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June 15, 2012

VIA PRIORITY MAIL

Jean D. Jewell, Secretary
Idaho Public Utilities Commission
472 W Washington Street
PO Box 83720
Boise, ID 83720-0074

Re: Case No. PAC-E-10-08
XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs, Complainant, v.
PACIFICORP, dba ROCKY MOUNTAIN POWER, Defendant

Dear Ms. Jewell:

Enclosed for filing in the above-captioned dockets are an original and seven (7) copies of *ROCKY MOUNTAIN POWER'S ANSWER TO XRG'S PETITION FOR RECONSIDERATION OF COMMISSION ORDER NO. 32553.*

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,

Jeff Lovinger

cc: PAC-E-10-08 Service List

Enclosures

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs, Complainant, v. PACIFICORP, DBA ROCKY MOUNTAIN POWER, Defendant.	Case No. PAC-E-10-08 ROCKY MOUNTAIN POWER'S ANSWER TO XRG'S PETITION FOR RECONSIDERATION OF COMMISSION ORDER NO. 32553

Pursuant to IDAPA Rule 31.01.01.331, PacifiCorp, dba Rocky Mountain Power (the "Company"), respectfully submits this answer to XRG's Petition for Reconsideration of Commission Order No. 32553 ("XRG's Petition").

I. PROCEDURAL BACKGROUND[1]

XRG filed a formal complaint with the Idaho Public Utilities Commission ("Commission") on July 29, 2010. The Company timely answered and the parties completed two rounds of discovery. The Company then moved to stay further discovery and for summary judgment. XRG opposed summary judgment and moved to continue discovery. The Commission heard oral argument. On May 18, 2012, the Commission issued Order No. 32553.[2]

In Order No. 32553, the Commission concluded that the case involved disputed issues of material fact. Accordingly, the Commission denied the Company's motion for summary judgment.[3] But the Commission also found that ample evidence existed to allow the Commission to decide the case on its merits.[4] The Commission carefully considered the record and concluded that XRG failed to take steps sufficient to establish a legally enforceable obligation to sell output from its four qualifying facilities ("QFs") prior to the change in rates. Specifically, the Commission found that by failing to return even a single draft PPA to the Company after repeatedly indicating that it would do so,

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[1] The Company has provided the Commission with a detailed statement of facts on pages four through nine of its motion for summary judgment. The Company has also provided the Commission with copies of the entire written correspondence between the parties from the date XRG first requested power purchase agreements through the date XRG filed its complaint. The Commission has accurately summarized the principle facts in Order No. 32553. In the interest of space, this answer does not reiterate the factual history of the case. The Company does not necessarily agree with the characterization of facts contained in XRG's petition for reconsideration.

[2] *XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10 v. PacifiCorp, dba Rocky Mountain Power*, IPUC Case No. PAC-E-10-08, Order No. 32553 (2012)

[3] *Id.* at 7 ("We find there are genuine issues of material fact related to the underlying complaint that do not permit a determination of this case through use of summary judgment.").

[4] *Id.* ("... we find that the record provided through pleadings and at oral argument presents ample evidence for the Commission to decide the underlying, disputed matters alleged in XRG's original complaint.")

"XRG failed to take sufficient action to create an obligation on its part."[5] And the Commission found that XRG's failure to create an obligation "cannot be attributed to a failure to negotiate by Rocky Mountain Power."[6] In conclusion the Commission stated:

> A legally enforceable obligation cannot exist until a QF takes sufficient steps to show it has obligated itself to provide energy to the utility. We find that an assertion that XRG intends to enter into a contract with Rocky Mountain Power, without actions in furtherance of its intent, is not sufficient to establish entitlement to pre-March 2010 published avoided cost rates. Consequently, we dismiss XRG's complaint.[7]

On June 8, 2012, XRG filed its petition for reconsideration. XRG argued that the Commission's decision to dismiss the complaint was an error resulting from "a completely arbitrary application of some hybrid form of summary judgment where only one party is provided with the opportunity to obtain and present evidence necessary for summary judgment."[8] XRG stated it is "unclear what legal standard the Commission applied to conclude there were material issues of fact that would preclude summary judgment, yet the extensive record nevertheless supported dismissal."[9] XRG asserted that "[t]he Commission erred by applying an arbitrary and unreasonable legal standard."[10] XRG also complained that the Commission has not ruled on its motion to complete discovery and on its request for leave to amend its complaint.[11]

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[5] *Id.* at 9.

[6] *Id.*

[7] *Id* at 10.

[8] XRG's Petition at 15.

[9] *Id.*

[10] *Id.* at 17.

[11] *Id.* at 17, 19. In fact, the Commission did rule on the XRG's motion to continue discovery. The second Ordering paragraph on page 10 of Order No. 32553 states: "Consequently, XRG's Motion to Compel Discovery is denied."

II. DISCUSSION

A. The Commission's holdings in Order No. 32553 are proper.

1. The Commission's decision to dismiss the complaint is supported by substantial evidence.

XRG's assertion that the Commission has resorted to "a completely arbitrary application of some hybrid form of summary judgment" is unfounded. In Order No. 32553, the Commission expressly denies the Company's motion for summary judgment. The Commission states that it is denying summary judgment because "there are genuine issues of material fact ... that do not permit determination of this case through use of summary judgment."[12] The Commission then states that the evidence on the record is sufficient to allow it to decide all disputed issues of material fact and dispose of the case on its merits.[13] And that is what the Commission proceeds to do.

The Idaho Supreme Court, when reviewing the Commission's determinations of fact, will apply a substantial evidence standard.[14] The evidence before the Commission includes the entire written record of correspondence between the Company and XRG.[15]

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[12] *Id.* at 7.

[13] *Id.* ("... we find that the record provided through the pleadings and at oral argument presents ample evidence for the Commission to decide the underlying, disputed matters alleged in XRG's original complaint.").

[14] The Idaho Supreme Court has held that "where the Commission's findings [of fact] are supported by substantial, competent evidence, this Court must affirm those findings." *A.W Brown, Inc. v. Idaho Power Co.*, 121 Idaho 812, 815-816, 828 P.2d 841 (1992) (quoting *Empire Lumber Co. v. Washington Water Power*, 114 Idaho 191, 193, 755 P.2d 1229, 1231 (1988)). The Court has further held that "[i]n reviewing findings of fact we will sustain a Commission's determination unless it appears that the clear weight of the evidence is against its conclusion or that the evidence is strong and persuasive that the Commission abused its discretion." *Rosebud Enters. v. State PUC*, 128 Idaho 624, 917 P.2d 781, 788 (1996) (quoting *Utah-Idaho Sugar Co. v. Intermountain Gas Co.*, 100 Idaho 368, 376, 597 P.2d 1058, 1066 (1979)).

[15] XRG and the Company conducted nearly all of their discussions in writing. All of their written communications were submitted as evidence with the Company's motion for summary judgment. Exhibit A to the motion for summary judgment is a 301-page, bound catalog of all written communications between XRG and the Company concerning the XRG projects from the date of XRG's initial request for power purchase agreements (January 21, 2009) through the date it filed its complaint (July 29, 2010). In response to the Company's discovery requests, XRG has acknowledged that it either sent or received each

The Commission discussed this record at length on pages seven through ten of Order No. 32553, and made specific findings of fact, including:

(1) that XRG allowed its interconnection requests with BPA to lapse in March 2009 for reasons unrelated to the Company's actions;[16]

(2) that XRG stated to the Company, on July 6, 2009, that it would "provide a redline to this contract and the other 3 identical contracts proposed" but never did so;[17]

(3) that XRG never returned a draft PPA even after inquiry by the Company just prior to the March 16, 2010 rate change;[18] and

(4) that no terms of any PPA were ever negotiated or discussed.[19]

The Commission ultimately found that XRG's actions were not sufficient to establish that it committed itself to sell energy and capacity to the Company prior to March 16, 2010.[20] The Commission reasoned: "[a] legally enforceable obligation cannot exist until a QF takes sufficient steps to show that it has obligated itself to provide energy to the utility."[21] This requirement arises from Section 292.304(d) of the Federal Energy Regulatory Commission's ("FERC") Public Utility Regulatory Policies Act ("PURPA") rules, which

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of the correspondences contained in Exhibit A and that it is aware of no additional written correspondences between the parties.

[16] Order No. 32553, at 7 ("We find no evidence in the record that Rocky Mountain Power was refusing to negotiate in March 2009. Therefore, we find that XRG's assertion that its interconnection requests with BPA lapsed because of Rocky Mountain Power's intransigent conduct is without merit.").

[17] *Id.* at 8.

[18] *Id.* at 9 ("XRG never returned a draft PPA—even after inquiry by Rocky Mountain Power.").

[19] *Id.* ("A legally enforceable obligation for utility purchase of QF power can be incurred prior to memorialization of terms in a contract between the parties, but, under the circumstances and facts presented in this case, no terms of any PPA were ever negotiated or discussed.").

[20] *Id.* at 10.

[21] *Id.*

entitles a QF to provide energy or capacity pursuant to a "legally enforceable obligation."[22]

FERC has explained that this provision gives a QF "the *option to commit itself* to sell all or part of its electric output to an electric utility" and thereby create a non-contractual, but still legally enforceable, obligation pursuant to the state's implementation of PURPA.[23] FERC has analogized the formation of a legally enforceable obligation to instances where parties may form a bilateral obligation before the formal memorialization of a contract in writing.[24]

In its recent *Cedar Creek* decision, FERC discussed this legal framework in the context of an actual dispute.[25] In that case, FERC noted that—(a) six months of contract negotiations, (b) the utility's delivery of a final, fully negotiated and mutually agreed upon unexecuted version of the contract to the QF, and (c) the QF's execution and delivery of that contract to the utility prior to the rate change—combined to provide persuasive evidence of a QF's commitment to sell to the utility. On the basis of these facts, FERC noted:

> [T]hese extensive negotiations between the parties are persuasive and point to the reasonable conclusion that [the QF] did commit itself to sell electricity to [the utility]. Such commitment to sell to an electric utility, [FERC] has found, "also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations."[26]

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[22] 18 C.F.R. § 292.304(d) (2011).

[23] *Cedar Creek Wind, LLC,* 137 FERC ¶ 61,006, P 32 (2011) (emphasis added).

[24] *Id.* at P 36, n. 62.

[25] 137 FERC ¶ 61,006.

[26] *Id.* at P 39 (quoting *JD Wind 1, LLC,* 129 FERC ¶ 61,148, P 25 (2009)).

While FERC was careful to note that states, not FERC, determine whether a QF created a legally enforceable obligation (consistent with FERC regulations), its application of Section 292.304(d) to the factual record in *Cedar Creek* is useful guidance regarding what FERC believes a QF must do to create a legally enforceable obligation.[27]

In the *Cedar Creek* decision, FERC stated that the extensive negotiations and objective actions between the QF and the utility point to the reasonable conclusion that the QF committed itself to sell energy to the utility under terms and conditions agreed to by the utility. The facts in the XRG case could hardly be more different. Here, there was essentially no negotiation, no exchange of draft contracts, and no attempt to deliver a contract or otherwise make an express indication of intent to create an enforceable obligation to sell to the utility. The Commission's determination that XRG's actions were insufficient to create a legally enforceable obligation is based on substantial evidence in the record and reasonably applies the applicable legal principles to that evidence.[28]

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[27] The Idaho Commission—not FERC—must ultimately establish when a legally enforceable obligation is formed in Idaho. It is worth noting, however, that the Commission's reasoning in Order No. 32553 does not conflict with FERC's holding in the *Cedar Creek* decision.

[28] It may be that XRG did not objectively manifest an intent to be bound because it preferred a mere option to sell to the Company. During discovery, the Company learned that XRG was still working with BPA in December 2010 to establish a transmission path from the XRG projects to the Company's system. At that time XRG was told by BPA that it would have to obtain multiple wheels across non-PacifiCorp transmission, requiring system upgrades and a 3-5 year construction window. Given the patent uncertainty in XRG's ability to deliver output to the Company's system at Brady by a given date and at a reasonable cost, XRG had a strong motive not to commit itself to sell energy to the Company prior to March 15, 2010.

2. Evidentiary hearings are not required if the issues, even disputed issues, may be adequately resolved on the written record.

XRG appears to assume that the Commission cannot decide disputed material facts and dispose of this case without an evidentiary hearing.[29] However, the Commission has regularly resolved formal complaint proceedings on the basis of written evidence and without an evidentiary hearing.[30] FERC also resolves appropriate cases based on a written record and without evidentiary hearing.[31] As FERC and reviewing courts have explained, issues of disputed fact are amenable to resolution on a written record without the need for an evidentiary hearing unless the disputed facts involve motive, intent, or credibility.[32] Moreover, the Commission's June 9, 2011 oral argument in this case provided the parties with a form of hearing. The parties submitted significant evidence prior to the oral argument and had the opportunity to argue their case to the Commission and answer the Commissioner's questions.

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[29] *See* XRG's Petition at 14-17 (emphasizing that the question before the Commission is whether to grant summary judgment and noting that the only other "obvious alternative[s] to summary judgment" are a motion for judgment on the pleadings or a motion to dismiss; by attempting to limit the Commission's options in this way, XRG appears to assume that the Commission must hold an evidentiary hearing before it can decide disputed material facts and dispose of the case on its merits).

[30] *See e.g., South Elmore Irrigation Co. v. Idaho Power Co.*, IPUC Case No. IPC-E-07-16, Order No. 30507 (2008) (The Commission, after finding no need for an evidentiary hearing, dismissed a formal complaint involving a billing dispute of $916,702 based on examination of the written record.); *see also Idaho Public Util. Comm'n Staff v. PacifiCorp*, IPUC Case No. PAC-E-12-01, Order No. 32506 (2012) (The Commission ordered the relief requested in a formal complaint filed by Commission staff based on written submissions of the parties and without a hearing citing IDAPA 31.01.01.201 for authority to proceed by modified procedure.).

[31] *See e.g., Midwestern Indep. Transmission Sys, Operator*, 137 FERC ¶ 61,074, P 340 (2011) (FERC denied requests for rehearing seeking evidentiary hearing and stated: "The courts have repeatedly recognized that [FERC] has broad discretion in managing its proceedings. ... [FERC] may properly deny an evidentiary hearing if the issues, even disputed issues, may be adequately resolved on the written record, at least where there are no issues of motive, intent, or credibility."); *see also Southern California Edison Co.*, 109 FERC ¶ 61,086, P 38 (2004).

[32] *See Louisiana Assoc. of Indep. Producers and Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992). An evidentiary hearing may also be necessary where questions of memory are material. *Id.* Memory is not a consideration here where the findings in Order No. 32553 rely on written correspondence.

3. The facts the Commission relied on to dismiss XRG's Complaint do not implicate issues of motive, intent, or credibility.

Order No. 32553 correctly based its analysis of XRG's actions on the record of written correspondence between XRG and the Company because evidence of XRG's subjective intent is irrelevant to the creation of a legally enforceable obligation. In the *Cedar Creek* decision, FERC noted that the extensive negotiations and objective actions between the QF and the utility point to the reasonable conclusion that the QF committed itself to sell energy to the utility under terms and conditions agreed to by the utility and that the QF manifest an objective intent to be bound by these mutually agreed terms by returning an executed copy of the agreement to the utility. The touchstone in FERC's analysis is whether the evidence demonstrates that the QF has objectively committed itself to sell to the utility.[33] Unless such commitment is manifest, there is no reciprocal obligation on the utility to purchase.

In order to establish a legally enforceable obligation, XRG must take actions that objectively manifest an obligation to sell to the Company. FERC focuses on actions occurring *between* the parties—the extent of negotiations, the finality of agreement on terms of a contract, and the definiteness of the QF's commitment to sell. The parties' motive, subjective intent, and credibility are not material in FERC's analysis of whether a QF has committed to sell to a utility. Nor are motive, subjective intent, and credibility relevant in the traditional analysis of contract formation where it is the objective manifestation of intent to be bound that controls.[34] In both cases, the issue is the

[33] *Supra* nn. 22-25 and accompanying text (explaining FERC's weighing of evidence of commitment).

[34] *Inland Title Co. v. Comstock*, 116 Idaho 701, 703, 779 P.2d 15, 17 (1989) ("Formation of a valid contract requires that there be a meeting of the minds as evidenced by a manifestation of mutual intent to

significance of the offeror's objective acts or words, not the offeror's subjective intent or motives. If the offeror's objective actions constitute a binding offer or commitment, then the offeror is bound to honor its offer, regardless of the offeror's subjective intent or motive.[35]

The legal question in this case is whether XRG took sufficient steps to to obligate itself to provide energy to the Company. Resolution of that question depends upon whether the actions *between* XRG and the Company manifest an objective intent to be obligated. As a result, the Commission correctly limited its analysis to the parties' outward manifestations to each other set forth in the correspondence record. As the Commission correctly concluded, those objective actions in this case did not manifest an intent on the part of XRG to be obligated to sell to the Company nor did the actions of the parties indicate any agreement as to terms.

B. XRG's allegations of error are incorrect.

1. XRG had constructive notice that the Commission might deny summary judgment and still reach a decision on the merits.

Commission Rule 327 gave XRG constructive notice that the Commission could elect to resolve the complaint on grounds other than summary judgment.[36] Under Rule

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contract. This manifestation takes the form of an offer and acceptance." (citations omitted)); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1108 (9th Cir. 2009) ("The formation of a contract, indeed, requires a meeting of the minds of the parties, a standard that is measured by the objective manifestations of intent by both parties to bind themselves to an agreement." (internal citations and quotation marks omitted)).

[35] Restatement (Second) of Contracts, § 24 ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.").

[36] IDAPA 31.01.01.327, IPUC Rule 327, "Substance of Orders", reads:

> Unless prohibited by statute, the substance of orders and the relief provided by orders may differ from the relief requested or proposed by any party. The Commission's order may provide for any result supported by the record before the Commission without regard to whether each component of the order or any component of the order was specifically recommended by a party to the proceeding.

327, the Commission is free to decide disputed material facts on the basis of substantial evidence in the record and to dispose of the case without further proceedings. Nevertheless, XRG argues that it was prejudiced because it did not expect the Commission to resolve disputed facts and rule on the merits.[37] XRG's implication is that, had it known the Commission would resolve disputed facts, it could have refuted the conclusion reached by the Commission in Order No. 32553. However, as explained in the following section, the evidence XRG contends it should have had the opportunity to develop is immaterial to the Commission's reasoning in Order No. 32553.

2. Denial of additional discovery did not prejudice XRG.

XRG does not dispute the accuracy of the Commission's factual findings (e.g., that XRG never provided the Company with a response to the draft PPA). Rather it insists that dismissal is inappropriate because XRG has not had an opportunity to conduct discovery regarding its allegation that the Company unreasonably failed to investigate the availability of transmission.[38] XRG's argument is unavailing because the Commission correctly found that the Company's position on transmission constraints could not excuse XRG's failure to take sufficient action to obligate itself:

> XRG admitted to being delayed by other projects in July 2009. At that time, XRG stated that it would redline the draft PPA provided by Rocky Mountain Power and replicate it for the "other 3 identical contracts proposed." We find that *XRG's failure to return even a single draft PPA in time to be eligible for the existing (now vintage) published avoided cost rates cannot be attributed to a failure to negotiate by Rocky Mountain Power.* ... A legally enforceable obligation for utility purchase of QF power can be incurred prior to memorialization of terms in a contract between the parties, but, under the circumstances and facts presented in

[37] XRG's Petition, at 16-17.

[38] XRG's Petition, at 17 ("Rocky Mountain Power's unreasonable conclusion that it lacked available transmission capacity until months after XRG filed its complaint is the critical issue in this case.").

> this case, no terms of any PPA were ever negotiated or discussed. A draft PPA was provided to XRG by Rocky Mountain Power. XRG failed to take sufficient action to create an obligation on its part.[39]

XRG argues that the "Commission cannot dismiss XRG's complaint without allowing XRG to fully explore [the Company's position on transmission constraints] in discovery, *unless* Rocky Mountain Power's conduct is completely irrelevant to the legal conclusions reached in Order No. 32553."[40] XRG appears to construe Order No. 32553 to say that a utility's conduct is never relevant to a finding on a legally enforceable obligation. However, the Commission did not find that the conduct of the utility is irrelevant as a general rule. The Commission did find that the Company's position on transmission constraints could not reasonably be held to have prevented XRG from moving forward with negotiations.

Indeed, XRG's own statements at the time show that it was not deterred by the Company's claim of a transmission constraint. Each time the Company repeated its position that transmission was not available for more than one project, XRG repeated its intent to mark up four draft power purchase agreements and send them back to the Company. In short, XRG repeatedly indicated that it would move forward with negotiations (by marking up the draft agreement) notwithstanding its disagreement with the Company's position on transmission constraints. The Commission reasonably concluded that XRG's failure to follow through and provide revisions to the draft power purchase agreement was not caused by the Company's position on transmission constraints.

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[39] Order No. 32253, at 9.

[40] XRG's Petition, at 17-18.

Indeed, the Commission has previously held that a QF cannot use the existence of a dispute to excuse its obligation to negotiate; rather, a QF must actively negotiate even if there is disagreement on a fundamental element of the proposed transaction.[41] Because the Company's position on transmission availability is not a legitimate excuse for XRG's failure to negotiate, the Commission was correct to conclude that XRG's failure to return even a single draft PPA prior to the March 2010 rate change was not the result of a failure to negotiate by the Company.[42]

3. The Commission's finding that the Company did not act unreasonably is not essential to the Commission's rationale for dismissal.

The Commission also found that the Company did not act unreasonably in 2009, when it determined a lack of sufficient transmission for four projects based upon information in the PacifiCorp Transmission OASIS website:

> We further find that, prior to the time the published rates changed in March 2010, Rocky Mountain Power reasonably held its position that transmission in the area of XRG's requested interconnection was constrained. In early 2009, when XRG initially proposed its projects, Rocky Mountain Power reviewed the publicly available information regarding its available transmission (OASIS). The report showed that there was then between 20 and 25 MW of unsubscribed capacity available at the location requested by XRG. . . . Based on these facts, we cannot find that Rocky Mountain Power was attempting to impede negotiations with XRG by failing to acknowledge the Populus to Terminal transmission upgrades.[43]

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[41] *Island Power Co. v. Utah Power & Light Co.*, IPUC Case No. UPL-E-93-4, Order No. 25647 (1994) ("To cease negotiations for failure to reach agreement on the first issue discussed is not to reach agreement on any issues. To initiate a complaint process at that time may resolve or clarify that particular issue but certainly doesn't entitle one to a contract.") (quoting *Empire Lumber Co. v. Washington Water Power Co.*, Case No. U-1008-241, Order No. 20693 (1986)). For a more complete discussion of this point, see pages 11 and 12 of the Company's motion for summary judgment. *See also* Order No. 32553, at 9.

[42] Order No. 32553, at 7.

[43] *Id.* at 9-10.

XRG protests that this determination was made without consideration of whatever evidence XRG believes it will find if allowed to do discovery on this matter. However, where XRG did not dispute the Company's contention that it relied on OASIS to determine available transmission capacity, the Commission was entitled to find that the Company's accurate reliance on OASIS is reasonable *per se*, without allowing further discovery. Furthermore, even if one assumes *arguendo* that the Commission erred in reaching this conclusion without allowing additional discovery, such an error would be harmless because—as the Commission found—XRG's failure to return even a single draft PPA in time to qualify for pre-March 2010 rates cannot be fairly attributed to the Company's position on transmission constraints.[44] XRG could have returned a draft PPA and moved negotiations forward. It repeatedly said that it would. But it never did so. Whether the Company rightly or wrongly relied on OASIS does not affect the Commission's conclusion that XRG failed to take steps sufficient to obligate itself (and therefore failed to create a legally enforceable obligation).

C. XRG's request to amend its Complaint should be denied.

XRG asks the Commission to grant leave to amend its complaint to allege a claim for the rates that came into effect when the Commission issued Order No. 31025 on March 16, 2010. Alternatively, XRG asks the Commission to hold that such a claim was an implicit part of XRG's original complaint.[45] The Company remains opposed to these requests for the reasons detailed in Section III (H) on pages 19 and 20 of its reply to XRG's answer opposing the motion for summary judgment. XRG's complaint is about

[44] *Supra*, § II.B.2, pp. 11-13 ("Denial of additional discovery did not prejudice XRG.").

[45] XRG's Petition at 19-20.

whether XRG is entitled to grandfathered treatment regarding rates in effect prior to March 16, 2010. At the time it moved for summary judgment in this case, the Company had no notice that XRG sought grandfathered treatment for the rates established by Order No. 31025. The motion to amend is also procedurally deficient because it was made in a footnote on page 17 of XRG's answer in opposition to the Company's motion for summary judgment and it was not mentioned in the caption of the filing. Granting leave to amend at this late date would clearly prejudice the Company. If XRG wishes to seek grandfathered treatment regarding the rates in effect just before December 14, 2010, it should be required to file a new complaint.

D. Minor Clarifications to Order No. 32553 would remove any doubt that the Commission's determination was proper.

The Commission can take advantage of its order on XRG's petition for reconsideration to clarify the facts and reasons supporting its decision to dismiss XRG's complaint.[46] The Company respectfully recommends that the Commission make the following clarifications in any order on reconsideration:

(1) Clarify that the Commission found there are disputed issues of material fact that prevented it from granting summary judgment but that the Commission has determined there is ample evidence in the record to allow it to decide all material disputed facts, that the Commission has decided the disputed material facts, and that the Commission has concluded that XRG failed to obligate itself before the March 2010 rate change.

(2) Clarify that no further hearing is necessary because the Commission has substantial evidence upon which to base its decision and the material determinations of fact the Commission was required to make do not involve questions of credibility, subjective intent, or motive.

[46] In denying a petition for reconsideration, the Commission frequently explains or clarifies its reasoning in the challenged order. *See e.g. In The Matter Of The Investigation Of Time-Of-Use Pricing for Idaho Power Residential Customers,* IPUC Case No. IPC-E-02-12; Order No. 29226 (2003) (simultaneously denying reconsideration and amending order to clarify). Moreover, the Commission is always free to clarify any order on its own motion. IDAPA 31.01.01.325.

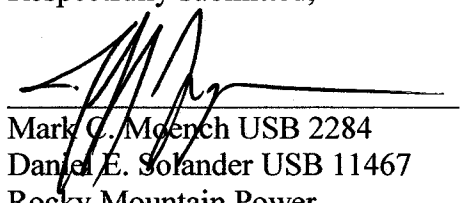
(3) Clarify that, while the Commission finds the Company was reasonable in early 2009 to conclude there was a transmission constraint at the proposed point of delivery, such finding is not essential to the holding that XRG failed to obligate itself to sell power prior to the March 2010 rate change.

III. CONCLUSION

XRG's request to reinstate its original claims should be denied because the Commission properly found on the merits that XRG did not take sufficient steps to create a legally enforceable obligation. XRG's request to amend its original complaint should be denied because it would result in unfair prejudice to the Company. XRG's remaining requests should be denied as moot. The Company respectfully requests that the Commission clarify Order No. 32553 as discussed above.

Dated this 15th day of June 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 15th day of June, 2012, a true and correct copy of the foregoing *ROCKY MOUNTAIN POWER'S ANSWER TO XRG'S PETITION FOR RECONSIDERATION OF COMMISSION ORDER NO. 32553* in Case No. PAC-E-10-08 was served in the manner shown to:

Jean Jewell Commission Secretary Idaho Public Utilities Commission PO Box 83720 Boise, ID 83720-0074 jean.jewell@puc.idaho.gov (Priority Mail and electronic mail) Peter J. Richardson Gregory M. Adams Richardson & O'Leary, PLLC PO Box 7218 Boise, ID 83707 greg@richardsonandoleary.com (First Class Mail and electronic mail)	Mark C. Moench Rocky Mountain Power 201 South Main Street, Suite 2300 Salt Lake City, UT 84111 mark.moench@pacificorp.com (First Class Mail and electronic mail) Daniel E. Solander Rocky Mountain Power 201 South Main Street, Suite 2300 Salt Lake City, UT 84111 daniel.solander@pacificorp.com (First Class Mail and electronic mail)

DATED this 15th day of June, 2012.

LOVINGER KAUFMANN LLP

Jeff Lovinger, OSB 960147
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