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Jim Ruby, Executive Secretary
Environmental Quality Council

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ATTORNEYS FOR BASIN ELECTRIC
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**BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING**

In the Matter of:)
Basin Electric Power Cooperative) Docket No. 07-2801
Dry Fork Station,)
Air Permit CT – 4631)

**BASIN ELECTRIC'S RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY
AND PROTESTANTS' MOTION TO RECONSIDER ORDER GRANTING
RESPONDENT DEPARTMENT OF ENVIRONMENTAL QUALITY'S
MOTION TO DISMISS**

Basin Electric Power Cooperative (Basin Electric) hereby responds to Protestants' Motion to Reconsider the EQC's August 21, 2008 Order Granting DEQ's Motion to Dismiss Count I (greenhouse gas claims) of Protestants' Protest and Petition for Hearing. The Motion is untimely and fails to seek relief available under the EQC's rules for rehearing. The Motion has already been rejected by the EQC when it voted to terminate this matter. Finally, the authority on which the Motion relies neither changes the law nor provides the specific guidance from the federal government previously required by the EQC when dismissing Protestants' greenhouse gas claims.

I. Background

On February 7, 2008, DEQ filed a Motion to Dismiss all of Protestants' carbon dioxide, greenhouse gas and global warming claims, and this issue was thoroughly briefed by the parties. On April 29, 2008, oral argument was heard by the EQC, and after deliberations, the EQC voted to grant DEQ's Motion to Dismiss. On August 21, 2008, the EQC through its Chairman entered a written Order memorializing the EQC's vote and dismissed Protestants' carbon dioxide, greenhouse gas and global warming claims. The EQC specifically "decline[d] to determine how to regulate CO₂ and other greenhouse gases without specific guidance from DEQ and the Federal Government" and "decline[d] to create a regulation process [for CO₂] without guidance from the Federal Government." (August 21, 2008 Order at 9-10, ¶¶23-24)(emphasis in original).

Further dispositive motions were then briefed and argued to the EQC, and after the EQC granted all motions for partial summary judgment by Basin Electric and DEQ on September 29-30, 2008, the parties on October 15, 2008 stipulated to the dismissal of remaining claims in the case and stipulated that this matter before the EQC would be terminated. For its November 20, 2008 meeting, the EQC scheduled decisions to enter final orders on its previous vote to grant partial summary judgment and scheduled the dismissal of this matter on the joint stipulation to dismiss and terminate this matter.

On the afternoon before the EQC's November 20 meeting, Protestants filed their Motion to Reconsider, citing an Environmental Appeals Board (EAB) decision from November 13, 2008. At the November 20 EQC meeting, there was discussion about the EQC's ability to later hear Protestants' Motion if the EQC went ahead and approved the parties' joint stipulation to withdraw the remaining claims and terminate this matter. Counsel for Basin Electric raised the

issue to solve this problem. Basin Electric and DEQ took the position that if the EQC would vote to approve the joint stipulation and proposed order approving the joint stipulation, the matter before the EQC would be terminated and the EQC would no longer be able to act on Protestants' Motion to Reconsider. Counsel for Basin Electric and DEQ cited the language in paragraph 8 of the Joint Stipulation and the last line of the proposed order approving the joint stipulation ("this matter before the Council shall be terminated") to illustrate that Protestants' Motion would no longer be on the table for consideration by the EQC. When the EQC invited counsel for Protestants to take a different position on this issue, counsel for Protestants simply stated they "stand by the joint stipulation." The EQC then voted to approve the joint stipulation and proposed order terminating this action, without modification to the proposed order.

Because of this discussion at the November 20 meeting, DEQ and Basin Electric were surprised when the EQC listed Protestants' Motion to Reconsider for its December 3, 2008 conference call meeting as a decision item. Basin Electric believes the Motion should not be entertained, but if heard, should be denied.

II. The EQC's Action Terminating the Appeal Decided the Pending Motion

As explained above, the EQC's November 20, 2008 action to approve the parties' Joint Stipulation to withdraw remaining claims and to terminate this matter has already disposed of Protestants' Motion to Reconsider. By operation of the termination of the entire case, that Motion has been decided. This result should neither surprise nor prejudice Protestants whose counsel was specifically invited by the EQC to take a position different from that taken by Basin Electric and DEQ in trying to highlight this outcome to the EQC. The EQC questioned the parties at the November 20 meeting on this issue. Despite Basin Electric and DEQ pointing out

that action on the joint stipulation finally terminating the matter before the EQC would have to mean that the Motion could no longer be heard or acted upon, Protestants' counsel was equivocal, stating he "stood by" the joint stipulation with no further comment on the viability of the Motion to Reconsider that was then pending. Thus, the proceedings on November 20 inevitably led to the decision to reject Protestants' Motion, a result clearly explained in advance by both counsel for Basin Electric and DEQ and not disputed by counsel for Protestants.

The Order stipulated by the parties and approved by the EQC on November 20 means what it plainly says: "this matter before the Council shall be terminated." Thus, Protestants' Motion to Reconsider may no longer be entertained by the EQC – it has effectively been ruled upon in the face of silence by Protestants' counsel. The EQC should not grant the Motion when counsel for Protestants stood idly by, seeking to keep the issue of the viability of the Motion a mystery as the EQC voted to terminate the proceedings. Protestants' counsel had a duty to speak up and request a hearing or ruling on the Motion before the EQC terminated the proceedings to avoid this result of the Motion already being decided. Under these circumstances, granting the Motion after termination of the entire case would be unfair and prejudicial to Basin Electric and DEQ, who fully disclosed what the case termination meant to Protestants' Motion and who then relied on the finality of the EQC's vote to terminate these proceedings. The Motion has been decided.

III. The Motion is Untimely

Protestants themselves admit their Motion is untimely under the DEQ Rules of Practice & Procedure, Chap. IV, Sec. 1. (Motion at 3). This Rule states: "Any party seeking any change in any decision of the Council may file a petition for rehearing within twenty (20) days after the

written decision of the Council has been issued.” *Id.* at Sec 1(a). Since the EQC’s written order granting DEQ’s motion to dismiss was dated August 21, 2008, the Protestants had until September 10, 2008 to request reconsideration.

Protestants ask the EQC to “exercise its discretion to reconsider this issue” (Motion at 3) because of a November 13, 2008 EAB decision, but Protestants fail to cite any authority for the EQC’s discretion to relax the 20-day time limit. There is none. Chap. IV, Section 2(b) speaks to the EQC’s discretion: “the granting of a petition to rehear is solely within the discretion of the Council.” However, no rule affords any discretion as to Section 1’s 20-day time limit. Protestants’ Motion is untimely and cannot be resurrected by invoking discretion the EQC does not have.

IV. The Motion Fails to Meet the Requirements of the Rule

The Rules specify the limited conditions in which a rehearing, including reconsideration, should be granted. Chap. IV, Sec. 1(b) provides: “Any petition for rehearing filed under this section must be confined to new questions raised by the decision and upon which the petitioner had no opportunity to argue before the Council” (emphasis added).

The EQC’s August 21, 2008 Order Granting DEQ’s Motion to Dismiss raised no new questions that were not briefed and argued to the EQC or discussed by the EQC in its deliberations and written order. An EAB decision issued months after the EQC’s August 21 Order simply fails to meet this very clear standard in the Rule for rehearing and reconsideration. Protestants’ Motion fails to explain – nor could it explain – how their request for reconsideration meets this standard.

V. The EAB Decision Does Not Create New Law and Does Not Justify Reconsideration of the EQC's Order

Although the EQC's governing rules as to reconsideration are somewhat unclear on the scope of reconsideration, Basin Electric understands that Protestants could – at most – only request the EQC to reconsider its August 21, 2008 Order, which if granted would require additional briefing. Such a procedure would be consistent with the Wyoming Rules of Appellate Procedure on requests for rehearing providing the opportunity to respond to a request for rehearing only after a rehearing is first granted upon application. WYO. R. APP. PROC. 9.07, 9.09. Although Protestants' request goes further than reconsideration and requests remand to DEQ, that action would be premature. The first step for the EQC is to decide whether it will reconsider its decision at all, and if so, Basin Electric believes the EQC would then need to set a briefing schedule to have the parties fully brief the impact, if any, of the EAB decision on the EQC's previous Order.

Although the EQC does not have the discretion to grant an untimely and unwarranted reconsideration request, if the EQC entertains Protestants' Motion, Basin Electric, without waiving its ability to further brief the issue, points out that the EAB decision in *In re Deseret Power Cooperative*, PSD Appeal No. 07-03 (EAB Nov. 13. 2008) ("*Deseret*") does not change or create any new law or provide the necessary "Federal Guidance" that the EQC sought in its previous Order:

- In *Deseret* the EAB did not decide whether CO₂ is subject to regulation under the Clean Air Act. It remanded that issue to EPA for further action. Just as before, the issue of whether CO₂ is subject to regulation remains undecided by the EAB.

- The Protestants attempt to mischaracterize the EAB's rejection of some EPA arguments as "support[ing] a different outcome" in this case. (Motion at 1). The EAB did not say whether CO₂ is or is not subject to regulation under the Clean Air Act. The EAB studiously avoided either conclusion, simply declining to decide the issue.
- Nothing about the applicable law and arguments made to the EQC in April 2008 has changed yet. *Deseret* is just another decision that does not change the law already briefed to the EQC, and Protestants may if they choose fully raise *Deseret* for whatever it is worth on appeal of the EQC's previous Order to the courts.
- As noted in the EQC's August 21, 2008 Order, it declined to regulate CO₂ or other greenhouse gases without specific guidance from the Federal Government. The EAB in *Deseret* essentially did the same, recommending national level comment and policy guidance:

In remanding this permit to the Region for reconsideration..., the Board recognizes that this is an issue of national scope that has implications far beyond this individual permitting proceeding. The Board suggests that the Region consider whether interested persons, as well as the Agency, would be better served by the Agency addressing the interpretation of the phrase 'subject to regulation under this Act' in the context of an action of nationwide scope, rather than through this specific permitting proceeding.

Id. at 5.

Thus, the yet to be promulgated "Federal Guidance" sought by the EQC in its Order was also being sought by the EAB and solicited from EPA on a national level. When properly understood and when viewed beyond the "hype" of the headlines, the *Deseret* case does not change the state of federal or Wyoming law pending such national level federal guidance. The EAB essentially deferred the issue to the new Administration. In any event, the *Deseret* case

does not provide any change in law or federal guidance that could justify the granting of Protestants' already denied Motion to Reconsider – sought contrary to the EQC's own rules when discretion to do so does not exist.

DATED November 26, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2008, I served the foregoing by electronic service and by placing a true and correct copy thereof in the United States mail, postage prepaid and properly addressed to the following:

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