failed to specifically seek expedited relief on substantive and procedural issues in its own motion leaving it to CAPAI to point out the untimely nature of the motion. As stated in Rule 256(a), the Company was required to state the "facts supporting its request to act on shorter notice." Rocky Mountain doesn't even specifically request shorter notice. All that Rocky Mountain seeks in the prayer for relief at the conclusion of its Motion to Strike is: "[t]hat the Commission (1) grant Rocky Mountain Power's motion to strike; (2) disregard any statements containing legal conclusions and (3) disregard the withdrawn legal brief on which Ms. Zamora's testimony relies." *Mtn. at p. 4.*

Much of the Motion to Strike is based on the fact that CAPAI took the reasonable step of withdrawing its Motion to Compel in this case after the Company had filed its response to a discovery request made approximately four months earlier. Without this withdrawal, the majority of the grounds for Rocky Mountain's motion, stated or unstated, would not exist.

Regarding the withdrawal of its Motion to Compel, CAPAI did not believe that Rocky Mountain's discovery response was complete nor made in good faith, but did not wish to hold the technical hearing up so withdrew its Motion to Compel on August 14, 2013, more than two weeks prior to Rocky Mountain's Motion to Strike was filed. The Motion to Strike is an opportunistic and unlawful tactic and was made long after it should have been filed and far too late to be considered prior to hearing. The Company offers no explanation for this needless and costly delay and the consequences of that delay should fall squarely on the shoulders of Rocky Mountain, not CAPAI.

**B. CAPAI's Withdrawal of Motion to Compel was Conditional**

Although it certainly did not anticipate the Company's exploitation of its willingness to withdraw its Motion to Compel, to free up the Commissioners' schedules, and to allow the hearing to proceed as scheduled, CAPAI withdrew its Motion to Compel, but did so with conditions and qualifications so that the record could not be altered as the Company is attempting to now do. CAPAI's withdrawal states:

Although it is CAPAI's position that Rocky Mountain's response indicates a lack of comprehension of the information sought and contains statements that are erroneous or confusing, CAPAI accepts the response for the purpose of its pending Motion to Compel and, consequently, withdraws that Motion.

Though the Motion to Compel is deemed withdrawn, CAPAI waives no rights associated with the discovery dispute in general, including whether there might be financial consequences to Rocky Mountain based on its refusal to timely respond to the discovery in good faith.

*Emphasis Added.*

Again, although there was no way that CAPAI could have known that Rocky Mountain would use CAPAI's reasonable withdrawal against it, CAPAI's unease with the Company's prior tactics caused it to incorporate conditional and general language regarding the non-waiver of its rights.

**C. No Stated Legal Basis for Motion**

The Company puts forth five somewhat redundant areas of argument as to why substantial portions of Ms. Zamora's testimony and information contained in pleadings including the briefs and affidavits supporting CAPAI's Motion to Compel should be stricken from the record. Those five areas include: 1) that Ms. Zamora admits she isn't an attorney and that "it is difficult" for Rocky Mountain to understand the point of Ms. Zamora's testimony; 2) that CAPAI's financial limitations as described by Ms. Zamora are irrelevant to this case and that it is cheaper and in CAPAI's best interests to employ an abbreviated and still undetermined ratemaking technique; 3) that low-income "studies" performed by Avista and referred to by Ms. Zamora do "not obligate Rocky Mountain to perform such studies; 4) Again, that Ms. Zamora admits she has limited or no legal knowledge or expertise yet her testimony "relies heavily on a legal brief" that was incorporated by reference in Ms. Zamora's testimony to provide the Commission with greater context in this proceeding, and; 5) because Ms. Zamora's testimony should largely be stricken from the record, so too should the exhibit attached to her testimony that contains CAPAI's brief in support of its Motion to Compel.

CAPAI will address each of these five areas offered in support of Rocky Mountain's motion in the order they were presented.

1. Rocky Mountain complains that "it is difficult" to understand the purpose of Ms. Zamora's testimony and that she apparently offers "legal opinions for which [she] has no expertise." *Mtn.*, p. 2.

Rocky Mountain's first point is itself difficult to understand. If the Company cannot understand the "purpose" of Ms. Zamora's testimony then its attorney can simply ask her to explain it during cross-examination. Were a witness's testimony stricken every time one party to a case didn't "understand the point" of that testimony, the Commission would rarely hear any testimony. Regarding Ms. Zamora's disclaimer of legal expertise, this is an very common statement for non-attorney witnesses to ensure that there is no doubt that they do not purport to possess the general knowledge of lawyers. Rocky Mountain failed to point to a single specific word of Ms. Zamora's testimony that should be stricken based on this ground making it impossible, not difficult, to respond to. Rather, the Company cites to large swaths of testimony, much of which isn't even relevant to Rocky Mountain's objections. Regardless, Ms. Zamora simply offers her understanding of the Commission's legal process but does not claim to be an attorney. If Rocky Mountain's legal counsel wishes to explore that fact, then that person is free to do so during cross-examination.

Again, the Company's motion seems to be an opportunistic act designed to keep critical evidence from the record including the Company's numerous promises to provide CAPAI with information critical to a determination of whether to join the settlement, only to be followed by a retraction of those promises followed by more promises and more retractions. The Company would, presumably, also like to keep from the record the heavy-handed tactic by which it refused to respond discovery unless and until CAPAI agreed to sign the settlement stipulation first,

before even seeing the discovery response, and thereby force CAPAI to waive its rights to challenge all or a portion of the settlement.

2. Rocky Mountain's claims that Ms. Zamora's testimony regarding CAPAI's financial limitations should be stricken because the procedure adopted by the other parties to this case is cheaper<sup>1</sup> is argumentative and simply begs the point. It is Ms. Zamora's clear position that the procedure employed did not result in less costs to CAPAI. Furthermore, the Company's rebuttal witness, Mr. Ted Weston, discusses this point at length in his testimony and that is where it should be made, not in a prehearing motion. Allowing Mr. Weston's testimony while striking Ms. Zamora's would be patently discriminatory.

Ms. Zamora's testimony regarding CAPAI's limited financial means is very relevant to and lies at the heart of CAPAI's objection to the procedure adopted in this case which, by the way, is the primary "point" of her testimony that Rocky Mountain claims to not understand. Ms. Zamora testifies that the discovery dispute alone in this case cost CAPAI more money than it can afford to squander and that the settlement process has been very costly. This is a direct rebuttal to the Company's claims, by way of the testimony of Mr. Weston among other means, that the procedure adopted is cheaper. As with the other grounds for its motion, Rocky Mountain fails to demonstrate that Ms. Zamora's testimony is somehow unfair to the Company or prevents them from attempting to challenge it through cross-examination.

CAPAI respectfully submits that when a disputed issue can be scrutinized through cross-examination, then this is a far preferable method than blindly striking chunks of a witness's testimony which, in turn, can then place other remaining testimony out of context.

3. Rocky Mountain's objection to Ms. Zamora's discussion of the fact that Avista willingly and with useful end result "has no bearing" on this case misses the point of Ms.

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<sup>1</sup> *Mtn. at p. 2.*

Zamora's discussion of the Avista discovery process which is to demonstrate that the information sought was readily available to the utility, and provided useful information to all concerned. The Avista rate case was processed under normal general rate case procedure. This case, as Ms. Zamora notes, resulted in very different results including a lengthy and costly battle to obtain legitimate information from Rocky Mountain. The promises made during settlement of good faith cooperation with respect to providing CAPAI the information it stated it desired to determine the impact of alternative rate designs and a determination of whether the existing rate design was fair to low-income customers evaporated once the Company obtained the party signatures it felt it needed on the settlement stipulation.

Rocky Mountain's motion contradicts itself by simply rearguing the issues contained in the Motion to Compel contending that the Company is not obligated to provide information to CAPAI that it ultimately provided. CAPAI has pointed out in the testimony of Ms. Zamora that a better understanding of the impact that alternative residential rate designs has on low-income customers is critical to making good the ratemaking decision process, with the end result being consideration of all ratepayers. That was the primary point of Ms. Zamora's referral to the information willingly provided by Avista, but stubbornly by Rocky Mountain.

4. This section of the motion repeats arguments already made regarding Ms. Zamora's lack of legal expertise and experience with Commission legal procedure and her reference to CAPAI's Motion to Compel. As noted earlier, it is Rocky Mountain that reargues the issues presented in the Motion to Compel in its Motion to Strike. Not only that, but Company witness Mr. Ted Weston and Staff witness Mr. Randy Lobb also discuss the merits of the Motion to Compel in their rebuttal testimonies. Thus, the Company has placed the matter back on the table for discussion.

It is not CAPAI's intent, nor the point of Ms. Zamora's testimony, to argue a motion that is no longer live. What the Company fails to acknowledge is that the briefs and affidavits supporting CAPAI's Motion to Compel contain facts that are relevant to the issues that remain in this case, specifically, the negative consequences and effects of a ratemaking procedure that is *ad hoc* and the rules of which seem to change as the case progresses. Certainly, the Company's position on CAPAI's discovery changed and that is at the core of the Motion to Compel and supporting pleadings. As already noted, that is the point of Ms. Zamora's mention of the discovery dispute; that it resulted in as much or more time and expense to CAPAI than a formal general rate case procedure would have. The parties have presented their ratemaking "alternatives" to the Commission not by way of description, blueprint, or even an explanation, but simply by way of a negotiated general rate increase settlement agreement. It is the Company that touts the virtues of this process while CAPAI points out its many shortcomings. This is the primary issue being presented to the Commission from CAPAI's perspective.

Regarding any interpretation of Ms. Zamora's testimony that characterizes it as a legal opinion, she has fully conceded that she is not a lawyer and is relatively new to PUC proceedings. This is her first time testifying before the Commission and CAPAI is merely being candid about that fact. This does not, however, render Ms. Zamora's assessment of the fundamental fairness and efficacy, or lack thereof, of the process employed in this case compared to her understanding of the legal process employed under formal general rate case statutes and administrative rules. The Commission is more than capable of recognizing the extent of Ms. Zamora's assessment of legal procedure and giving it the weight it deems it is entitled to. Striking the entirety of Ms. Zamora's testimony, however, is overkill. Much of what the pleadings supporting CAPAI's Motion to Compel discuss and prove are Rocky Mountain's

gamesmanship when it came to negotiations with CAPAI and the process of first agreeing to promptly and informally responding to CAPAI's discovery, then taking a significant step back and conditioning any response on CAPAI's execution of the settlement stipulation, then renewing its promise to respond to the discovery, and back and forth. It is CAPAI's contention that this behavior would not have been as likely to occur under a formal rate case process.

Even Staff has taken advantage of the informal process in this case through the rebuttal testimony of Mr. Randy Lobb who argues that CAPAI did not properly propound its discovery (an argument that Rocky Mountain did not make or join in with) or timely file its motion to compel. Although the discovery had nothing to do with Staff who lacks standing to even challenge it on such grounds, the fact is that the information Rocky Mountain seeks to strike from the record demonstrates the haphazard nature of the discovery process and the fact that the Company misled CAPAI into believing a promise that the Company never intended to keep, then offered to respond to the requested discovery only if CAPAI first waived all of its rights to oppose the settlement and actually sign the stipulation. Even then, Rocky Mountain only offered to conduct a vague "workshop" to consider the discovery request. It is CAPAI's position that this type of behavior would not likely have occurred under a general rate case procedure and that is why proof of the discovery process remains relevant to whether the adopted, expedited procedure is a fair, just and reasonable basis for setting rates.

5. This basis for the Motion to Strike is redundant to several others and CAPAI incorporates responses already made. It is one thing to consider the Motion to Compel withdrawn from the record, but the grounds for that motion remain at the heart of CAPAI's overall objection to the procedure adopted in this case as already explained. The pleadings supporting the Motion to Compel contain factual allegations, and proof of those allegations, that

are still relevant and should not be stricken from the record. In the alternative, CAPAI could be allowed to cross-examine Mr. Weston using as exhibits the emails and other documents proving many of Ms. Zamora's contentions regarding the higher price that the alternative procedure has carried for CAPAI. Once again, the purpose of maintaining this information in the evidentiary record is to demonstrate the consequences of the alternative procedure employed, not to reargue the Motion to Compel discovery responses.

CAPAI submits that the Company is attempting to surgically separate each portion of Ms. Zamora's testimony and then attack it out of context to the whole. Ms. Zamora's testimony brings numerous aspects of the procedure adopted in this case to the Commission's attention in order for the Commission to determine whether any purported benefits really exist and even if they do, whether they offset the costs. Thus, Ms. Zamora's testimony regarding the loose nature of this case's procedure, the fact that it led to inappropriate behavior in keeping critical information from CAPAI until several days prior to the prefile deadline, the fact that this cost CAPAI money it could not afford to spend, the fact that the process was exclusionary and gave preference to certain parties but not others, must all be viewed in their entirety for the Commission to have a sense of whether a procedure that might have precedential effect is desirable or ill-advised. Striking Ms. Zamora's testimony as suggested by Rocky Mountain will keep an already opaque process in the dark rather than viewed by the Commission and ratepayers in the light of day.

### **III. SUMMARY**

The Company's Motion to Strike should be rejected as untimely on the grounds that 1) the basis for the motion, the withdrawal of CAPAI's Motion to Compel, occurred more than two weeks earlier, and; 2) the Company's motion was filed roughly a week prior to hearing, depriving

CAPAI of the 14 day response time all parties are entitled to and too late to be acted upon other than through extraordinary expedited fashion, a request the Company never even made and the requirements of which it did not even satisfy. The Company has simply not satisfied the required showing of facts and circumstances that justify such a needlessly late-filed motion that, if granted, would have severe consequences for CAPAI.

Rocky Mountain's motion is discriminatory in that the testimony of Ms. Zamora sought to be stricken from the record is the subject matter of a portion of Company witness Weston's testimony. While Ms. Zamora's testimony might not be popular with the Company, she has adequately stated a case for why the unprecedented and extremely informal procedure adopted in this case is unfair to CAPAI and the interests of the low-income customers it represents and should not be accepted by the Commission.

Finally, though Rocky Mountain places much emphasis on its inability to understand Ms. Zamora's testimony, it is the Company's Motion to Strike that is obtuse. Rather than a statement of applicable legal standards followed by application of those standards to the facts extant in this case, the motion engages in a narrative but vague criticism of what seems to represent more frustration than factual and legal substance. For each of the bases listed by the Company in support of the motion, there is little to no analysis of how any particular statement by Ms. Zamora violates any principle of law. Rather, at the end of each section of the brief, there is a large chunk of her testimony cited and that the Company summarily dismisses as somehow being inadmissible under legal standards not even stated.

The motion, therefore, is more argumentative in nature and the Company's objections would be better suited to cross-examination during hearing than the far more drastic act of cutting out large swaths of the testimony of CAPAI's only witness. This latter technique has a

tendency to interrupt the flow of testimony and put what remains of that testimony out of context. The Commission is not a jury of laypersons and is extremely competent at giving all evidence submitted during hearing the weight it deserves and assigning the probative value that the Commission deems in its experience and expertise to be appropriate.

Based on the foregoing, CAPAI respectfully submits that Rocky Mountain's Motion to Strike be denied in its entirety.

DATED, this 9th day of September, 2013.



Brad M. Purdy

## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 9th day of September, 2013, I served a copy of the foregoing document on the following by electronic mail.

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