



April 27, 2021

**ONLY VIA EMAIL**

Commission Secretary  
Idaho Public Utilities Commission  
[secretary@puc.idaho.gov](mailto:secretary@puc.idaho.gov)

Rocky Mountain Power:  
Ted Weston  
[ted.weston@pacificorp.com](mailto:ted.weston@pacificorp.com)

Emily Wegener  
[emily.wegener@pacificorp.com](mailto:emily.wegener@pacificorp.com)

**Re: Opposition of Commercial Energy Management, Inc. (“CEM”) to the Power Purchase Agreement proffered by Rocky Mountain Power, a division of PacifiCorp (“PacifiCorp/RMP”) in Case No. PAC-E-21-05 (the “Case”).**

Dear Idaho Public Utilities Commission;

This law firm has been retained to represent CEM and to provide public comment on CEM’s behalf to the Idaho Public Utilities Commission (the “Commission”) in this Case. In the Case, PacifiCorp/RMP seeks approval of a Power Purchase Agreement, dated February 26, 2021 (the “Agreement”), between PacifiCorp/RMP and CEM. However, CEM asks the Commission to reject the Agreement submitted by PacifiCorp/RMP because of the process PacifiCorp/RMP has gone through to obtain CEM’s acquiescence to the Agreement and the inclusion of a 90/110 provision concept throughout the Agreement.

First, as noted in PacifiCorp/RMP’s application in this Case, PacifiCorp/RMP first contracted with CEM in an agreement dated November 21, 1991. (*Application of Rocky Mountain Power (“Application”), ¶ 6*). At that time, years in advance, the parties understood that the agreement would expire on May 31, 2020. (*Agreement, ¶ 6*). Since August 2019, CEM has been reaching out to PacifiCorp/RMP to try and negotiate a new power purchase agreement to take effect after the prior agreement expired. (*See, e.g., Letter from Maher Wissa, President of CEM, to the Commission in Case No. PAC-E-20-09, received January 27, 2021 (which is incorporated herein by reference)*). Yet, PacifiCorp/RMP would not engage with CEM for weeks and months at a time. This tactical decision by PacifiCorp/RMP has the potential to cost CEM a great deal, since the Commission’s published rates of June 1, 2019 (which would have been applicable to any agreement had PacifiCorp/RMP timely engaged in discussions with CEM) are much higher than those subsequently published by the Commission and incorporated into the Agreement.<sup>1</sup>

<sup>1</sup> For example, the 2019 rates would have required \$56.35/MWh for 2021, whereas the more recent rates—included in the Agreement—require \$51.11/MWh for 2021. (*See Agreement, Ex. K*).

Perhaps to avoid these costs and believing that PacifiCorp/RMP could secure a better deal later, PacifiCorp/RMP delayed a new power purchase agreement, and secured an extension (amendment) of the prior agreement through March 1, 2021. While PacifiCorp/RMP has framed these delays in terms of being able to “provide [CEM] additional time to meet the current transmission interconnection requirements,” (*Application*, ¶ 7), the fact was that the interconnection issues were not timely raised and had they been discussed in 2019, CEM could have addressed those matters prior to the expiration of the prior agreement.

Even with the extension in hand, PacifiCorp/RMP still delayed its efforts in negotiating the new Agreement—despite CEM’s efforts to negotiate with RMP, and while CEM paid PacifiCorp/RMP to address the interconnection issues—until the last minute. CEM had numerous objections to terms of the contract, but those were all ignored by PacifiCorp/RMP. PacifiCorp/RMP dictated terms that CEM had to either accept or (to its ruin) reject. Given those circumstances and with the extension expiring on March 1, 2021, the new Agreement was only signed on February 26, 2021, just three days before the extension ended.

The Commission and its review in this Case is the only opportunity for CEM to be heard, because of the delays in discussions that PacifiCorp/RMP has caused for its advantage, the obvious disparity in bargaining power between PacifiCorp/RMP and CEM, and PacifiCorp/RMP’s demonstrable willingness to use its size and power to ignore any attempts at negotiation. Accordingly, CEM asks that the Commission send a message that large buyers cannot steamroll small sellers by rejecting the Agreement and sending PacifiCorp/RMP back to the drawing board to actually work with CEM to arrive at a new power purchase agreement.

The second point CEM would submit for the Commission’s consideration is the most egregious of the contractual provisions included in the Agreement that were forced on CEM over its objections: the 90/110 provisions. Specifically, the 90/110 provisions are embodied in the Agreement, including Sections 4.9 and 5.1, together with the definitions of “Conforming Energy”, “Confirming Energy Purchase Price”, “Non-Conforming Energy”, and “Non-Conforming Energy Purchase Price”, as well as Exhibit K in the Agreement. CEM’s prior 1991 agreement with PacifiCorp/RMP did not include this concept at all, and CEM objected vigorously to its inclusion in the current Agreement. However, as described above, those objections were ignored by PacifiCorp/RMP, which offered only a take-it-or-leave-it choice upon CEM. The issues underlying the 90/110 concept were not discussed.

Obviously, the 90/110 concept favors the buyer, but—to CEM’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 CEM to incur devastating liabilities to RMP. 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). For these reasons, and others, CEM objected to the inclusion of the 90/110 concept in the Agreement; but those objections were ignored and CEM was left with little choice but to take what PacifiCorp/RMP decided to offer in the Agreement.

The Commission cannot allow PacifiCorp/RMP to game the system to its advantage without consequence. PacifiCorp/RMP has timed the Commission's process to its advantage and CEM's injury. PacifiCorp/RMP has used its behemoth size and market dominance to give CEM no choice but to agree with PacifiCorp/RMP's proposed terms. For all these reasons, CEM asks that the Commission reject the Agreement submitted by PacifiCorp/RMP in this Case, and send the parties back for true negotiations that can arrive at a power production agreement that is fair to both PacifiCorp/RMP and CEM.

Cordially,



D. Andrew Rawlings, Esq.

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.