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July 6, 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 *ANSWER OF ROCKY MOUNTAIN POWER TO CEDAR CREEK WIND, LLC'S PETITION FOR RECONSIDERATION.*

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,

Ken 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 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 **ANSWER OF ROCKY MOUNTAIN POWER TO CEDAR CREEK WIND, LLC'S PETITION FOR RECONSIDERATION**

Pursuant to Idaho Administrative Rule 31.01.01.331.05, PacifiCorp, dba Rocky Mountain Power (the "Company"), submits this Answer to the Petition for Reconsideration of Order No. 32260 and Request for Expedited Treatment filed by Cedar Creek Wind, LLC ("Cedar Creek") on June 29, 2011. For the reasons stated herein, Rocky Mountain Power respectfully requests the Commission issue an order denying Cedar Creek's petition and further documenting and explaining why the Commission's disapproval of the five PURPA power purchase agreements was proper.

I. Background

On January 10, 2011, the Company filed five Applications each requesting acceptance or rejection of a 20-year Firm Energy Sales Agreement (collectively the "Agreements") between Rocky Mountain Power and Cedar Creek for its Rattlesnake Canyon, Coyote Hill, North Point, Steep Ridge and Five Pine wind projects. All five qualifying facility ("QF") projects have capacity of 10 aMW or less and all five Agreements included the avoided cost prices for small qualifying facilities published by the Commission

in Order No. 31025. On June 8, 2011, the Commission found, in Order No. 32260 (the "June 8 Order"), that because the Agreements were executed after the date upon which the eligibility cap for published avoided cost prices changed from 10 aMW to 100 kW the five wind projects are not eligible for published avoided cost prices. The Commission disapproved the Agreements on that basis. On June 29, 2011, Cedar Creek filed a petition asking the Commission to reconsider its June 8 Order and to approve the Agreements as submitted. Cedar Creek alleges, in its petition: (1) that the Commission's determination—that a QF of more than 100 kW capacity must have a fully executed contract before the date of the eligibility change in order to qualify for the published rates—violates PURPA; (2) that the Commission was bound by prior precedent to grandfather the Agreements; and (3) that the Commission did not give proper notice before deviating from past precedent regarding grandfathering. Answers to Cedar Creek's petition must be postmarked by July 6, 2011.[1]

As explained below, Cedar Creek's petition should be denied because the June 8 Order does not violate PURPA, the June 8 Order serves the public interest in preventing large QFs from disaggregating and taking advantage of published avoided cost rates, and the June 8 Order fairly discloses the facts upon which the Commission relies in a manner sufficient to demonstrate that the Commission has not acted arbitrarily. Moreover, the Commission's order denying Cedar Creek's petition for reconsideration can further articulate and clarify the facts and reasons supporting its decision not to allow QFs above 100 kW to qualify for grandfathered eligibility unless the QF and the utility signed a power purchase agreement before the eligibility cap was reduced effective December 14, 2010.[2]

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[1] IDAPA 31.01.01.331.04.

[2] *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

II. Idaho Law Regarding Formation of a Legally Enforceable PURPA Obligation

FERC regulations implementing PURPA give a QF the right to sell net output to the utility at a price determined at the time of delivery or at the time the QF establishes a legally enforceable obligation to sell its output to the utility.[3] FERC explained, when it adopted this regulation, that the term "legally enforceable obligation" recognizes that, in order to prevent a utility from frustrating the intent of PURPA by refusing to sign a power purchase agreement, a QF must have a path to create a buy-sell obligation between itself and the utility without the utility's execution of a contract.[4] FERC, however, left it to each state to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under state law.[5]

Under long-standing Idaho law, as announced by the Commission and affirmed by the Idaho Supreme Court, there are two paths by which a QF may establish a legally enforceable obligation under PURPA. The first path is for the utility and the QF to execute a power purchase agreement and to obtain approval of that agreement by the Commission.[6] On this path, the contract becomes effective and a legally enforceable obligation arises—thereby fixing the avoided cost rate—when the Commission approves the executed contract.

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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 v. Idaho Pub. Util. Comm'n*, 101 Idaho 567, 575, 617 P.2d 1242, 1250 (1980) ("Not only must the Commission make and enter proper findings of fact, but it must set forth its reasoning in a rational manner.").

[3] 18 C.F.R. § 292.304(d)(2); *Rosebud Enterprises, Inc. v. Idaho Pub. Util. Comm'n*, 128 Idaho 609, 613, 917 P.2d 766, 770 (1996).

[4] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12214, 12224, FERC Order No. 69 (Feb. 25 1980).

[5] *Rosebud*, 128 Idaho at 623-24, 917 P.2d at 780-81 (citing *West Penn Power Co.*, 71 FERC ¶ 61,153 (1995)).

[6] *Earth Power Resources, Inc. v. The Washington Water Power Co.*, Case No. WWP-E-96-6, Order No. 27231 (1997) ("Since its initial implementation of PURPA in 1980, the Commission has required that signed contracts be submitted for review, approval and lock-in of effective rates. A lock-in of rates does not occur until the Commission approves a contract to provide power. 18 C.F.R. § 292.304(d).").

If, however, the rate applicable to the proposed power purchase agreement has changed prior to the date the Commission grants its approval, the Commission may, in its discretion, determine that the QF should receive grandfathered rate treatment and have access to the rates that were in effect just prior to the rate change.[7] In *Rosebud*, the Idaho Supreme Court found that "[c]onferment of grandfathered status on qualifying facilities is essentially an IPUC finding that a legally enforceable obligation to sell power existed by a given date. Such a finding is within the discretion of the state regulatory agency."[8] The Agreements between Rocky Mountain Power and Cedar Creek recognize the essential role of Commission approval. The Agreements provide:

> This Agreement shall become effective after execution by both Parties and after approval by the Commission ("**Effective Date**"); *provided*, however, this Agreement shall not become effective until the Commission has determined, pursuant to a final and non-appealable order, that the prices to be paid for energy and capacity are just and reasonable, in the public interest, and that the costs incurred by PacifiCorp for purchases of capacity and energy from Seller are legitimate expenses, all of which the Commission will allow PacifiCorp to recover in rates in Idaho in the event other jurisdictions deny recovery of their proportionate share of said expenses.

Cedar Creek Agreements, Section 2.1 (emphasis in original).

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[7] *See Rosebud*, 128 Idaho at 620, 917 P.2d at 777 (noting that QF "is not entitled to a lock-in of an avoided cost rate until it has entered into a legally enforceable and IPUC approved obligation for delivery or energy and capacity..." and acknowledging the IPUC's "grandfathered treatment" of QFs that have executed a contract or filed a complaint but not obtained Commission approval before the rate changed); *see also In the Matter of the Application of Idaho Power Company for New Cogeneration/Small Power Production Purchase Rates*, Order No. 19850 (1985) (IPUC states that QFs that file a meritorious complaint prior to rate change will enjoy grandfathered status and will be entitled to old rates if the complaint is subsequently approved by the Commission); *see also Application of San Diego & Electric Company (U 902-E) for an Ex Parte Order Approving Modifications to Uniform Standard Offer No. 1 and Standard Offer No. 3*, 68 CPUC 2nd 434; 1996 Cal. PUC LEXIS 1016, *45-47 (1996) (California utility commission has no obligation to use the same grandfathering criteria, or any grandfathering criteria, for each change to published avoided cost rates); *see also Public Service Company of New Hampshire*, 131 FERC ¶ 61,027, ¶¶ 23-24 (2010) (FERC recognizes distinction between grandfathering and the establishment of a legally enforceable obligation and concludes that a QF may have a grandfathered right to require a utility to purchase its net output even if the QF has not fully established a legally enforceable obligation prior to the date FERC grants the utility's request to be relieved of the PURPA buy-sell obligation).

[8] *Rosebud*, 128 Idaho at 624, 917 P.2d at 781.

Alternatively, a QF may incur a legally enforceable obligation under Idaho's implementation of PURPA by filing a meritorious complaint. This is the second path. In order for a complaint to be "meritorious," the complainant must allege and prove: (1) that the project was substantially mature to the extent that would justify finding that the developer was ready, willing, and able to sign a contract; and (2) that the developer had actively negotiated for a contract which, but for the reluctance of the utility, would have been executed.[9]

In sum, a legally enforceable obligation is not established in Idaho until either: (1) the Commission approves a power purchase agreement that has been executed by the utility and the QF; or (2) the QF files a complaint alleging that *but for* the utility's inappropriate refusal to execute an agreement the QF would have obtained a power purchase agreement and the Commission has approved the relief request (i.e., the complaint must prove to be meritorious).

The concept of grandfathering is distinct from the concept of the establishment of a legally enforceable obligation.[10] Where a QF and a utility execute a power purchase agreement before a change in published avoided cost rates but the Commission does not approve the agreement until after the rate change, then the legally enforceable obligation does not arise until after the rate change. However, the Commission has typically applied the concept of *grandfathering* to conclude that the QF is entitled to the old rates because the

[9] *Earth Power Resources, Inc.*, Order No. 27231; *Rosebud*, 128 Idaho at 624, 917 P.2d at 781; *A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 814, 828 P.2d 841, 843 (1992).

[10] *See* note 7, *supra*.

parties executed the contract (or the QF filed a meritorious complaint) before the rate change took effect.[11]

III. Argument

A. Commission's ruling is proper under Idaho law.

1. Commission's Order properly applied the controlling legal standard for determining when a legally enforceable obligation arises under Idaho law.

There is no dispute that Cedar Creek has not filed a complaint; therefore Cedar Creek's legally enforceable obligation must exist, if at all, via the first path described in Section II, *supra*.[12] Under the approach explained in *Earth Power*, and recognized as valid in *Rosebud* and *A.W. Brown*, Cedar Creek did not perfect entitlement to published rates on December 13, 2010, when it tendered the signed Agreements to Rocky Mountain Power. Those Agreements—under Idaho law and under Section 2.1—do not become effective until approved by the Commission.[13] Under the grandfathering criteria announced in the June 8 Order, the Commission looked to see whether the QF qualified for grandfathered rate treatment prior to the date of the change of the eligibility cap. The Commission concluded that Cedar Creek was ineligible for grandfathered treatment because the date of execution

[11] The Commission generally has required that, in order for a legally enforceable obligation that is based on a meritorious complaint to enjoy grandfathered rate treatment, the complaint must be filed *prior* to the date of the rate change. *See In the Matter of the Application of Idaho Power Co. for Approval of a Firm Energy Sales Agreement with Yellowstone Power, Inc. for the Sale and Purchase of Electric Energy*, Case No. IPC-E-10-22, Order No. 32104, 2 (2010). However, the Commission has allowed grandfathered rate treatment in some cases where a legally enforcable obligation was established by a meritorious complaint that was filed after the rate change when the complaint was filed very shortly after the rate change or a delay in filing was the result of the utility's bad faith acts. *See e.g., Blind Canyon Aquaranch, Inc. v. Idaho Power Co.,* Case No. IPC-E-94-1, Order No. 25802 (1994).

[12] The fact that the Commission did not address the second path to establishing a legally enforceable obligation in its June 8 Order does not make its reasoning defective, particularly because the Commission is discussing grandfathering criteria. However, in any order responding to Cedar Creek's petition for reconsideration, the Commission might note that Cedar Creek has not filed a complaint. In fact, Cedar Creek has never alleged that PacifiCorp wrongly delayed signing the Agreements.

[13] *Earth Power*, Order No. 27231; Cedar Creek Agreements, Section 2.1.

was after the date of the change in eligibility cap.[14] The Commission's findings are consistent with Idaho law.

2. Commission was not obligated to follow prior grandfathering criteria.

The Commission has discretion whether to allow grandfathering. If the Commission elects to allow grandfathering, it has discretion regarding the circumstances or prerequisites that must be satisfied before the Commission will allow a QF that establishes a legally enforceable obligation after a rate change to enjoy the ability to reach back and obtain grandfathered rate treatment. Contrary to Cedar Creek's assertions in its petition, the Commission may modify grandfathering criteria if the facts support a change and the Commission makes a reasoned decision to change grandfathering criteria.[15] The Commission is not rigidly bound by principles of *stare decisis* to follow prior precedent so long as a record is developed and sufficient findings supported by the evidence show that its action is not arbitrary and capricious.[16] In 2005, the Commission adopted one set of grandfathering criteria when it lowered the eligibility threshold for published rates from 10 MW to 100 kW.[17] Because the grandfathering criteria are discretionary, and may be

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[14] June 8 Order at 9.

[15] *In the Matter of the Petition of Idaho Power Co. for an Order Temporarily Suspending Idaho Power's PUPRA Obligation to Enter into Contracts to Purchase Energy Generated by Wind-powered Small Power Production Facilities,* Case No. IPC-E-05-22, Order No. 29872, 9-11 (2005); *see Application of San Diego Gas & Electric Co.*, 68 CPUC 2d 434, 1996 Cal. PUC LEXIS 1016, *46. The CPUC set forth criteria for grandfathering QFs that did not have fully executed agreements prior to the chosen date, but noted that its criteria might have been different had the factual circumstances varied. *Id.*

[16] *Rosebud*, 128 Idaho at 618, 917 P.2d at 775 ("Because regulatory bodies perform legislative as well as judicial functions in their proceedings, they are not so rigorously bound by the doctrine of *stare decisis* that they must decide all future cases in the same way as they have decided similar cases in the past.") (citing *Intermountain Gas Co.*, 97 Idaho at 119, 540 P.2d at 781).

[17] *In the Matter of the Petition of Idaho Power Co. for an Order Temporarily Suspending Idaho Power's PUPRA Obligation to Enter into Contracts to Purchase Energy Generated by Wind-powered Small Power Production Facilities,* Case No. IPC-E-05-22, Order Nos. 29839, 29851, and 29872 (2005). The Commission offered grandfathered treatment to those who, as of the applicable deadline, had (i) submitted to the utility a signed power purchase agreement or a completed application for interconnection study and (ii) demonstrated "other indicia of substantial progress and project maturity" such as (1) a wind study demonstrating a viable site

eliminated entirely, it is debatable whether the Commission need provide any rationale for using different criteria in 2011 than it used in 2005. Nevertheless, the Commission may articulate several substantial reasons why it opted to invoke a bright line requirement of an executed power purchase agreement for grandfathered treatment regarding the December 14, 2011 change in eligibility cap.

One reason to change the criteria is administrative efficiency. In 2005, nine qualifying facilities sought grandfathered treatment after the Commission changed the eligibility cap for published avoided cost prices.[18] Each of these cases required a determination of whether the qualifying facility qualified under the subjective grandfathering test. A bright line test of an executed power purchase agreement prior to the relevant date, by comparison, requires little or no further investigation to determine whether a QF qualifies—thereby saving substantial Commission resources.

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for the project, (2) a signed contract for wind turbines, (3) arranged financing for the project, and/or (4) related progress on the facility permitting and licensing path." Order No. 29839, 10.

[18] *See In the Matter of the Application of Idaho Power Co. for Approval of a Power Purchase Agreement with Idaho Winds, LLC*, Case No. IPC-E-06-36, Order No. 30253 (2007); *In the Matter of the Application of Idaho Power Co. for Approval of a Firm Sales Agreement for the Sale and Purchase of Electric Energy Between Idaho Power Co. and Bennett Creek Wind Farm, LLC*, Case No. IPC-E-06-35, Order No. 30245 (2007); *In the Matter of the Application of Idaho Power Co. for Approval of a Firm Sales Agreement for the Sale and Purchase of Electric Energy Between Idaho Power Co. and Hot Springs Wind Farm, LLC*, Case No. IPC-06, Order No. 30246 (2007); *In the Matter of the Application of Idaho Power Co. for Approval of a Firm Sales Agreement for the Sale and Purchase of Electric Energy Between Idaho Power Co. and Magic Wind Park, LLC*, Case No. IPC-E-06-26, Order No. 30206 (2006); *In the Matter of the Application of Idaho Power Co. for Approval of a Firm Sales Agreement for the Sale and Purchase of Electric Energy Between Idaho Power Co. and Milner Dam Company Wind Park, LLC*, Case No. IPC-E-05-30, Order No. 29948 (2006); *In the Matter of the Application of Idaho Power Co. for Approval of a Firm Sales Agreement for the Sale and Purchase of Electric Energy Between Idaho Power Co. and Lava Beds Wind Park, LLC*, Case No. IPC-E-05-31, Order No. 29949 (2006); *In the Matter of the Application of Idaho Power Co. for Approval of a Firm Sales Agreement for the Sale and Purchase of Electric Energy Between Idaho Power Co. and Notch Butte Wind Park, LLC*, Case No. IPC-E-05-32, Order No. 29950 (2006); *In the Matter of the Application of Idaho Power Co. for Approval of a Firm Sales Agreement for the Sale and Purchase of Electric Energy Between Idaho Power Co. and Salmon Falls Wind Park, LLC*, Case No. IPC-E-05-33, Order No. 29951 (2006); *In the Matter of the Application of Idaho Power Co. for Approval of a Firm Sales Agreement for the Sale and Purchase of Electric Energy Between Idaho Power Co. and Arrow Rock Wind, Inc.*, Case No. IPC-E-06-24, Order No. 29886 (2005).

Another reason is the risk of utility customer overcharge presented by the recent deluge of large QF wind projects disaggregating to take advantage of published avoided cost rates. The Commission was investigating the phenomenon of large wind projects disaggregating into 10 aMW projects in Docket No. GNR-E-10-04 during the period Rocky Mountain Power and Cedar Creek were negotiating their Agreements.[19] In GNR-E-11-01, the Commission noted that it was "concerned that large QF projects were disaggregating into smaller QF projects in order to be eligible for published avoided cost rates that may not be just and reasonable to the utility customers or in the public interest."[20] Upon completion of the investigation, the Commission concluded that reduction of the cap down to 100 kW for wind projects was necessary to protect the utility customer:

> [W]e emphasize that PURPA and our published rate structure were never intended to promote large scale wind and solar development to the detriment of utility customers. * * * If we allow the current trend to continue, customers may be forced to pay for resources at an inflated rate and, potentially, before the energy is actually needed by the utility to serve its customers. This is clearly not in the public interest.[21]

The danger the Commission spoke of in hypothetical terms, above, has squarely manifested itself. Between December 16, 2010 and January 10, 2011 Rocky Mountain Power and Idaho Power Company ("Idaho Power") together filed with the Commission seventeen published avoided cost power purchase agreements comprising 443.4 Megawatts of disaggregated wind qualifying facilities, all of which were executed *after* the reduced eligibility cap took effect.[22]

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[19] *See In the Matter of the Joint Petition of Idaho Power Company, Avista Corporation, and Pacificorp dba Rocky Mountain Power to Address Avoided Cost Issues and to Adjust the Published Avoided Cost Rate Eligibility Cap*, Case No. GNR-E-10-04; Order No. 32131 (2010).

[20] *In the Matter of the Commission's Investigation into Dissagregation and an Appropriate Published Avoided Cost Rate Eligibility Cap Structure for PURPA Qualifying Facilities*, Case No. GNR-E-11-01, Order No. 32262, 4 (2011).

[21] *Id.* at 8.

[22] *See In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement Between Idaho Power and...*, Case Nos. IPC-E-10-51 to -55, Order No. 32254 (2011) (disapproving

The resulting harm to utility customers if the Commission approved all of the power purchase agreements between Rocky Mountain Power or Idaho Power, on the one hand, and disaggregated large wind projects, on the other,[23] provides a compelling basis for Commission to require, as a prerequisite to grandfathered eligibility treatment, that the QF and the utility execute the power purchase agreements prior to December 14, 2010.

In sum, there are compelling legitimate reasons why the Commission departed from the 2005 grandfathering criteria adopted in Order No. 29839. To the extent the Commission did not articulate those reasons in its June 8 Order, it may do so now and cure any such defect.[24]

Idaho Power's power purchase agreements with Alpha Wind LLC (29.9 MW), Bravo Wind LLC (29.9 MW), Charlie Wind, LLC (29.9 MW), Delta Wind, LLC (29.9 MW), and Echo Wind (27.6 MW)); *see also In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement Between Idaho Power and...*, Case Nos. IPC-E-10-56 to -58, Order No. 32255 (2011) (disapproving Idaho Power's power purchase agreements with Murphy Flat Mesa, LLC (25 MW), Murphy Flat Energy, LLC (25 MW), and Murphy Flat Wind, LLC (25 MW)); *see also In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement Between Idaho Power and...*, Case Nos. IPC-E-10-59 and -60, Order No. 32256 (2011) (disapproving Idaho Power's power purchase agreements with Rainbow Ranch Wind, LLC (23 MW) and Rainbow West Wind, LLC (23 MW)); *see also In the Matter of the Application of Idaho Power Co. for a Determination regarding a Firm Energy Sales Agreement Between Idaho Power and...*, Case Nos. IPC-E-10-61 and -62, Order No. 32257 (2011) (disapproving Idaho Power's power purchase agreements with Grouse Creek Wind Park, LLC (21 MW) and Grouse Creek Wind Park II, LLC (21 MW); Order No. 32260 (disapproving Rocky Mountain Power's power purchase agreements for Cedar Creek Wind's Rattlesnake Canyon Project (27.6 MW), Coyote Hill Project (27.6 MW), North Point Project (27.6 MW), Steep Ridge Project (25.2 MW), and Five Pine Project (25.2 MW)).

[23] Cedar Creek admitted that its five projects were disaggregated from two, 78 MW wind projects. Comments of Cedar Creek Wind in Support of Rocky Mountain Power's Application for Approval of a Power Purchase Agreement, Case Nos. PAC-E-11-01; PAC-E-11-02, PAC-E-11-03; PAC-E-11-04, PAC-E-11-05, 2-3 (January 28, 2011).

[24] *See Rosebud*, 128 Idaho at 624, 917 P.2d at 781 (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).

B. None of Cedar Creek's arguments demonstrate that Commission's June 8 Order is legally flawed.

1. Cedar Creek's argument that the Commission grants the utility unilateral power to frustrate a power purchase agreement is misplaced.

As explained in Section II, *supra*, a QF developer can establish a legally enforceable obligation under Idaho law either through an executed agreement approved by the Commission or through a meritorious complaint ultimately approved by the Commission. Only the first path requires the assent of the utility. If a utility is obstructing the negotiation process, the QF developer may file a complaint. If the Commission finds that the complaint is meritorious—that the QF would have had an executed agreement but for the dilatory tactics of the utility—it will declare the QF's entitlement to a legally enforceable obligation. Cedar Creek's argument that Idaho law does not permit a legally enforceable obligation without the consent of the utility is incorret.

2. Cedar Creek's argument that June 8 Order violated notice requirements is misplaced.

Cedar Creek argues that the Commission retroactively applied the grandfathering criteria established in the June 8 Order in violation of (1) the 30-day notice required for rate changes in Idaho Code § 61-307; (2) notice requirements in the Administrative Procedure Act ("APA") in Idaho Code § 61-5201; and (3) due process.[25]

As the Commission noted in its June 8 Order, published rates established in 2010 in Order No. 31025 have not changed. Therefore it is doubtful that Idaho Code § 61-307, which on its face applies to "rates", applies to a change in the eligibility cap. To the extent § 61-307 does apply, the Commission has "good cause" for waiving the notice requirement: If the Commission were compelled to wait 30 days prior to giving effect to its announced

[25] Cedar Creek Petition at 10-12.

change in the eligibility cap, it might be unable to prevent substantial harm to Idaho utility customers in the form of overpriced power purchase agreements.[26] The Commission did not make this finding explicitly in the June 8 Order, but may do so now as part of its order denying reconsideration without prejudice to Cedar Creek.[27]

Cedar Creek's argument regarding the APA is groundless because the APA was not applicable to the December 14, 2010 reduction in eligibility.[28] Lastly, as the Commission noted recently, QFs without an executed agreement approved by the Commission or a meritorious complaint do not have rights to certain published rates protected by due process.[29]

Cedar Creek had ample notice that it might become ineligible for published rates effective December 14, 2010. The November 5, 2010 Joint Petition filed by Idaho Power,

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[26] The fact that Idaho Power filed ten executed power purchase agreements with disaggregated wind projects on December 16, 2010—just two days after the change in the eligibility cap—illustrates the compelling need for the Commission to have the freedom to act more quickly than 30 days when circumstances so warrant. *See* note 22, *supra.*

[27] 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. Order No. 31092, 11-14.

[28] *A.W. Brown Co. v. Idaho Power Co.*, 121 Idaho 812, 819 (1992) ("[W]hen the Commission is engaged in a legislative function, such as [PURPA] rate-setting, it need not act pursuant to the APA [and specifically Idaho Code § 61-5201], but need only fulfill the notice requirements imposed on it by the public utility regulation statutes.")

[29] Order No. 31092, 12. The Idaho Supreme Court has held that a QF developer's due process rights do not attach to a particular avoided cost rate until the developer has established a legally enforceable obligation to sell its output to a utility at the rate in question. *Rosebud Enterprises, Inc. v. Idaho Pub. Util. Comm'n*, 131 Idaho 1, 12 (1997) ("*Rosebud II*"). In most relevant part of *Rosebud II* states:

> Rosebud contends that IPUC's 1994 orders gave it a property interest in the form of a legally enforceable obligation it was required to have to be entitled to the 1994 rates. Because Rosebud never made a legally enforceable obligation, as discussed above, it never had a reasonable expectation that IPUC could not change the methodology for determining avoided cost rates. *Cf. Smith v. Meridian Joint Sch. Dist. No. 2*, 128 Idaho 714, 722-723, 918 P.2d 583, 591-92 (1996) (requiring more than a mere hope or expectation of continued employment to constitute a property interest). Therefore, it never had a property interest in the 1994 rates, and due process never attached to IPUC's consideration of the change of the 1994 rates.

Rosebud II, 131 Idaho at 7; *see also* Order No. 31092, 12.

Avista, and Rocky Mountain Power—the petition that launched the Commission's investigation into whether the eligibility cap should be lowered to 100 kW—asked the Commission to lower the eligibility cap to 100 kW "effective immediately." The Commission's December 3 order stated that published rate eligibility might change effective December 14. In the December 3 order, the Commission did not suggest that QFs without an executed agreement might be given grandfathered eligibility. It is not unreasonable that QFs should assume that, unless and until the Commission announces grandfathering criteria, there will be no such criteria.

Cedar Creek's contention that the bright line rule in the June 8 Order was a change from prior orders does not stand up to examination. The orders that Cedar Creek relies on are themselves specific exceptions to the bright line grandfathering rule; in each of those proceedings the Commission justified the exception to the bright line rule in detail. Cedar Creek points to orders wherein the Commission granted power purchase agreements at grandfathered rates on a case-by-case basis.[30] Cedar Creek also points to the grandfathering criteria used by the Commission when it temporarily reduced eligibility of wind QFs for published avoided cost rates in 2005 in IPC-E-05-22.[31] In 2005, the Commission temporarily reduced eligibility while it investigated the integration cost of intermittent wind projects. In that proceeding, the Commission did not provide prior notice of the effective date of reduction in eligibility or prior notice of the grandfathering criteria (or even prior notice that it would issue generic grandfathering criteria). Indeed, several parties challenged the grandfathering criteria as a departure from past Commission precedent. The Commission

[30] Cedar Creek Petition at 17.

[31] *Id.* at 6-7.

justified the departure on thoroughly reasoned analysis of equities at the time.[32] It is ironic that Cedar Creek points to IPC-E-05-22—itself an aberration from the bright line grandfathering rule—as the source of binding Commission precedent.

In sum, the Commission's past practice has been to make exceptions to the bright line rule on a case-by-case basis. In the 2005 case when the Commission allowed generic grandfathering criteria, it did so without advance notice of what those criteria would be. The Commission has not established a regular practice of granting grandfathering for changes to the eligibility cap. In any event, the November 5, 2010 Joint Petition and the Commission's December 3, 2010 notice gave Cedar Creek fair notice that it might become ineligible for published avoided cost rates as of December 14, 2010.

3. Cedar Creek's factual argument that only administrative work remained after December 13 is wrong.

In its petition, Cedar Creek states "it is undisputed that when Cedar Creek executed the Agreements and delivered them to Rocky Mountain Power on December 13, 1010, the only remaining task was for Rocky Mountain Power to complete its administrative processing."[33] This statement is misleading to the extent it implies that any contract existed prior to December 22, 2010. As explained in the Reply Comments of Rocky Mountain Power,[34] Rocky Mountain Power undertook a number of internal reviews of the Agreements between the time it received them and the time it executed them. Part of the review is to confirm that the terms negotiated by PacifiCorp's Merchant function and set forth in the

[32] Order No. 29872, 9-11 (2005) (change to elibility based on "need to invetigate the integration costs" and "recognition of the significant increase in the number of PURPA wind projects" balanced against "reasonable expectations of the wind QFs" and "considerable time, effort and energy expended by some QFs" and "QFs who relied on utility representations regarding the effect of interconnection study applications").

[33] Cedar Creek Petition at 13.

[34] Case No. PAC-E-11-01, 3-4 (April 12, 2011)