Brad M. Purdy
Attorney at Law
2019 N. 17th St.
Boise, Idaho 83702
(208) 384-1299
Cell: (208) 484-9980
Fax: (208) 384-8511

HAND DELIVERED

December 4, 2011

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

Re: Case No. IPC-E-08-11: CAPAI Response to Staff's Motion to Strike CAPAI's Surrebuttal Testimony

Dear Ms. Jewell:

Included herewith is the original and seven (7) copies of Community Action Partnership Association of Idaho's Response to Staff's Motion to Strike CAPAI's Surrebuttal Testimony [of Teri Ottens]. Per an email I sent to you yesterday (Sunday, Dec 4, 2011), I have previously served this Response on all parties, and you, via electronic mail. Thank you for your acceptance of this filing.

Brad M. Purdy

Brad M. Purdy
Attorney at Law
Bar No. 3472
2019 N. 17th St.
Boise, ID. 83702
(208) 384-1299 (Land)
(208) 384-8511 (Fax)
bmpurdy@hotmail.com
Attorney for Petitioner
Community Action Partnership
Association of Idaho

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF IDAHO POWER COMPANY FOR AUTHORITY TO INCREASE ITS RATES AND CHARGES FOR ELECTRIC SERVICE TO ITS CUSTOMERS IN THE STATE OF IDAHO	CASE NO. IPC-E-11-08 COMMUNITY ACTION PARTNERSHIP ASSOCIATION OF IDAHO'S REPLY TO STAFF'S MOTION TO STRIKE

COMES NOW, the Community Action Partnership Association of Idaho (CAPAI), by and through its attorney of record, Brad M. Purdy, and in response to Staff's Motion to Strike the Surrebuttal Testimony of CAPAI (Ms. Teri Ottens), states as follows:

In support of its motion to strike Ms. Ottens' surrebuttal, Staff argues three points, all of which fail as a matter of law, equity and practicality. Staff's three points are: 1) scheduling Order No. 32316 "did not allow for surrebuttal;" 2) CAPAI did not file a motion accompanying the surrebuttal of Teri Ottens, and; 3) the timing of Ms. Ottens' surrebuttal "works a hardship on Staff's preparation for this case."

1. **Surrebuttal Testimony Is a Matter of Equity, Not Procedural Technicality.**

Though it is not written into the Commission's procedural rules, the use of "surrebuttal" has been allowed by the Commission for many years where circumstances justify it. A brief

search of the Commission's "Orders Archive" alone using the word "surrebuttal" reveals numerous Orders spanning many years, including those in the recent past, and involving a myriad of scenarios in which surrebuttal testimony was allowed by parties. Obviously, the Commission is well aware of this long-standing practice and can take Official Notice of relevant Orders, rules, and policies.[1]

CAPAI points out the foregoing simply because the nature of Staff's Motion to Strike seems to suggest that there is something innately unique or improper about the filing of surrebuttal testimony. The Commission is obviously best suited to determine under what circumstances surrebuttal should be allowed. CAPAI respectfully submits that the single most important criterion for allowing surrebuttal should be that equity justifies it. Though scheduling Order No. 32316 does not specifically "allow" surrebuttal as Staff notes, neither does it disallow it. It is often the nature of surrebuttal that something unexpected or unusual occurred that justifies allowing a party to respond to the positions taken by another. After all, the term "surrebuttal" is based on the word "surrebutter" and is simply a plaintiff's response to a defendant's position.[2] As discussed below, CAPAI is effectively in the position of a plaintiff in this respect regarding low-income weatherization funding.

In no manner is CAPAI attempting to "circumvent the Commission's [scheduling] Order" as claimed by Staff. *Motion To Strike, p. 3.* CAPAI is simply responding to the fact that Staff waited until rebuttal to present its direct case on the issue of LIWA funding. This alone justifies the filing of surrebuttal by CAPAI. The absence of a specific provision in Order No. 32316 pertaining to surrebuttal should not, in itself, have any bearing on the issue.

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[1] Rule 263, IDAPA 31.01.01.263.
[2] Black's Law Dictionary.

2. **Filing Surrebuttal Without a Motion Has No Practical Significance In This Case.**

Staff's second basis for its Motion is that CAPAI filed Ms. Ottens' surrebuttal without a formal motion. It is true that no motion was filed with Ms. Ottens' surrebuttal. CAPAI neither ignored this technicality nor presumed that it had an unfettered right to file surrebuttal. The practical effect of this fact, however, makes utterly no difference in this case. Ms. Ottens' Surrebuttal was filed Monday, November 28, 2011, one week prior to hearing. Under the hurried circumstances of this case, CAPAI reasoned that by the time it was able to file Ms. Ottens' surrebuttal, a motion was not feasible and would actually reduce the amount of time that Staff and other parties had to review the surrebuttal and prepare for hearing accordingly.

Procedural Rule 256 requires that other parties have two weeks to respond to a motion unless the moving party demonstrates that it has taken certain procedural steps and that appropriate circumstances exist. In no event, however, shall the Commission grant a motion in less than two working days after receipt by the Commission Secretary and notice to other parties absent "extraordinary circumstances."[3] Even if CAPAI had filed a motion seeking authority to file surrebuttal to Ms. Donohue's rebuttal, the earliest that the Commission could theoretically have ruled on the motion pursuant to Rule 256, absent a showing of "extraordinary circumstances" would have been Thursday, December 1, 2011, three days after the date Ms. Ottens' surrebuttal was actually filed.[4] This would have given Staff and others virtually no time to review and respond to the surrebuttal testimony until the end of the week. Staff most certainly have moved to strike on that basis alone. The most expedient, logical, and forthright procedure for CAPAI to put forth Ms. Ottens' surrebuttal, therefore, was to file it as soon as it was

[3] IDAPA 31.01.01.256(2)(b).
[4] Though Ms. Donohue's rebuttal was filed November 16, 2011, it was not available to CAPAI, as a practical matter, until November 17. Two weeks from November 17 is December 1, 2011.

prepared, giving Staff and other parties the greatest amount of time to review, respond, and object if they desired. A motion filed accompanying the testimony would have changed nothing.

Finally, CAPAI notes that, for its part, Staff waited until late Friday to file its Motion although Staff received the surrebuttal by email on Monday, November 28. Staff's Motion does not even seek expedited relief pursuant to the explicit requirements of Rule 256(2)(b). Even if Staff had sought expedited treatment of its Motion, it failed to provide CAPAI and other parties two working days to respond as required by Rule 256(2)(b) and the Motion should be rejected on that basis.

At the very least, Staff could have notified CAPAI's counsel of its objection to the testimony at any time after the surrebuttal was filed. CAPAI did not become aware of Staff's Motion until Saturday, while preparing for Monday's hearing. A simple phone call from Staff's counsel would have allowed CAPAI to submit a written response prior to day's end on Friday.

CAPAI believes, however, that this issue is far too important to hinge on a procedural technicality. As it is, the Commission will presumably have to wait until Monday morning on the day of hearing to review this Response and make an expedited ruling. Again, technicalities should not govern, but if they do, then Staff should be required to accept the consequences of its own arguments and the very procedural rules it cites.

3. CAPAI's Surrebuttal Does Not Work an Undue Hardship on Staff.

A. Ms. Donohue's Rebuttal Constitutes Significant Departure From Prior Staff Policy.

Staff's contention that filing surrebuttal one week prior to the hearing in this case "works a hardship on Staff's preparation for this case" paints a misleading picture under the actual facts of this case. First, because CAPAI effectively carries the burden of proof on the issue of LIWA

funding, it should be entitled to have the final say. All that Ms. Ottens' surrebuttal contains is a response to Ms. Donohue's new theories and positions and does not advance anything new on behalf of CAPAI. In fact, the thrust of the surrebuttal is to explain the unfairness that results from using Ms. Donohue's new theories as a basis for delaying much needed relief for Idaho Power's low-income customers. CAPAI's position in this respect is hardly new to Staff. Thus, the "hardship" Staff refers to is that its legal counsel had a week to prepare for cross-examination of the surrebuttal. Because Ms. Ottens was simply responding to Staff's new theories and position, however, the surrebuttal contains nothing new and would require little or no "hardship on Staff's preparation for the case."

Second, Ms. Ottens' surrebuttal creates far less hardship for Staff than Ms. Donohue's rebuttal did for CAPAI. As explained in detail by Ms. Ottens in her surreubttal, the testimony of Ms. Donohue constituted a "departure"[5] from Staff's position on LIWA funding in general and Idaho Power in particular and "raises certain issues and/or makes certain recommendations to the Commission that bear directly on CAPAI's involvement in this case." *Surrebuttal Testimony of Teri Ottens, p. 2, lns 19-21.* Ms. Ottens further noted that "[n]o Staff witness submitted direct testimony addressing the same issues and containing the same recommendations as those addressed and contained in Ms. Donohue's rebuttal." *Id. at lns 21-23.* Ms. Ottens concluded that "[i]n fact, it is fair to say that Staff's direct testimonies simply supported the proposed settlement stipulation in this case to which CAPAI is not a party but did not address the primary issue of concern to CAPAI and its constituents. Thus, CAPAI had no way to anticipate the scope, nature and extent of the positions Staff has now taken through Ms. Donohue's rebuttal and had nothing to rebut as of the rebuttal testimony deadline. CAPAI, therefore, filed no rebuttal." *Id. at pp 2 (lns 23-24) through p.3 (lns 1-4).*

[5] *Surrebuttal of T. Ottens, p. 5, ln 1.*

To describe the many ways in which Ms. Donohue's rebuttal testimony constitutes a departure from historical Staff policy and positions would make this Response too lengthy. The most obvious example though is Ms Donohue's proposal that the Commission completely disregard the principle of "parity" of LIWA funding between Idaho Power, AVISTA and Rocky Mountain. Ms. Donohue's relevant testimony is as follows:

> Q. Do you agree that the Commission should seek to attain parity among utilities as defined by Ms. Ottens?
> A. No. It makes more sense to provide similar funding based on need, not on the basis of total residential utility customers as proposed by Ms. Ottens.

Reb. Test. S. Donohue, p.4, lns 3-7.

Ironically, Ms. Donohue goes on to suggest that the Commission base its LIWA funding ruling in this and future cases on factors such as the number of low income customers [for each utility], the number of homes needing weatherization and poverty rates. *Id. at p. 4, lns 17-19.* As noted in Ms. Ottens' surrebuttal, this is precisely the criteria CAPAI has always proposed reliance on.

Regarding the principle of parity, CAPAI has discussed this concept with Staff for nearly a decade, if not longer, and has always had good reason to believe that parity was an important consideration for Staff as well, and possibly something that the Commission took into consideration, along with other factors. If the Commission truly believes that parity has absolutely no relevance to LIWA funding decisions and should be completely disregarded as recommended by Ms. Donohue, then CAPAI has operated under a misimpression and should be so informed. Regardless, CAPAI fails to understand how this Ms. Donohue's proposal deviates from the status quo.

Where Ms. Donohue's rebuttal clearly does depart from Staff's past theories and positions begins on page 5 of her rebuttal where she expresses "concern" over what she perceives to be "problematic inconsistencies" among Idaho's LIWA programs. *Id., lns. 2-3.* Ms. Donohue goes on for six pages outlining Staff's new vision for everything from determining LIWA funding to evaluating the cost-effectiveness of LIWA programs. Prior to Ms. Donohue's rebuttal, Staff had not gone into the level of detail and analysis that Ms. Donohue does in any of its past cases. In her surrebuttal, Ms. Ottens characterizes Ms. Donohue's efforts evidenced by her rebuttal as "both impressive and commendable" and that Ms. Donohue "has clearly taken Staff's technical level of analysis of LIWA to a new high watermark." *Surr. Test. T. Ottens, p.15.* The gist of Ms. Ottens' surrebuttal is that Ms. Donohue's efforts notwithstanding, it is inappropriate to defer a long overdue WAQC funding increase for Idaho Power into the indefinite future based on new, untested and unapproved theories and positions presented for the first time in rebuttal.

Further, Ms. Donohue places considerable importance on Rocky Mountain's filing in Case No. PAC-E-11-13 in which RMP calls into question the very LIWA program that Staff proposed a significant funding increase for earlier this year in the Company's 2010 general rate case.[6] In addition to casting doubts and critiques on the Community Action Agencies' administration of LIWA programs in general, Ms. Donohue concludes that before Idaho Power's LIWA funding level be increased, there be extensive evaluations and workshops addressing numerous issues including "consistent implementation methodology and cost effectiveness evaluation, identification of non-energy benefits, proper determination of need, and appropriate levels of annual low-income funding." *Id., p. 11, lns 6-10.* Again, Ms. Ottens' surrebuttal simply challenges the appropriateness of using these unproven contentions as a basis in this case to defer a ruling. Thus, the litany of issues and critical tasks that must be addressed before Staff will

[6] Case No. PAC-E-10-07.

support increasing Idaho Power's LIWA funding is substantial and includes matters never even raised by Staff before.

In contrast, Ms. Ottens' surrebuttal does not contain new positions and does not present any type of hardship for Staff. Thus, Staff's Motion to Strike that surrebuttal on the basis that it constitutes a "hardship" for Staff's case preparation is without substance.

B. Staff Presented Its Direct Case Entirely In Rebuttal.

CAPAI could have filed a motion to strike Ms. Donohue's testimony on the basis that it raised, for the first time, issues never raised and took positions never taken by Staff and to do so in rebuttal testimony is patently unfair. CAPAI believes, however, that the Commission's policy is to allow all relevant issues to be fully explored rather than excluding evidence on the basis of technicalities. CAPAI therefore chose to file surrebuttal rather than a motion to strike. Staff characterizes the filing of Ms. Ottens' testimony as an "attempt to obtain special privileges." *Motion To Strike, p.* 3. CAPAI hardly believes itself, and its constituents, fortunate enough to have "special privileges."

Instead of moving to strike Ms. Donohue's testimony, CAPAI chose to file the Surrebuttal of Teri Ottens. Several important facts are relevant to this issue and Staff's motion. First, Ms. Donohue's testimony was filed shortly before the Thanksgiving holiday, at a time when Staff and Rocky Mountain were making formal and informal discovery and "inquiries" of CAPAI and the Community Action Agencies, CAPAI was under considerable pressure to meet deadlines in not only this case, but the Rocky Mountain rate case, the Rocky Mountain LIWA evaluation case and the pending United Water rate case, mid-November is the busiest time of year for CAPAI and its agencies as they are fully engulfed in heating assistance intake, and CAPAI had no control over the simultaneous filing of the four extremely important cases just

mentioned. To say the least, this combination of deadlines, pressures and outside commitments pushed CAPAI beyond its limited resources and means. The surrebuttal testimony of Teri Ottens was prepared, reviewed, and filed as soon as possible under the circumstances. Regardless, for the reasons outlined elsewhere herein, it creates no hardship or prejudice to Staff or anyone else to merely allow CAPAI to respond to Staff's direct case made in rebuttal in order to satisfy CAPAI's burden of proof.

Staff's Motion makes numerous assertions that are untrue or seriously misleading. For example, Staff claims that "[u]ntil CAPAI filed its testimony seeking to increase weatherization funding by $1.5 million, there was no evidence in the record that CAPAI sought to increase funding by that amount." *Motion To Strike, pp. 2-3 [Emphasis added]*. This statement is disturbing for many reasons. Staff and CAPAI have a long-standing relationship based on trust, mutual respect, open communication, and positive resolution of issues, often resulting in collaboration. CAPAI has had many communications over many years with Staff in which CAPAI has emphasized its belief in the principle of parity of LIWA funding between utilities. Furthermore, Staff has long been aware of how CAPAI makes its parity calculations. CAPAI has often argued in cases before this Commission in favor of parity. Ms. Ottens will be present when hearing commences in this case at 9:30 a.m., Monday, December 5, 2011 and will be available to confirm these statements under oath should the Commission desire.

The disturbing aspect of Staff's statement regarding what is "contained in the record" is that Staff is creating a serious misimpression regarding Staff's knowledge of CAPAI's position by using the confidentiality provision regarding settlement negotiations contained in Rule 272 of the Commission's Rules of Procedure as a shield, an unfortunate tactic for Staff to take. Pursuant to public notice, settlement negotiations were conducted in this proceeding well before the direct

prefile deadline for Staff and Intervenors. As the settlement stipulation and testimonies state, CAPAI participated in those negotiations but did not sign the settlement stipulation and does not support the settlement. While it would be grossly inappropriate for CAPAI to violate Rule 272, it is equally inappropriate for Staff to give the Commission a misleading impression of Staff's awareness of CAPAI's position in this case by using Rule 272 as a shield.

Regardless, Ms. Ottens' can also confirm under oath on Monday that CAPAI communicated its position on increasing Idaho Power's WAQC funding, and the basis for that increase outside the course of any settlement negotiations, for many years, including the months leading up to the filing of direct testimony by Staff and Intervenors in this case. Staff has long known that CAPAI seeks relative parity, or fairness, between the funding levels and benefits of the three major electric utilities' LIWA programs. Staff has long been aware of the method by which CAPAI calculates parity, whether it agrees with that method or not, and was able to, if nothing else, put pen to paper to determine what would be required to bring Idaho Power's funding into parity with AVISTA and Rocky Mountain using CAPAI's method. CAPAI has always been extremely up front with Staff, all parties, and certainly the Commission regarding its position on all issues relevant to the poor. Staff's inference that it had no idea what CAPAI would propose prior to the filing of Ms. Ottens' direct testimony is simply not true.

C. CAPAI Did Not "Fail" To Anticipate Or "Explore" Staff's Position Prior to Rebuttal.

Staff's contention that Ms. Ottens' surrebuttal should be stricken because of "CAPAI's failure to explore Staff's potential testimony on LIWA," is equally disingenuous. CAPAI was quite clear as to its positions in this case long before Staff/Intervenor testimony was filed. Though Staff suggests that it had no idea that CAPAI would seek a $1.5 million increase in

WAQC funding, Staff too could have conducted discovery to "explore" Ms. Ottens' "potential" testimony and used that to present Ms. Donohue's testimony on direct rather than rebuttal. Staff did not conduct such discovery and cannot avoid the same consequences of its own logic and the procedural rules it relies upon in its motion.

D. Equity Does Not Justify Striking Ms. Ottens' Surrebuttal.

CAPAI urges that arguments of legal counsel and respective positions of the parties are dwarfed in importance by the need to provide the Commission with the best and most thorough evidence and information possible to assist it in reaching a decision that is fair, just and reasonable. Staff's procedural Motion To Strike notwithstanding, CAPAI believes that the positive relationship it has with Staff members should and will continue in the nature it always has been.

But regarding the issue of WAQC funding, even Idaho Power does not object to CAPAI's proposal to increase WAQC funding by $1.5 million. Ms. Theresa Drake testified in rebuttal on behalf of Idaho Power stating:

> Q. Does Idaho Power object to increasing the funding for WAQC?
> A. No, provided there is the potential for more cost-effective savings.

Reb. Test. T. Drake, p. 4, lns. 21-24.

Ms. Drake concludes:

> Q. In summary, is Idaho Power opposing more funding for WAQC?
> A. Idaho Power is willing to collect customer funds for WAQC to be administered by the CAP agencies at the level the Commission deems appropriate and that customers are willing to support.

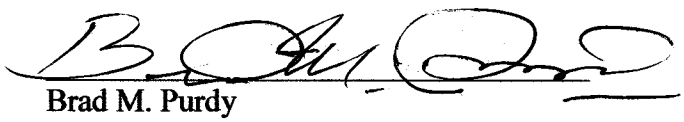
Id. at p. 15, lns. 8-13.

Thus, Staff alone opposes CAPAI's WAQC funding request in this case, waited until rebuttal to state its basis for that opposition, and now seeks to avoid any scrutiny of its delayed

case in chief. The Commission Staff is statutorily mandated to take into consideration the interests of all customer classes. Its procedural tactics should be more forthright and transparent, especially when what is at stake by virtue of Staff's motion and this response are not the sensitivities of individuals or parties, but the interests of Idaho Power's low-income customers and residential customers in general.

CAPAI respectfully submits, in that light, that this issue is too critical to the interests of those low-income and residential customers and the Commission's final ruling should not hinge on technicalities, innuendos and inferences. Staff is not in any manner prejudiced by Ms. Ottens' surrebuttal and its Motion To Strike should be denied.

DATED, this 4th day of December, 2011.



Brad M. Purdy

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 4th day of December, 2011 I served a copy of the foregoing document on the following by electronic mail.

Lisa D. Nordstrom
Donovan E. Walker
Jason B. Williams
Idaho Power Company
1221 W. Idaho St.
Boise, ID 83702
lnordstrom@idahopower.com
dwalker@idahopower.com
jwilliams@idahopower.com

Gregory W. Said
Idaho Power Company
1221 W. Idaho St.
Boise, ID 83702
gsaid@idahopower.com

Donald L. Howell
Idaho Public Utilities Commission
472 W. Washington St.
Boise, ID 83702
Don.howell@puc.idaho.gov
Karl.klein@puclidaho.gov

Eric L. Olsen
201 E. Center
Pocatello, ID 83204-1391
elo@racinlaw.net

Anthony Yankel
29814 Bay Village, OH 44140
tony@yankel.net

Peter J. Richardson
Gregory M. Adams
515 N. 27th St.
Boise, ID 83702
peter@richardsonandoleary.com
greg@richardsonandoleary.com

Don Reading

6070 Hill Rd.
Boise, ID 83703
dreading@mindspring.com

Arthur Perry Bruder
United States Department of Energy
1000 Independence Ave., SW
Washington D.C. 20585
Arthur.bruder@hq.doe.gov

Kurt J. Boehm
36 E. Seventh St., Suite 1510
Cincinnati, OH 45202
kboehm@bkllawfirm.com

Thorvald A. Nelson
Holland & Hart
6380 S. Fiddlers Green Circle
Suite 500
Greenwood Village, CO 80111
tnelson@hollandhart.com

Benjamin J. Otto
Idaho Conservation League
710 N. Sixth St.
Boise, ID 83702
botto@idahoconservation.org

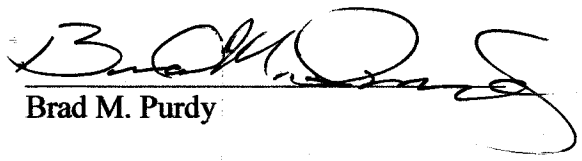
Ken Miller
Snake River Alliance
P.O. Box 1731
Boise, ID 83701
kmiller@snakeriveralliance.org

Nancy Hirsch
NW Energy Coalition
811 1st Ave., Suite 305
Seattle, WA 98104
nancy@nwenergy.org

Dean J. Miller
420 E. Bannock
Boise, ID 83702
joe@mcdevitt-miller.com

Scott Paul, CEO

Hoku Materials, Inc.
One Hoku Way
Pocatello, ID 83204
spaul@hokucorp.com



Brad M. Purdy