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July 21, 2011

VIA OVERNIGHT DELIVERY AND ELECTRONIC MAIL

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

Re: Case Nos. PAC-E-11-01, PAC-E-11-02, PAC-E-11-03, PAC-E-11-04, PAC-E-11-05
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING FIRM ENERGY SALES AGREEMENTS BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (RATTLESNAKE CANYON, COYOTE HILL, NORTH POINT, STEEP RIDGE, AND FIVE PINE PROJECTS)

Dear Ms. Jewell:

Enclosed for filing in the above-captioned dockets are an original and seven (7) copies of the *SUR-REPLY OF ROCKY MOUNTAIN POWER TO CEDAR CREEK WIND, LLC'S REPLY TO ROCKY MOUNTAIN POWER'S ANSWER.*

An extra copy of this cover letter is enclosed. Please date stamp the extra copy and return it to me in the envelope provided.

Thank you in advance for your assistance.

Sincerely,

Kenneth E. Kaufmann

Kenneth E. Kaufmann

cc: PAC-E-11-01/PAC-E-11-02/PAC-E-11-03/PAC-E-11-04/PAC-E-11-05 Service List

Enclosures

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IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (RATTLESNAKE CANYON PROJECT	)	Case No. PAC-E-11-01
IN THE IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (COYOTE HILL PROJECT	)	Case No. PAC-E-11-02
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (NORTH POINT PROJECT)	)	Case No. PAC-E-11-03
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (STEEP RIDGE PROJECT)	)	Case No. PAC-E-11-04

IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (FIVE PINE PROJECT)	)	Case No. Pac-E-11-05
	)	**SUR-REPLY OF ROCKY MOUNTAIN POWER TO CEDAR CREEK WIND, LLC'S REPLY TO ROCKY MOUNTAIN POWER'S ANSWER**

Rocky Mountain Power files this sur-reply in response to the reply of Cedar Creek Wind, LLC, ("Cedar Creek") filed July 12, 2011, to Rocky Mountain Power's answer. As Cedar Creek's reply noted, the Commission need not consider its reply.[1] Likewise, the Commission need not consider this sur-reply. If the Commission considers the reply, Rocky Mountain Power respectfully submits this sur-reply, which is limited to rebutting three incorrect allegations in the reply: (A) that the Commission cannot provide further justification for the June 8 Order[2] in an order denying reconsideration; (B); that Order No. 32176 was a PURPA avoided cost rate change; and (C) that Rocky Mountain Power unduly delayed executing the Power Purchase Agreements.

A. The Commission may provide further justification for the June 8 Order in an order denying reconsideration.

Cedar Creek argues that the Commission may not use reconsideration to provide further justification, or elaborate on its original justification, in support of the June 8 Order.[3] In support, Cedar Creek cites to two federal court opinions interpreting the Federal Administrative

[1] *In the Matter of the Application of United Water Idaho, Inc. for Authority to Increase its Rates and Charges for Water Service in the State of Idaho*, Case No. UWI-W-04-4, Order No. 29871 (2005) (reply to answer to petition for reconsideration filed "although the Company recognized Replies to Answers to Petitions for Reconsideration are not specifically contemplated by the Commission's procedure rules.").

[2] Order No. 32260, Case No. PAC-E-11-01 *et al* (June 8, 2011).

[3] Reply of Cedar Creek Wind, LLC to Rocky Mountain Power's Answer ("Reply"), at 12 n. 33.

Procedure Act.[4] Cedar Creek misinterprets the doctrine of *post hoc* rationalization. As explained below, the two federal opinions cited by Cedar Creek address the circumstance where an agency raises arguments for the first time on judicial review;[5] they are in no way analogous to an agency's reconsideration of its own order. Reconsideration is the appropriate place to bolster the reasoning in the June 8 Order, should the Commission desire to do so.

Under Idaho law, the Commission may change any part of an order on reconsideration.[6] As the Commission stated recently in Order No. 32212, "[r]econsideration provides an opportunity for a party to bring to the Commission's attention any question previously determined and thereby affords the Commission with an opportunity to rectify any mistake or omission."[7] Rocky Mountain Power's answer cited examples of the Commission doing just that on page 11, note 24[8] and on page 13, note 27.[9] Other examples exist of the Idaho Supreme Court

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[4] *Id.*

[5] The United States Supreme Court explained the doctrine of *post hoc* rationalization as follows:

> [W]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question, on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971); *cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency [orders]").

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (emphasis added).

[6] Idaho Code § 61-626(3):

> If after reconsideration, including consideration of matters arising since the making of the order, the commission shall be of the opinion that the original order or any part thereof is in any respect unjust or unwarranted or should be changed, the commission may abrogate or change the same.

[7] Order No. 32212, 2-3 (stating standard of review on reconsideration, citing *Washington Water Power Co., v. Kootenai Environmental Alliance*, 99 Idaho 875, 879; 591 P.2d 122, 126 (1979) ("The purpose of an application for rehearing is to afford an opportunity to the parties to bring to the afford the Commission an opportunity to rectify any mistake made by it before presenting the same to this Court.")).

[8] *See Rosebud Enterprises, Inc. v. Idaho Pub. Util. Comm'n*, 128 Idaho 609, 624, 917 P.2d 766, 781 (1996) (affirming Commission decisions after considering findings of fact and reasoning in both the original Commission order and the Commission order denying reconsideration of that original order).

[9] The Commission's treatment, in Order No. 31092, of a similar claim raised in a petition for reconsideration in GNR-E-10-01, is instructive here. The Commission found that a finding of "good cause" was implicit in its original order, and further documented that good cause explicitly in its final order denying reconsideration. *See In the Matter*

considering both the Commission's original order and the order denying reconsideration during judicial review of Commission decisions.[10]

Cedar Creek would have the Commission substitute Idaho law with the doctrine of *post hoc* rationalization, a doctrine wholly inapplicable to administrative reconsideration. The two federal court of appeals opinions relied upon by Cedar Creek address the scope of judicial review of administrative decisions.[11] First, in *NW. Envt'l Def. Ctr. v. BPA*, the Ninth Circuit Court of Appeals set aside a decision by the Bonneville Power Administration ("BPA") to effectively abandon a fish passage center.[12] BPA based its decision to do so on Congressional committee reports.[13] On review, the Ninth Circuit held that the Congressional reports "had no binding legal import."[14] The court found that the administrative record under review gave no explanation for why BPA would abandon the fish passage center in the face of a mandate to not do so, beyond the mistaken belief of BPA that statements in Congressional reports were binding.[15] The court declined to entertain alternative "*post hoc*" justifications for BPA's decision that were not in the administrative record under review but only offered for the first time on judicial review.[16]

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of the Adjustment of Avoided Cost Rates for New PURPA Contracts for Avista Corporation DBA Avista Utilities, Idaho Power Co., and PacifiCorp DBA Rocky Mountain Power, Case No. GNR-E-10-01, Order No. 31092, 11-14 (2011).

[10] *See e.g. Key Transp. v. Trans Magic Airlines Corp.*, 96 Idaho 110, 112 (1974) ("The commission in its order granting Trans Magic's application *and in its order denying Sun Valley Key's petition for rehearing* considered the impact of Trans Magic's proposed air carrier service on the Boise to Hailey-Sun Valley route on Sun Valley Key's operation." (emphasis added)).

[11] Reply, at 12 n. 33.

[12] 477 F.3d 668 (2007).

[13] *Id.* at 682.

[14] *Id.*

[15] *Id.* at 688.

[16] *Id.* at 688 ("As the Supreme Court has explained, we may not accept appellate counsel's post hoc rationalizations for agency action, and we may not supply a reasoned basis for the agency's action that the agency itself has not given." (internal citations and quotations omitted)).

In *Safe Air for Everyone v. EPA*, cited by Cedar Creek in footnote 33 of its Reply, the Ninth Circuit vacated the EPA's amendment to an air quality standard.[17] The court found the EPA's reason for its decision, as contained in the administrative record, to be "legally unsustainable."[18] The court concluded that it owed no deference to two additional reasons for the EPA decision offered for the first time on judicial review.[19]

In short, careful reading of the authority cited by Cedar Creek shows that the doctrine prohibiting *post hoc* rationalizations applies only to rationalizations made for the first time on judicial review (i.e., after the administrative record is closed). Yet Cedar Creek argues that the Commission must apply this doctrine to the Commission's reconsideration of its own orders. The same argument was made before the Fifth Circuit Court of Appeals in *Tenneco Oil Co v. Fed. Energy Reg. Comm'n.*[20] In *Tennneco Oil*, the Fifth Circuit rejected the argument, stating that offering additional rationalization for a decision is one of the very functions of agency rehearing.[21] Thus, even under federal administrative law, the doctrine argued by Cedar Creek would not apply. Under applicable Idaho law, the Commission clearly may use reconsideration to provide additional rationalization in support of the June 8 Order.

B. Order No. 32176 was not a PURPA avoided cost rate change.

Cedar Creek's argument that the Commission unfairly departed from past grandfathering criteria established in cases related to changes in the avoided cost is misplaced.[22]

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[17] 488 F.3d 1088 (2007).

[18] *Id.* at 1091.

[19] *Id.* at 1999.

[20] 571 F.2d 834, 842 (5th Cir. 1978).

[21] *Id.* (rejecting argument that agency's justification made on rehearing was "post hoc rationalization").

[22] Reply, at 5-9.

The Commission made clear in Order No. 32176[23], and in Order No. 32260[24] at issue here, that the change in eligibility for published avoided cost rates was *not* a change to the avoided cost rate required by PURPA. PURPA permits a state commission to establish avoided cost rates administratively, by auction, or on a case-by-case basis.[25] Standard rates (e.g. rates that are approved by the Commission in advance and available to any QF) are required only for QFs with capacity of 100 kW or less.[26] The Commission satisfied the requirements of PURPA for QF over 100 kW when it approved the IRP methodologies used by the IOUs to determine avoided cost prices for qualifying facilities.[27] The IRP methodology remains available to Idaho QFs today. When the Commission elected to make published avoided cost rates available for projects between 100 kW nameplate and 10 aMW capacity, it went beyond what PURPA requires; its choice to do so was a policy decision committed to its sound discretion.

Because FERC delegated to states the discretion to set the eligibility threshold for published avoided cost rates, it makes sense that the rules for changing the eligibility threshold need not be identical to the rules for setting (and modifying) the avoided cost rate. Cedar Creek improperly ignores this distinction. The legal difference between avoided cost rates and eligibility for standard rates and contracts was addressed by the California Public Utilities Commission (CPUC) in the context of standard offer contracts for qualifying facilities. The

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[23] Order No. 32176 at 1.

[24] Order No. 32260 at 9-10.

[25] *Federal Energy Regulatory Comm'n. v. Mississippi*, 456 U.S. 742, 750, 102 S. Ct. 2126 (1982).

[26] 18 CFR § 292.304 (c) (1)).

[27] *See In the Matter of the Application of PacifiCorp for Final And Interim Orders Revising its Avoided Cost Rates; In the Matter of the Application of PacifiCorp for an Order Modifying the Availability of Published Avoided Cost Rates*, Case No. PPL-E-93-5, Docket No. UPL-E-93-7, Order No. 25882 (1995); *In the Matter of the Application of the Washington Water Power Co. for an Order Revising Avoided Cost Rates*, Case No. WWP-E-93-10, Order No. 25883 (1995); *In the Matter of the Application of the Idaho Power Co. for Approval of Prices for the Purchase of Electricity from Cogenerators and Small Power Producers Qualifying under Section 210 of the Public Utility Regulatory Policies Act of 1978*, Case No. IPC-E-93-28, Order No. 25884 (1995). These orders adopted the IRP methodology proposed by PacifiCorp, Avista Corp., and Idaho Power Company, respectively.

CPUC found that PURPA *does not* mandate that a QF have a unilateral right to form a *standard offer* agreement without action on the part of the utility because FERC delegated such matters to the state commissions:

> It is useful to recall that the Commission's decision to have standard offers at all was one entirely within its discretion under PURPA * * * *PURPA does not require us to have standard offers at all, much less mandate that a standard offer agreement may be formed without any action on the part of the utility.* Both of these aspects of standard offers stem from [CPUC] policy decisions implementing PURPA in the early 1980's. Obviously, other states that do not have standard offers do not violate PURPA, and the continued availability of standard offers is not a right to which PURPA entitles QFs.[28]

Under the CPUC's ruling, above, the CPUC declared that it may eliminate the availability of standard rates and terms for QFs over 100 kW at any time, subject only to any applicable state law notice requirement.[29] The Commission noted that the consequence of failing to act quickly when the terms of a standard offer became too generous could be billions of dollars in extra costs borne by California ratepayers:

> [I]n our early efforts to promote QF development, we made available standard offers that were not contingent upon the utility's voluntary offer: standard offers were effectuated through regulatory order of their availability, and the voluntary acceptance of that offer by a QF formed the agreement. This approach failed dramatically and we suspended, without hearings, standard offer 2 and interim standard offer 4 for that reason. The combination of standard offer prices and their ready availability led to more dramatic subscription than the Commission anticipated. Because a basic tenant of PURPA is the indifference of ratepayers of the purchase price, relative to utility self-generation or other purchases (18 Code of Federal Regulations (CFR) Section 292.101(b) (6)), the Commission has previously suspended the availability of standard offers. Unfortunately, by the time the Commission acted to suspend standard offer 2 and interim standard offer 4, many agreements the Commission chose to honor had been signed by QF developers, and those agreements are now a significant (but not the only) contributor to California's high rate problem and corresponding regional

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[28] *See Application of San Diego Gas & Electric Co. (U 902-E) for an Ex Parte Order Approving Modifications to Uniform Standard Offer No. 1 and Standard Offer No. 3*, Decision No. 96-10-036, Application No. 95-11-057, 68 CPUC 2d 434, 1996 Cal. PUC Lexis 1016, *35 ("SO1 Order")(emphasis added; internal pagination, footnote, omitted).

[29] *Id.* at *36.

> competitive disadvantage to California business. Existing QF agreements are expected to contribute billions of dollars to the competitive transition charge (CTC) that must be paid by ratepayers in order to move to a more competitive generation market.[30]

The passage, above, highlights the principal risk to ratepayers that arises when a Commission decides to make standard (published) rates available for QFs larger than 100 kW: If the published rates are too high, the resulting development of QFs may be dramatic and far in excess of what the Commission expected. When QF development dramatically exceeds the Commission's expectations, there is a strong likelihood that the published rate may exceed the utility's true avoided cost, potentially saddling the utility's customers for many years with costs beyond those envisioned by PURPA. This risk has led the CPUC to conclude that it must have the ability to suspend the availability of standard offer agreements quickly—and without a hearing; otherwise QF developers may enjoy a gold rush at the expense of the ratepayers.

The CPUC's analysis seems to achieve the right result: it allows the CPUC to permit standard offer contracts—for the benefit of QFs—yet allows the CPUC to suspend the availability of standard offer contracts in the event they are not working as intended. After all, if a Commission lacked the authority to quickly suspend standard rates when necessary to protect the ratepayer from excessive purchases, why would it exercise its discretion to adopt standard rates in the first place? Only if it knows that it can turn off the spigot without delay when necessary can the Commission justify a policy of promoting QF development by authorizing published rates for QFs over 100 kW.

Like the CPUC, the Idaho Commission faced dramatic development of QFs greatly in excess of what it anticipated. The Commission faced a difficult choice: approve the contracts and thereby obligate Idaho electric customers to purchase power for 20 years at rates that may be

[30] *Id.* at p. *16-17.

too high, or disapprove the contracts and jeopardize the economic health of developers who expended large sums in reliance on their eligibility for the published avoided cost rates. The Commission decided to lower the eligibility cap 11 days after providing formal notice—29 days after Idaho Power, Avista, and Rocky Mountain Power filed their petition seeking immediate relief. It decided, further, that only those QFs that had fully executed power purchase agreements with a utility prior to the effective date of the eligibility cap change are eligible under the old eligibility cap.

Under the CPUC analysis, above, the Commission's determination did not violate PURPA because the establishment of standard rates for QFs above 100 kW, and the administration thereof, is committed to the Commission's discretion. Furthermore, the Commission has the discretion under PURPA to determine when a legally enforceable obligation arises. Under both legal frameworks, the result reached by the Commission was proper. Cedar Creek may feel like this is a harsh result, but it would also be harsh for the Commission to conclude that Rocky Mountain Power's Idaho customers must bear the cost of published rates when the Commission has determined that those rates may be too high and were never intended for large projects that disaggregate in order to become eligible. The Commission gave notice of the change in eligibility criteria and articulated good reasons for the change, and for the grandfathering criteria it adopted. This is all it was required to do, and its determination was proper.

C. Rocky Mountain Power did not cause undue delay in executing the Power Purchase Agreements.

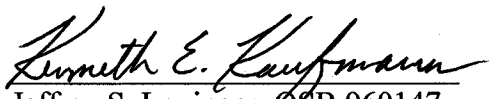
Rocky Mountain Power categorically rejects Cedar Creek's insinuation, on page 9, note 24 of its Reply, that Rocky Mountain Power caused undue delay in executing the Power Purchase Agreements (PPAs). Rocky Mountain Power does not believe the issue is relevant to

this proceeding, but is prepared to vigorously defend its due diligence and negotiation of the Cedar Creek PPAs if necessary. Rocky Mountain Power is confident that the record of negotiations in its entirety will show that its actions were thorough, diligent and timely, particularly given that Cedar Creek was simultaneously requesting PPAs for five contiguous projects totaling 133 MW of capacity. Rocky Mountain Power raised the issue in page 7 of its answer solely for the purpose of noting that Cedar Creek has not filed a complaint.

IV. CONCLUSION

For the reasons above, Rocky Mountain Power respectfully requests that the Cedar Creek's petition for reconsideration be denied.

DATED this 21st day of July 2011.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 21st day of July, 2011, a true and correct copy of the foregoing *SUR-REPLY OF ROCKY MOUNTAIN POWER TO CEDAR CREEK WIND, LLC'S REPLY TO ROCKY MOUNTAIN POWER'S ANSWER* was served in the manner shown to:

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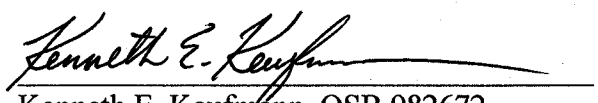
DATED this 21st day of July, 2011.

LOVINGER KAUFMANN LLP



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