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IDAHO PUBLIC
UTILITIES COMMISSION

Established in 1896

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February 9, 2022

VIA EMAIL and U.S. MAIL

Jan Noriyuki, Commission Secretary
IDAHO PUBLIC UTILITIES COMMISSION
P.O. Box 83720
Boise, Idaho 83720-0074
secretary@puc.idaho.gov

**Re: Case No. PAC-E-21-05
In the Matter of Rocky Mountain Power's Application for Approval or Rejection of
the Power Purchase Agreement with Commercial Energy Management, Inc.**

Dear Ms. Noriyuki:

Enclosed for electronic filing, please find Commercial Energy Management, Inc.'s Petition for Reconsideration of IPUC Order 35303 in the above matter. A copy is being mailed to you as well, at the above address, and copies are being mailed and emailed to Rocky Mountain Power.

Please feel free to contact me directly with any questions you might have about this filing.

Cordially,

D. Andrew Rawlings, Esq.
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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF ROCKY MOUNTAIN
POWER'S APPLICATION FOR APPROVAL
OR REJECTION OF THE POWER PURCHASE
AGREEMENT WITH COMMERCIAL
ENERGY MANAGEMENT, INC.

Case No. PAC-E-21-05

**PETITION FOR
RECONSIDERATION OF
IPUC ORDER 35303**

Commercial Energy Management, Inc. ("Seller"), by and through its counsel of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., submits this *Petition for Reconsideration of IPUC Order 35303*. Pursuant to Idaho Code § 61-626, Seller asks the Idaho Public Utilities Commission (the "Commission") to reconsider its final Order 35303 in this matter (the "Order 35303") for the reasons explained herein. Specifically, Seller requests that the Commission reconsider Order 35303 in relation to requiring and allowing the imposition of the 90/110 clause (the "90/110 Provision") in the Power Purchase Agreement (the "PPA") between Seller and Rocky Mountain Power, a division of PacifiCorp ("Company"). This petition is based upon the following:

I. LEGAL STANDARD

A party must seek reconsideration prior to initiating an appeal to the Idaho Supreme Court. Idaho Code § 61-627. An issue not presented to the Commission on reconsideration will not be considered on appeal. *Key Transp. Inc. v. Trans Magic Airlines Corp.*, 96 Idaho 110, 524 P.2d 1338 (1974). “The purpose of an application for rehearing is to afford an opportunity to the parties to bring to the attention of the Commission in an orderly manner any question theretofore determined in the matter and thereby afford the Commission an opportunity to rectify any mistake made by it before presenting the same to this Court.” *Washington Water Power Co., v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979) (citations omitted).

The Commission may grant reconsideration by reviewing the existing record; by submission of briefs, memoranda, written comments, interrogatories, and statements; or by evidentiary hearing. IDAPA 31.01.01.331.03 and 31.01.01.332.

II. BACKGROUND

The Order adequately describes the factual background of the issues in this matter:

The Company asserted that the Seller owns and operates a 900 kilowatt (“kW”) hydroelectric qualifying facility (“QF”) under the Public Utility Regulatory Policies Act of 1978 (“PURPA”). *Application* at 1. The QF is on the Portneuf River east of Lava Hot Springs in Bannock County, Idaho. *Id.* at 1-2. The Seller and the Company’s previous contract for the sale of energy from the QF was dated November 12, 1991. *Id.* at 2. The Company asserts this contract was entered into prior to the Company’s separation of its energy supply and transmission functions as required by FERC and included provisions that addressed both energy sales and interconnection requirements. *Id.* at 3. In June 2020, the Commission approved an extension to this contract that extended its term through March 1, 2021, or upon the replacement date of the new PPA, whichever was sooner. *Id.* citing Order No. 34792, PAC-E-20-09.

Order 35303 at 1. In relation to the 90/110 Provision, the Commission noted that “Seller asserted that the original 1991 contract with the Company did not include this concept.” Order 35303 at 2

(citation omitted). This assertion is true and, perhaps more importantly, is not contested by the Company or in the Commission's Staff Comments. *See* Order 35303 at 2-5; *see also* Commission Order 34792 (a prior order between these same parties as to the amendment of this original PPA from 1991, with the staff comments noting that the "Amended PPA does not include 90/110 provisions because **the original PPA was entered into before the 90/110 rule was implemented**" (emphasis added)).

Ultimately, as relevant to this petition, the Commission left the 90/110 Provision in the PPA, but required that the definition of Expected Net Output "to reflect that the forecast is not updated after contracting and should use the correct amount of 2,310 MWh/year." Order 35303 at 6.

III. PETITION FOR RECONSIDERATION

The Commission did not provide any independent analysis of the 90/110 Provision or the rationale behind it, instead it appears that Order 35303 relies on the Commission's Staff Comments in this regard. Order 35303 at 2-3. In relation to the 90/110 Provision, the Staff Comments analyzed the monthly estimates (which resulting in the recommendation that the definition of Expected Net Output be amended), the advanced notice requirement, and the market price determination. But in relation to the rationale of the 90/110 Provision, the Commission only explained: "Staff confirmed the PPA contains the 90/110 provisions required by Commission Order 29632." Order 35303 at 2. Specifically, the Staff Comments state:

Staff confirmed the PPA contains the 90/110 Rule as required by Commission Order 29632. The 90/110 Rule requires a QF to provide utilities with a monthly estimate of the amount of energy the QF expects to produce. If the QF delivers more than 110 percent of the estimated amount, then the utility must buy the excess energy for the lesser of 85 percent of the market price or the contract price. If the QF delivers less than 90 percent of the estimated amount, then the utility must buy total energy delivered for

the lesser of 85 percent of the market price or the contract price. *See* Order No. 29632 at 20.

Staff Comments at 2. “The Company also disagreed with the Seller’s objection to the 90/110 provision in the PPA asserting that this provision has been approved by the Commission in previous cases and is consistent with law and past practice, as detailed in Staff Comments.” Order 35303 at 5 (citation omitted). While this adequately describes the 90/110 Provision, the Commission, the Commission Staff, and the Company have not wrestled with the underlying rationale for a 90/110 Provision and whether it should be imposed and allowed in this PPA.

Seller explained in its comments:

Obviously, the 90/110 concept favors the buyer, but—to [Seller’s] knowledge—the issue has never been assessed from the seller’s perspective. Frankly, any matter outside the narrow definition of Force Majeure (see Agreement, § 14.1) can cause [Seller] to incur devastating liabilities to [Company]. The rationale for the 90/110 concept is to economically incentivize a seller’s reliability and predictability. While those bases specifically favor buyers and take a buyer’s concerns and market issues into account, nothing has addressed a seller’s concerns or market issues. **While worded as an economic incentive, it is actually a penalty, requiring payment of a mandated rate when production is within 10% of predictions, but providing for drastic reductions in price when power production is more than 10% off from the predictions. There is no corresponding “upside” for sellers—there is no added premium paid when production matches predictions, just the regulated rate is paid.** In short, the 90/110 approach creates a regime for buyers to penalize unreliability without creating any corresponding or resulting advantage for sellers (other than having the ordinary rates as published by the Commission).

Seller’s Comments at 2-3 (emphasis added). Again, Seller is unaware of any attempt by the Commission to assess the 90/110 Provision from a seller’s perspective and, despite Seller’s explicit invitation to do so here, the Commission has again passed on the chance to review the one-sided reasoning underlying 90/110 Provisions. Reconsideration of Order 35303 provides the Commission another opportunity to finally do so.

This Seller's original contract with the Company in 1991 did not contain anything analogous to the 90/110 Provision in the current PPA. Of course, the prior contract was executed before the Commission considered 90/110 Provisions in Commission Order 29632. However, the Commission should not now allow the Company to fundamentally alter the parties' relationship—particularly without a basis for doing so.

The Commission, its Staff, and the Company all rely on Commission Order 29632 and “past practice” since that order to justify imposition of the 90/110 Provision in this PPA. But a review of the past order shows why the same justifications do not exist in this case. There, the Commission held in relation to the 90/100 Provision:

For a QF it translates into an obligation or commitment to deliver its monthly estimated production. Idaho Power proposes that this delivery of committed energy fall within a 90/110 band. Staff proposes that the band be expanded to 80/120. We find 90/110 to be reasonable. The Commission recognizes that excess energy is not accepted by the Company without consequence. If unplanned for and not easily integrated the energy may as suggested by the Company have to be sold in the surplus market or other more economic resources of the Company backed down.

The Commission finds that energy delivered in excess of 110% should be priced at 85% of the market or the contract price, whichever is less. As reflected in our discussion of 10 MW we find it reasonable to cap the maximum monthly generation that qualifies for published rates at the total number of hours in the month multiplied by 10 MW. This is also a cap for excess energy payments. By way of example, a QF that commits to deliver a monthly total of 7,000 kWh in January and delivers greater than 90% of the commitment amount that month will receive the posted rate for all energy up to 110% of the 7,000 kWh commitment amount and 85% of the Mid-C market price for energy exceeding 110% up to the 10 MW cap. The QF will receive no payment for any energy provided above the 10 MW cap.

Idaho Power proposes that if the QF delivers less than 90% of the scheduled “net energy” amount (for reasons other than forced outage or forced majeure events) that the shortfall energy be priced at 85% of the market price, less the contract rate, the difference capped at 150% of contract rate. The Commission believes that such a shortfall energy pricing method might have the potential of exacting too heavy a price. We instead

find it reasonable when the QF fails to deliver 90% of the monthly commitment amount to price all delivered energy at 85% of the market price, or the contract rate, whichever is less.

Commission Order 29632 at 20. In considering this, the issue was very clearly framed as a buyer-favoring penalty: “Should [the buyer] be allowed to include contractual provisions that impose **financial penalties or liquidated damages** if a PURPA generator’s energy deliveries vary by more than plus or minus 10% from its forecasted performance?” Commission Order 29632 at 4 (emphasis added). There, the generators at issue used the “Rafter River Geothermal Power Plant” and “wind power projects.” Commission Order 29632 at 1-2. In contrast to Seller’s hydroelectric facility here, the generators there (or at least the geothermal facility) provided more regular, steady power generation.

Further, the geothermal plant at issue in Commission Order was likely “capable of producing up to 15.6 MW of electrical power from each square mile” and the buyer wanted to “purchase a maximum of 10 MW in any given hour.” Commission Order 29632 at 2. The wind turbine projects there had a “capacity of 325 kW” and “eleven 900 kW NEG-micron turbines,” respectively. Commission Order 29632 at 2-3. These projects are **much larger** than Seller’s “900 kilowatt (‘kW’) hydroelectric qualifying facility (‘QF’).” Order 35303 at 1. Thus, as a matter of economics, the 90/110 Provision would have a proportionately lower effect on the larger projects of Commission Order 29632 than it will on Seller here. Consider: **the 10% band for the geothermal facility in Commission Order 29632 was 1 MW—which is more than the entire generating capacity of Seller’s facility here.** Not only is the margin for error much narrower for a smaller facility like Seller’s, but **the financial penalties or liquidated damages imposed by the 90/110 Provision will have a much greater impact on a small company, like Seller, than larger companies like those at issue in Commission Order 29632.**

Simply, the Commission cannot carry on imposing a blanket policy of allowing 90/110 Provisions in every instance without an individualized analysis or justification. In the prior case, the Commission found “90/110 to be reasonable” (Commission Order 29632 at 20), but there is no similar finding here (and no basis for such a finding based on the Application or the other submissions in this matter). Each case—and this PPA specifically—deserves the Commission’s consideration in this kind of proceeding so that the Commission can wield its statutory powers in compliance with the constitutional and statutory requirements, including due process and the appropriate exercise of quasi-judicial powers. Here, Seller’s facility is subject to more variation than a geothermal plant. Seller’s facility is a hydroelectric power plant, generating less than 1 MW, and subject to “run-of-the-river” flows that are controlled by a private irrigation company (*i.e.*, the Marsh Valley Canal Company). Also, the prediction of snow falls, freezing condition of winter months, and ground water absorption are very difficult and nearly impossible to predict within the scope of the 90/110 Provision.

Thus, Order 35303 unreasonably, unlawfully, erroneously, and not in conformity with the law imposes the 90/110 Provision on Seller without any individualized basis for doing so. *See* IDAPA 31.01.01.331.01. Accordingly, Seller asks the Commission to remove the 90/110 Provision from this PPA altogether. At a minimum, the Commission must reconsider Order 35303 to provide an individualized basis for allowing the 90/110 Provision in **this PPA** (rather than providing a blanket authorization for such a provision in all agreements without any individual consideration).

**IV. NATURE AND EXTENT OF EVIDENCE AND ARGUMENT
TO BE OFFERED ON RECONSIDERATION**

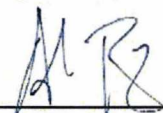
IDAPA 31.01.01.331.01 requires that Seller state the nature and extent of evidence or argument it will present or offer if reconsideration is granted. Seller respectfully asks that the Commission grant reconsideration in this matter and amend final Order 35303 to (a) direct that the 90/110 Provision be removed from this PPA altogether; or (b) justify the 90/110 Provision in this PPA on an individualized basis specific to this PPA.

Alternatively, should the Commission grant reconsideration in this matter, Seller suggests that the Commission set a procedural schedule whereby it may take and consider additional information provided the Parties regarding the items and issues identified herein related to the 90/110 Provision in final Order 35303. Should the Commission grant reconsideration, Seller stands ready to augment the evidentiary record by additional comments, legal briefing, testimony, exhibits, and hearing, any or all of which as determined to be appropriate and at the discretion of the Commission.

V. CONCLUSION

Seller respectfully requests that the Commission reconsider Order 35303 and (a) remove the 90/110 Provision from this PPA altogether because the original PPA was entered before the 90/110 rule was adopted; or (b) at least provide an individualized basis for allowing the 90/110 Provision in **this PPA** (rather than providing a blanket authorization for such a provision in all agreements without any individual consideration). Doing so will comport with the Commission's statutory, due process, and other constitutional obligations in making this decision.

Dated this 9th day of February 2022.



D. Andrew Rawlings, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2022, I served a copy of the following described pleading or document on the attorneys and/or individuals listed below by the method indicated below.

DOCUMENT SERVED: *Petition for Reconsideration of IPUC Order 35303*

ATTORNEYS AND/OR INDIVIDUALS SERVED:

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