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IDAHO PUBLIC
UTILITIES COMMISSION

February 22, 2011

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

RE: PAC-E-10-08

Dear Ms. Jewell:

We are enclosing an original and seven (7) copies of the XRG LLCs' ANSWER IN OPPOSITION TO ROCKY MOUNTAIN POWER'S MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY AND MOTION FOR SUMMARY JUDGMENT and XRG LLCs' MOTION TO COMPLETE DISCOVERY PURSUANT TO I.R.C.P. 56(f), as well as the exhibits thereto, in the above-referenced case.

A copy is also enclosed for your stamping and return to our office.

Sincerely,

Gregory M. Adams
Richardson & O'Leary PLLC

Enc: XRG LLCs' 2-22-11 Filing

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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Complainants XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs

**BEFORE THE
IDAHO PUBLIC UTILITIES COMMISSION**

XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs,
Complainants,

vs.

PACIFICORP, DBA ROCKY MOUNTAIN
POWER,
Defendant.

Case No. PAC-E-10-08

XRG LLCs' ANSWER IN
OPPOSITION TO ROCKY
MOUNTAIN POWER'S MOTION
FOR PROTECTIVE ORDER TO STAY
DISCOVERY AND MOTION FOR
SUMMARY JUDGMENT,

AND XRG LLCs' MOTION TO
COMPLETE DISCOVERY
PURSUANT TO I.R.C.P. 56(f)

Comes now XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs (referred to collectively as "XRG" or "Exergy"), and pursuant to Idaho Administrative Rules ("IDAPA") 31.01.01.57.03 and 31.01.01.256.04, files this Answer to Rocky Mountain Power's

ANSWER TO ROCKY MOUNTAIN POWER'S MOTION FOR PROTECTIVE ORDER AND
MOTION FOR SUMMARY JUDGMENT AND XRG LLCs' MOTION TO COMPLETE
DISCOVERY

PAGE 1

Motion for Protective Order to Stay Discovery and Motion for Summary Judgment.¹ XRG remains committed to entering into a power purchase agreement for each of its 4 wind projects near Malta, Idaho. XRG has attempted to settle this dispute in good faith to no avail. XRG has diligently responded to Rocky Mountain Power's Production Request Nos. 1 to 50. XRG has already granted Rocky Mountain Power a 14-day extension to respond to XRG's Production Requests Nos. 24 to 63, each of which pertain to the highly relevant issue of Rocky Mountain Power's bad faith negotiations. For all of these reasons and more, XRG opposes Rocky Mountain Power's motions, and respectfully requests that the Idaho Public Utilities Commission ("Commission") deny Rocky Mountain Power's motions. XRG alternatively moves the Commission, pursuant to Idaho Rule of Civil Procedure ("I.R.C.P.") 56(f), to require Rocky Mountain Power to respond to all pending discovery requests prior to the time XRG must provide a final response to any motion for summary judgment.

LEGAL AND REGULATORY BACKGROUND

A. PURPA's Mandatory Purchase Provisions

The mandatory purchase provisions of PURPA require electric utilities to purchase power produced by cogenerators or small power producers that obtain status as a "qualifying facility" ("QF"). 16 U.S.C. § 824a-3(a)(2). Congress's intent "was to encourage the promotion and development of renewable energy technologies as alternatives to fossil fuels and the construction of new generating facilities by electric utilities." *Rosebud Enterprises, Inc. v. Idaho Pub. Util. Commn.*, 128 Idaho 609, 613, 917 P.2d 766, 780 (1996).

¹ Because the fourteenth day after Rocky Mountain Power's February 7, 2011 motions was the President's Day Holiday, XRG's filing is timely on the fifteenth day, February 22, 2011. See IDAPA 31.01.01.17; IDAPA 31.01.01.57.03 and 31.01.01.256.04.

Under Federal Energy Regulatory Commission (“FERC”) regulations, the price PURPA section 210(b) requires the utilities to pay to QFs in exchange for a QF’s electrical output is termed the avoided cost rate, which must compensate QFs for the utilities’ *full* avoided cost and not discriminate against QFs. 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. § 292.304(a), (b); *see also Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policy Act of 1978*, 45 Fed. Reg. 12,214, 12,222-12,223 (Feb. 25, 1980). With regard to off-system QFs, “Any electric utility to which such energy or capacity is delivered must purchase this energy under the obligations set forth in these rules as if the purchase were made directly from the qualifying facility.” 45 Fed. Reg. at 12,220, *codifying* 18 C.F.R. § 292.303(a)(2).

QFs may select the “avoided costs calculated at the time the obligation [to provide energy or capacity] is incurred.” 18 C.F.R. § 292.304(d)(2)(ii). “While this may be done through contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state’s implementation of PURPA.” *JD Wind 1, LLC*, “Notice of Intent Not to Act and Declaratory Order,” 129 FERC ¶ 61,148, at ¶ 25 (November 19, 2009).

The Idaho Commission requires utilities in Idaho to make the rates in the published rate schedule available to QFs that generate less than 10 average megawatts (“aMW”). *See U.S. Geothermal, Inc. v. Idaho Power Company*, Case No. IPC-E-04-8, Order No. 29632, p. 14; 18

C.F.R. § 292.304(c)(1)-(3).² When the published rates change before the QF can obtain an executed contract, the QF is entitled to grandfathered rates if it can “demonstrate that ‘but for’ the actions of [the utility, the QF] was otherwise entitled to a power purchase contract.” *Earth Power Resources, Inc. v. Washington Water Power Company*, Case No. WWP-E-96-6, Order No. 27231 (1997); *see also Blind Canyon Aquaranch v. Idaho Power Company*, Case No. IPC-E-94-1, Order No. 25802 (1994); *Snow Mountain Pine v. Maudin*, 84 Or. App. 590, 600, 734 P.2d 1366, 1371 (1987).

B. Federal Power Act and FERC’s Open Access Transmission Tariff

“Section 205 of the Federal Power Act [] prohibits public utilities, with respect to any jurisdictional transmission or sale, from granting an undue preference or subjecting any person to any undue disadvantage.” *In Re Portland General Electric Company*, 131 FERC ¶ 61,224, ¶ 8 (June 4, 2010). “FERC acted upon evidence of pervasive discrimination in the transmission of electric power by completing a massive regulatory revision, culminating in Order No. 888.” *Entergy Service, Inc. v. FERC*, 375 F.3d 1204, 1205-06 (D.C. Cir. 2004) (citing 16 U.S.C. §§ 824(b), 824d and 824e). FERC promulgated “a pro forma Open Access Transmission Tariff (‘OATT’) that includes the minimum terms and conditions under which transmission providers may offer service.” *Id.* at 1206.

“Part II of the OATT, is transmission service from a specified point of receipt to a specified point of delivery,” and FERC requires utilities to use Part II to serve their own wholesale and/or unbundled retail load. *Id.* (citing 18 C.F.R. § 35.28(c)(2)). In contrast, “Part

² As explained below, the Commission reduced the eligibility cap for published rates to 100 kilowatts for wind QFs since the time that XRG filed its Complaint in this case.

III of the OATT, is a flexible service, which allows the transmission provider to service a network customer's load by using multiple receipt and delivery points," and FERC allows utilities to use Part III (as a network customer) to serve bundled retail loads. *Id.* Thus, FERC required the utilities themselves to become transmission customers and comply with the terms of the OATT. To overcome the inherent "incentive to reserve certain capacity simply to prevent everyone else from using it," FERC "required a network transmission customer [including a utility], as a prerequisite to obtaining network transmission service, to designate those 'network resources' that would generate the power to be transmitted over the reserved capacity." *Id.* at 1207 (internal quotations and alterations omitted). FERC also adopted standards of conduct for transmission providers. *See* 18 C.F.R. § 358.5(b)(1) (prohibiting market function employees from conducting transmission functions or having access to the system control center); *id.* at § 358.6 (prohibiting anyone from being a "conduit" of non-public transmission information between the transmission and merchant functions).³

³ Other protections against discrimination include that a transmission provider must accurately post available transmission capacity on its Open Access Same-time Information System website. 18 C.F.R. § 37.6(b)(3)(ii)(A); *see also In Re Portland General Electric Company*, 131 FERC ¶ 61,224, ¶¶ 12, 17 (approving stipulation to fines for inaccurate posting). And a utility may not withhold the availability of planned transmission lines from open access to all users solely on account of the utility's own future plans to use the lines. *See Puget Sound Energy, Inc.*, 133 FERC ¶ 61,160, ¶¶ 7, 10 (November 18, 2010).

FACTUAL AND PROCEDURAL BACKGROUND⁴

A. XRG's fruitless attempts to obtain 4 PPAs prior to filing the Complaint

The Complaint in this case arose from Rocky Mountain Power's conduct which stalled XRG's development of 4 off-system wind generation facilities near Malta, Idaho, each of which is a self-certified PURPA QF. XRG DP-7, XRG DP-8, and XRG-DP 9 will be nameplate 20 MW, and XRG DP-10 will be nameplate 10 MW. *Complaint* at ¶ 6. XRG has actively developed these projects since 2006. *See, e.g., XRG's Answer to Rocky Mountain Power's Motion for Summary Judgment Exhibit 1 (hereinafter "XRG Exhibit")*, at pp. 1-48 (containing 2007 wind leases); *id.*, at p. 49 (describing XRG's efforts to collect and evaluate wind data and secure interconnection both beginning in 2006).

On January 21, 2009, XRG formally requested that Rocky Mountain Power provide it with 4 standard PURPA PPAs for the projects subject to the Complaint, as well as 2 larger QF wind projects sized over 10 aMW for which XRG requested IRP Methodology rates. *Rocky Mountain Power's Motion for Summary Judgment Exhibit A (hereinafter "RMP SJ Exhibit")*, pp. 12-95, 111. XRG proposed to deliver the output of the projects to Rocky Mountain Power's system at the Brady substation with online dates of December 31, 2010. *Id.* at 44, 56, 78, 87.

Rocky Mountain Power, however, quickly rejected XRG's request. Beginning February 25, 2009, Rocky Mountain Power rejected the request for 4 standard PPAs, and never provided IRP Methodology rates for the 2 larger projects. *Id.* at pp. 105, 117, 143, 209-10, 299-301.

⁴ XRG provides background regarding additional factual matters to those in Rocky Mountain Power's Motion. To the extent Rocky Mountain Power disagrees with XRG's characterization of the facts, such disagreement only serves to prove the Commission should hold an evidentiary hearing.

Rocky Mountain Power stated it lacked transmission capacity for the cumulative output such that Rocky Mountain Power Commercial and Trading (“Rocky Mountain Power C&T”) could designate the projects as network resources and thereby obtain network transmission service from Rocky Mountain Power Transmission, as required by PacifiCorp’s OATT. *Id.* Rocky Mountain Power stated that it would need to deliver the output to its Utah load, would only be able to do so for 23 MW delivered to the Brady or Borah substation, and therefore required XRG to select only one of its projects for a PPA. *Id.* at p. at 117.

Meanwhile, in March 2009, Bonneville Power Administration (“BPA”) required completion of \$20,000 environmental studies for each of the 4 standard project’s interconnection – a total of \$80,000. *XRG Exhibit 1*, at p. 49. Because Rocky Mountain Power had expressed its resistance to executing PPAs for all 4 projects, XRG had to bear the futility of its PPA efforts in mind when committing additional funds to the interconnection process and ultimately lost its queue numbers for each project which it had initiated in 2006. *Id.*

XRG nevertheless persisted in attempting to convince Rocky Mountain Power that transmission from Brady to the Utah load center would not be a problem, and pointed out that publicly available information regarding upgrades to the applicable transmission path refuted Rocky Mountain Power’s position. *See RMP SJ Exhibit A*, at p. 269. From a phone conversation on November 10, 2009, XRG understood Rocky Mountain Power itself to state that transmission would not be a problem if the projects came online in June 2011, and in light of this information XRG requested to move the online date to June 2011. *See id.*, at pp. 289, 296.

Yet Rocky Mountain Power consistently and unequivocally relied on the perceived transmission problem to reject XRG’s request for 4 PPAs. *See, e.g. id.*, at p. 209. XRG again

requested 4 PPAs in March 2010. *See id.*, at pp. 289, 296. On March 12, 2010, the Commission issued Order No. 31021, increasing Rocky Mountain Power's wind integration charge, and then issued Order No. 31025 on March 16, 2010, which significantly decreased the published avoided cost rates. On April 13, 2010, Rocky Mountain Power responded to XRG's March inquiries by letter from Mr. Ken Kaufmann. He stated, "PacifiCorp has not offered to purchase net output from any remaining Exergy project because PacifiCorp lacks the ability to accept more than approximately 23 MW of new capacity at either its Borah or Brady substation and XRG has not offered to pay for system upgrades necessary to accept more than 23 MW." *Id.*, at p. 299. Rocky Mountain Power disagreed with Exergy's reliance on the November 2010 phone call to "conclude that PacifiCorp Transmission will be able to accommodate all Exergy projects after completion by PacifiCorp Transmission of the upgrade in mid-2011." *Id.*, at p. 300.

B. XRG's Complaint

Left with no other recourse, XRG filed the Complaint in this case on July 29, 2010. XRG alleged that it attempted to negotiate 4 standard PPAs in good faith prior to March 12, 2010, but that Rocky Mountain Power refused to furnish them on account of its purported transmission constraint. *Complaint*, at ¶¶ 8, 15-16. XRG alleged that, "By failing to provide publicly available standard PPA terms and conditions, and delaying its responses to XRG's binding offers to enter into four PURPA PPAs for its wind QFs near Malta, Idaho, PacifiCorp is in violation of PURPA, FERC's implementing regulations, and the Commission's orders." *Id.* at ¶ 18. XRG requested that the Commission order Rocky Mountain Power to "execute standard PURPA power purchase agreements for XRG's four QF projects at PacifiCorp's avoided cost rates on file for QFs under 10 aMW prior to March 12, 2010[,] or, "Grant[]any other relief that

the Commission deems necessary.” *Id.* at p. 6.

In its Answer, Rocky Mountain Power “admits it informed XRG in writing on March 23, 2009, May 11, 2009, and October 2, 2009, that available transmission capacity from the proposed delivery point - Brady substation – was insufficient for accepting more than 23 megawatts of net output from XRG’s proposed qualifying facilities.” *Answer*, at ¶ 8. It also asserted as an affirmative defense that it had not acted in bad faith or with undue delay. *Id.*, at p. 6.

C. Rocky Mountain Power’s admission that network transmission was available

The parties commenced discovery, and XRG’s First Set of Production Requests (Requests No. 1-15) inquired into the transmission capacity issue. *See XRG Exhibit 2*, at pp. 1-24, 34, 36-37. Then, on September 21, 2010, Rocky Mountain Power sent XRG a letter admitting that transmission was now available for all 4 QFs. *XRG Exhibit 3*, at pp. 1-10. Rocky Mountain Power’s September 21, 2010, letter did not even reference the Complaint case. *Id.* As though the litigation were not ongoing, and as though Rocky Mountain Power’s perceived transmission constraint were not a central issue in the litigation, the letter stated:

On July 15, 2010, PacifiCorp Transmission designated a new Point of Delivery/Point of Receipt for Network Transmission Service under its Open Access Transmission Tariff called “Path C” . . . The new Point of Delivery/Point of Receipt at Patch C effectively increases available firm transmission across Path C and resolves PacifiCorp C&T’s concerns at this time about the availability of firm Network Resource Transmission Service for the four QF projects. . . . If you decide to pursue all four projects, we would request an update on each project per the attached matrices so that we can correctly and expediently prepare the draft PPAs.

Id., at p. 2 (emphasis added).

The letter provided no explanation for why Rocky Mountain Power designated a new point of service on Path C, or why Rocky Mountain Power was unaware prior to this date that transmission would be available by the time XRG had initially proposed the projects come online – December 31, 2010. The letter contained, for the first time since XRG contacted Rocky Mountain Power on January 21, 2009, a standard matrix of additional project information for each of the 4 QFs that Rocky Mountain Power believed XRG needed to provide in order for Rocky Mountain Power to prepare standard contracts and complete due diligence. *Id.*, at pp. 3-10.

Back in the litigation, in discovery, Rocky Mountain Power then provided internal communications between Jim Partouw, a trader in Energy Marketing for PacifiCorp C & T, to John Younie, a contract administrator for PacifiCorp C & T, regarding Rocky Mountain Power's investigation into the transmission availability. *XRG Exhibit 2*, at pp. 1-22, 61. On January 29, 2009, Mr. Younie had described the projects, including the online date of December 31, 2010, and that each would be a mandatory purchase PURPA project with an "Idaho Standard QF Off-System MAG PPA." *Id.*, at p. 4-7. He asked Mr. Partouw, "Are there any issues with this much capacity being delivered to Brady?" *Id.*, at p. 3.

On January 29, 2010, Mr. Partouw responded, "Import to Utah system on a firm basis is limited to 23 MW total for these transactions Another 250 MW exists but APS has first rights to schedule on the path." *Id.* at pp. 16-19. Mr. Partouw further elaborated by stating:

Will need to request Network Resource status for this resource. Please notify when you want request for Network Resource status submitted (will need to have signed attestation of C&T commitment). Suggest PPA be contingent upon receiving Network Resource status. Without Network Resource status for this

resource, we will need to use PacifiCorp PTP capacity and schedule the energy to load on the PTP reservation.

Id. (emphasis added).

XRG quickly filed its Second Set of Production Requests (Nos. 16-23), on September 29, 2009, to inquire further into the erroneous transmission finding, including information regarding Rocky Mountain Power's internal procedures for investigating available transmission for off-system PURPA projects.

D. XRG's renewed attempt to secure 4 PPAs without further litigation

Despite the highly suspicious nature the newly revealed facts, XRG entered into settlement negotiations in good faith in hopes of foregoing further litigation and simply securing PPAs for its projects at a rate that would provide it with a reasonable return. XRG accepted Rocky Mountain Power's request to stay discovery, and settlement negotiations commenced in October 2010.

Then, on November 5, 2010, Rocky Mountain Power, along with Idaho Power Company and Avista Corporation, filed a Joint Motion to Adjust Published Avoided Cost Rate Eligibility Cap in GNR-E-10-04. The utilities requested that the Commission immediately reduce the eligibility cap for standard rates contained in PURPA PPAs for QFs from a project size of under 10 aMW to a project size of under 100 kilowatts ("kw") nameplate capacity. *See* Case No. GNR-E-10-04. On December 3, 2010, the Commission issued Order No. 32131, wherein it declined to immediately reduce the eligibility cap, but stated that its final decision on the eligibility cap issue would be retroactively effective on December 14, 2010.

XRG understood settlement negotiations to be ongoing despite the Joint Motion to reduce

the eligibility cap. The parties met on December 7, 2010. But XRG perceived that meeting to have been a break down in the settlement negotiations. After that meeting XRG provided Rocky Mountain Power with a letter containing updated information regarding the projects, which in part, responded to the September 21, 2010 letter requesting refreshed information on the projects since the time in early 2009 when Rocky Mountain Power refused to negotiate. *See XRG Exhibit 3*, at pp. 11-15.⁵ Although XRG's response to the September 21, 2010 letter was delayed by litigation and settlement negotiations, XRG expressed interest in simply executing contracts. *Id.*, at p. 13. In response, Rocky Mountain Power did not provide contracts containing the rates in Order No. 30744 or 31025. Indeed, it never responded to XRG's letter at all. Rather, it re-commenced litigation.

E. The recently re-commenced litigation

Rocky Mountain Power responded to XRG's Second Set of Production Requests on December 21, 2010, and Rocky Mountain Power filed its Second Set of Production Requests (Nos. 26-51) on December 22, 2010. XRG filed its Third Set of Production Requests (Nos. 24-63) on January 11, 2011, asking for detailed explanations for Rocky Mountain Power's failure to earlier realize that transmission would not be a problem, and its reliance on that non-existent problem to stall negotiations. For example, XRG has asked, "please explain why Rocky Mountain Power did not offer the option to XRG to make the requested PPAs 'contingent upon receiving Network Resource status,'" *Rocky Mountain Power's Motion for Protective Order*

⁵ Because settlement negotiations are confidential for some purposes and Rocky Mountain Power has objected to discovery requests regarding the settlement negotiations, XRG has provided only the redacted letter which does not refer to settlement negotiations. As redacted, it is simply a response to Rocky Mountain Power's September 21, 2010 letter, provided by Rocky Mountain Power outside the context of the litigation.

Exhibit A (hereinafter "RMP PO Exhibit"), at No. 31(b), which would have enabled Rocky Mountain Power to make a formal request to its transmission experts to analyze availability of transmission. *Id.*, at Nos. 36-39; *XRG Exhibit 2*, at pp. 63-64. XRG also asked Rocky Mountain Power to explain the legitimate use under its OATT for which it held 250 MW of PTP capacity, and the reason it did not offer that capacity for XRG's projects. *RMP PO Exhibit A*, at Nos. 32-33.

XRG also requested explanation for Rocky Mountain Power's failure to recognize the publicly available information regarding Rocky Mountain Power's plans to upgrade Path C such that it would have up to 1600 MW of transfer capacity by the end of 2010, and would require no upgrades for deliveries at Brady. *See, e.g., id.*, at Nos. 42, 44. XRG further inquired into Rocky Mountain Power's commitment to the Idaho Commission during the Mid-American holdings acquisition in 2005 to upgrade this path, and into its successful request for preferential transmission ratemaking treatment for the upgrades at FERC in 2008 where it stated that southwestern Idaho would be "hub" from which its "power will be collected and delivered in different directions." *Id.*, at Nos. 48, 52. XRG requested explanation into Rocky Mountain Power's request to rate base the upgrades in its 2010 rate case before the Idaho Commission. *Id.*, at Nos. 47, 49, 50. XRG asked whether anyone at Rocky Mountain Power C & T that processed XRG's PPA requests knew of the proposed upgrades. *See, e.g., id.*, at No. 44(d).

XRG then timely responded to Rocky Mountain Power's Production Request Nos. 26-50 on January 12, 2011, without requesting a delay, despite the intervening holiday season. On January 20, 2011, XRG agreed to allow Rocky Mountain Power an additional 14 days to respond to XRG's Requests Nos. 24-63. *See XRG Exhibit 4*, at pp. 1. At that time, Rocky Mountain

Power did not indicate that it planned to file a motion for a protective order or for summary judgment.

Then, on February 2, 2011, Rocky Mountain Power requested that XRG agree to stay the response to all of Request Nos. 24-63 pending resolution of a Motion for Summary Judgment Rocky Mountain Power now planned to file. *Id.*, at p. 3. XRG rejected this request. On February 7, 2011, Rocky Mountain Power then filed its Motion for Protective Order to Stay Discovery on XRG's Production Requests Nos. 24-52, and Motion for Summary Judgment, which together with attachments include 381 pages of documents. Rocky Mountain Power requests expedited review of its request to stay discover, citing the now-expired, extended deadline for its responses on February 15, 2011, which was only 8 days after its voluminous filing. On the same day, the Commission issued Order No. 32176, in Case No. GNR-E-10-04, reducing the published avoided cost rate eligibility cap to 100 kw for wind QFs effective December 14, 2010. One can therefore infer from Rocky Mountain Power's motions that it believes XRG cannot now even entitle itself to the published avoided cost rates in Order No. 31025. On February 15, 2011, Rocky Mountain Power responded to XRG's pending requests that do not regard the erroneous transmission constraint finding (Nos. 52-63), but has not responded to transmission questions (Nos. 24-52).

ANSWER

I

Rocky Mountain Power's Motion for Summary Judgment should be denied.

A. Legal Standard Applicable to a Motion for Summary Judgment

“Summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Ackerman v. Bonneville County*, 140 Idaho 307, 310, 92 P.3d 557, 560 (Ct. App. 2004). “When ruling on a motion for summary judgment, the trial court must determine whether the evidence, when construed in the light most favorable to the nonmoving party, presents a genuine issue of material fact or shows that the moving party is not entitled to judgment as a matter of law.” *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). “The moving party bears the burden of proving the absence of material facts.” *Id.* “If the evidence is conflicting on material issues or supports conflicting inferences, or if reasonable minds could reach differing conclusions, summary judgment must be denied.” *Doe v. Sisters of Holy Cross*, 126 Idaho 1036, 1039, 895 P.2d 1229, 1232 (Ct. App. 1995). “Should it appear from the affidavits of the party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” I.R.C.P. 56(f).

An affirmative defense, such as laches, “must be pleaded and proved by the defendant,” and the “defendant has the burden of proving every element necessary to establish the affirmative defense.” *Hawley v. Green*, 117 Idaho 498, 504, 788 P.2d 1321, 1327 (1990); *see*

also I.R.C.P. 8(c). The defendant has the burden of supporting a claimed affirmative defense on a motion for summary judgment. *See Chandler*, 147 Idaho at 771, 215 P.3d at 491.

B. The Commission should deny Rocky Mountain Power’s Motion for Summary Judgment, or at least stay the Motion until after Rocky Mountain Power responds to XRG’s discovery requests and XRG supplements this filing with the additional discovery.

1. Rocky Mountain Power’s Motion for Summary Judgment is not the appropriate procedural manner with which to process this case.

The Commission’s rules do not provide for a Motion for Summary Judgment. Under IDAPA 31.01.01.57.03 – a catch-all rule applicable to all motions – XRG must respond by Answer “with all deliberate and reasonable speed. In no event, is the party entitled to more than fourteen (14) days to answer a motion . . .” Because an adverse ruling would be dispositive, XRG must respond on the merits “with all deliberate speed,” and not less than 14 days.

A response to a summary judgment motion filed in a court where the rules are specifically designed to address summary judgment, however, would not need to be filed so quickly without advance notice. Under I.R.C.P. 56(c), a response to a motion for summary judgment is due 14 days prior to the date set for the hearing on the motion, and no responding party would agree setting the hearing such that it would have a 14-day turnaround on an unscheduled, 381-page filing.⁶ In Idaho federal courts, a responding party has 21 days to respond to a motion for summary judgment.⁷

⁶ See Local Rules. 2.1, 2.2, District Court and Magistrate Division for the Fourth Judicial District of the State of Idaho, available online at <http://www2.state.id.us/fourthjudicial/FOURTH%20DISTRICT/2011%20Fourth%20Judicial%20District-Rules.pdf>.

⁷ See Local Rule 7.1(c)(1), (e)(2) United States District Court for the District of Idaho, available online at http://www.id.uscourts.gov/docs/2011_LOCALRULES_Clean.pdf.

XRG is clearly prejudiced by having to file a response so quickly to this unexpected 381-page dispositive filing in such a short time frame. Because the Commission has not requested motions for summary judgment in this case, the typical procedures should apply. The Commission's rules of procedure provide for two avenues by which to process a complaint case – either by evidentiary hearing (IDAPA 31.01.01.241 to 260), or by modified procedure with comments (IDAPA 31.01.01.201 to 204). The complex factual record before the Commission does not support a finding that it would be in the public interest to process this case without a hearing. The Commission should therefore process this case by evidentiary hearing. For these reasons alone, the Commission should reject Rocky Mountain Power's Motion for Summary Judgment.

- 2. The Commission should deny Rocky Mountain Power's Motion for Summary Judgment because it contains no admissible evidence and therefore fails to comply with I.R.C.P. 56(c), (e).**

Although styled as a motion for summary judgment, Rocky Mountain Power's Motion fails the basic requirement that it include admissible evidence in support of all material facts. *See* I.R.C.P. 56(c), (e); *see also Shacocass, Inc. v. Arrington Constr. Co.*, 116 Idaho 460, 463, 776 P.2d 469, 472 (Ct. App. 1989) (holding that where party submitted exhibits unattached to an affidavit, those exhibits had no evidentiary value and could not support a motion for summary judgment). Rocky Mountain Power's Motion for Summary Judgment fails this test because it is supported only by inadmissible exhibits unattached to an affidavit. Rocky Mountain Power should not be allowed to avail itself of this unscheduled, surprise, dispositive motion called for in the Idaho Rules of Civil Procedure without actually complying with the rules contained therein.

For this reason alone, Rocky Mountain Power's motion must be rejected.⁸

3. **Even if the Summary Judgment Motion is appropriate procedurally, the Commission should deny the Motion because the record overwhelmingly demonstrates that there are genuine issues of material fact as to Rocky Mountain Power's bad faith negotiations prior to and after XRG filed the Complaint, and XRG is entitled to its additional discovery under I.R.C.P. 56(f).**

XRG's Complaint alleges that Rocky Mountain Power raised transmission constraint issues with which XRG disagreed, caused undue delay in negotiations, and thereby deprived XRG of its right to 4 standard PPAs containing the rates in Order No. 30744, or any other relief the Commission deems necessary. XRG's Complaint's request for any other relief the Commission deems necessary should be read to include an alternative request for an order entitling it to 4 PPAs containing the rates in Order No. 31025.⁹ Because "the record as currently constituted does not permit an undisputed finding that" XRG failed to attempt to negotiate in good faith before and after filing the Complaint, or a finding that it was possible to negotiate in light of Rocky Mountain Power's relentless bad faith, each of Rocky Mountain Power's three

⁸ Because Rocky Mountain Power has not properly filed affidavits in compliance with the rule, XRG has no burden to rebut Rocky Mountain Power's inadmissible evidence. See I.R.C.P. 56(e). Should the Commission allow Rocky Mountain Power the right to re-submit its attachments to its filings with affidavits, XRG respectfully requests the opportunity to do the same for XRG's supporting exhibits unattached to affidavits.

⁹ To the extent the Commission disagrees that XRG's Complaint includes a request for such alternative relief, XRG hereby requests leave to amend its complaint. Under I.R.C.P. 15(a), "in the interest of justice, district courts should favor liberal grants of leave to amend a complaint." *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). Because the availability of published rates has changed and Rocky Mountain Power has admitted network transmission is available since the filing of the Complaint, XRG should be allowed to amend the Complaint to include an alternative claim to entitlement to the intervening rates in effect when it filed its Complaint if the Complaint cannot be read to request such alternative relief.

asserted bases for summary judgment fail. *See In the Matter of PacifiCorp for an Order Determining that PacifiCorp is not Required to Provide Wheeling Service to Snake River Valley Electric Association*, Case No. PAC-E-01-6, Order No. 28888, p. 13 (2001) (denying PacifiCorp's motion for summary judgment).

- a. **There is a genuine issue of material fact as to whether XRG met its obligation to attempt to actively negotiate, but was precluded from doing so by Rocky Mountain Power's bad faith.**

The QF's expressed intent and attempts to obligate itself are the critical factors under any reasonable interpretation of when a legally enforceable obligation is incurred under 18 C.F.R. § 292.304(d)(2)(ii). In *Earth Power Resources, Inc.*, the Commission found that "Earth Power attempted to negotiate and did everything in its power to commit itself," but "Water Power Company . . . either knowingly or through negligence or ineptitude acted so as to prevent Earth Power from obtaining a contract." Order No. 27231. The QF was therefore entitled to a contract containing rates in existence when it attempted to obligate itself. *Id.*; *see also Snow Mountain Pine*, 84 Or. App. at 600, 734 P.2d at 1371. The Commission's prior decisions also demonstrate that a QF's intent can be evidenced by the level of maturity of its development of the project and its knowledge of the standard contract terms.¹⁰

¹⁰ *See In the Matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement with Yellowstone Power Company*, Case No. IPC-E-10-22, Order 32104, at p. 12 (2010) (approving of grandfathered rates despite "the apparent lack of any written documentation . . . evidencing that the terms of a power purchase agreement were materially complete [before the rate change]" in part because QF had "familiarity with PURPA projects and the standard terms of Idaho Power's power purchase agreements"); *In the Matter of Cassia Wind to Determine Exemption Status*, Case No. IPC-E-05-35, Order No. 29954, at pp. 2-4 (2006) (finding wind QF entitled to grandfathered rates when it had merely submitted a completed application for interconnection study, including the applicable fee, and had performed

XRG meets the legally enforceable obligation test for its 4 QFs. XRG provided very detailed project specifics for its self-certified QFs in January 2009. XRG's parent company, Exergy Development Group of Idaho, LLC, has developed many Idaho wind QF projects and is intimately familiar with the unique contract provisions authorized by the Commission for standard PURPA wind contracts. Rocky Mountain Power has provided no evidence that any terms were in dispute. Indeed, Rocky Mountain Power's own internal communications in January 2009 noted that each of these XRG projects would execute an "Idaho Standard QF Off-System MAG PPA." *XRG Exhibit 2*, at pp. 4-7.

XRG and Rocky Mountain Power knew the terms at the times XRG attempted to obligate itself. XRG also took substantial steps to develop the projects, despite Rocky Mountain Power's delay tactics. *See XRG Exhibit 1*, at pp. 49-50. XRG began the interconnection studies in 2006, and has paid multiple interconnection fees. *Id.* XRG has reinitiated the process after Rocky Mountain Power's delay contributed to the loss of XRG's initial BPA queue numbers. *Id.* XRG has performed and analyzed wind studies since 2006, has possessed real property rights since 2007, has engaged third parties to complete title and survey work necessary to plan construction, and turbine and road layouts. *Id.*, at pp. 1-50. In addition to these activities occurring prior to Order No. 31025, XRG's continued efforts in 2010 included completion of work to ensure the projects will not interfere with the government systems or microwave towers, and will not affect endangered species. *Id.* at p. 50. XRG's projects are much farther along than the grandfathered wind QF in *Cassia Wind*. *See* Order No. 29954.

wind studies, commenced preliminary permitting and licensing activities, and made efforts to secure sites to place turbines).

Despite XRG's repeated attempts to execute 4 PPAs, Rocky Mountain Power took one year and eight months (January 21, 2009 until September 21, 2010) to respond to XRG with the Company's standard matrix that it provides to QFs as one of the first steps in QF negotiation and due diligence. Prior to that time, it provided XRG with no indication that any information XRG provided was incomplete, even for the one project that Rocky Mountain Power asserts it attempted to negotiate. Rocky Mountain Power admits that the discovery to which it objects relates to its actions to evaluate whether it could integrate 70 MW of output at Brady substation. *Rocky Mountain Power's Motion for Protective Order*, at p. 4. Rocky Mountain Power also admits XRG "indicated on multiple occasions that it thought the parties should proceed to negotiate all four PPAs and resolve any issue involving transmission constraints on a separate negotiating path. The Company did not yield to this request." *Rocky Mountain Power's Motion for Summary Judgment*, at p. 5. There is no disagreement that the non-existent transmission constraint precluded any necessary negotiations.¹¹

As noted above, FERC's regulations require a utility to accept the energy and capacity

¹¹ Rocky Mountain Power asserts that XRG delayed the process towards 4 PPAs. See *Rocky Mountain Power's Motion for Summary Judgment*, at pp. 14-15. XRG respectfully submits that an inquiry into the settlement negotiations initiated by XRG shortly after Rocky Mountain Power first agreed on September 21, 2010, to provide 4 PPAs for all 4 QFs would serve to negate Rocky Mountain Power's assertion that XRG was the party that delayed progress. IDAPA 31.01.01.272 states that settlement negotiations are confidential, but this rule should be read in the context of Idaho Rule of Evidence 408, which only excludes evidence of settlement negotiations if offered for the purpose of proving "liability for, or invalidity of, the claim or any other claim." The rule "does not require exclusion when the evidence is offered for another purpose," including "negating a contention of undue delay." I.R.E. 408; *Soria v. Sierra Pacific Airlines*, 111 Idaho 594, 605-06, 726 P.2d 706, 717-18 (1986); see also *Athey v. Farmers*, 234 F.3d 357, 362 (8th Cir. 2000); *Carney v. American University*, 151 F.3d 1090, 1095 (D.C. Cir. 1998). That the settlement negotiations ceased only after the filing of the Joint Petition in GNR-E-10-04 only further negates Rocky Mountain Power's claim that XRG is the party that has delayed progress towards 4 executed PPAs.

for an off-system QF just as it would for an on-system QF. *See* 18 C.F.R. § 292.303(a)(2). For on-system QF's, PacifiCorp recently asserted in defense of a QF complaint that the transmission and merchant functions of the Company had failed to communicate, "PacifiCorp C&T does not communicate to PacifiCorp Transmission Services regarding a QF's interconnection status unless authorized by the QF." *See XRG Exhibit 5*, at p. 26. PacifiCorp stated, "While functional separation is mandated by FERC in order to facilitate open access to FERC-regulated transmission services, 18 C.F.R. § 358.2, there are other important reasons to observe functional separation in the context of QF negotiations" *Id.* at p. 10 n.7. Rocky Mountain Power does not deny that FERC's rules apply to its processing of XRG's PPA requests, *see XRG Exhibit 2*, at pp. 38-40, 60, 63-64, and therefore Rocky Mountain Power should not be allowed to abuse its role as transmission provider and PURPA negotiator to discriminate against QFs.

XRG's pending Production Requests Nos. 24-52 request information very likely, however, to demonstrate Rocky Mountain Power committed acts of discrimination against XRG too numerous to detail in this filing. For example, Mr. Griswold stated that necessary network transmission upgrades "likely would take four to five years to complete." *RMP SJ Exhibit A*, at p. 209. But if Mr. Griswold – who is a market function employee – made this determination without contacting the transmission function employees, he very likely violated FERC's functional separation rules by exercising a transmission function of determining transmission availability for XRG's projects.¹²

¹² "Transmission" includes "network or point-to-point service." 18 C.F.R. § 358.3(f). FERC has stated, "it serves no purpose to physically separate transmission personnel from the utility company's merchant personnel without also transferring responsibility for transmission operations and reliability functions to the transmission staff that is charged with the

Additionally, Rocky Mountain Power's failure to notify XRG of the option to make the contracts contingent upon receiving network resource status or of initiating the network transmission request process prior to executing the agreements was very likely an act of bad faith, about which XRG is entitled to additional discovery.¹³ Had Rocky Mountain Power C & T agreed to process the contract negotiation and the transmission requests on different tracts, as requested by XRG, there is no doubt the transmission function employees would have determined that transmission would be adequate. Further, Rocky Mountain Power C & T should have been aware of the ongoing upgrades themselves because XRG discussed the issue with them on November 10, 2009, and the Company had even obtained and requested various forms of cost-recovery for the upgrades in multiple ratemaking forums.

None of the cases cited by Rocky Mountain Power involved a utility's complete refusal to even provide draft contracts on account of a "fatal flaw" perceived by the utility, which later proved grossly incorrect. *See Cogen Power II, Inc. v. PacifiCorp*, Case No. UPL-E-94-1, Order No. 25638 (1994) (stating "the facts of this case do not demonstrate a pattern of delay, intransigence or obduracy on the part of PacifiCorp"). "[I]t is only after negotiation and/or a reasonable period for the utility investigation and response that an otherwise eligible QF can

responsibility of processing transmission requests." *Arizona Public Service Company v. Idaho Power Company*, 87 FERC ¶ 61,303, 62,225- 62,226 (June 17, 1999); *see also Standards of Conduct for Transmission Providers*, Order No. 717-C, 131 FERC ¶ 61,045, ¶ 15 (April 16, 2010).

¹³ FERC's rules allow Rocky Mountain Power C & T to attest that it has the right to a network resource through a contract that is contingent upon obtaining network resource status. *See Preventing Undue Discrimination and Preference in Transmission Service*, Order 890-B, 123 FERC ¶ 61,299, ¶ 183 (June 23, 2008) (order on rehearing and clarification). "Network customers are therefore not required to commit to purchasing a resource prior to submitting a request to designate that resource." *Id.*

expect to obtain a power purchase contract and a lock-in of avoided cost rates.” *Id.* (emphasis added); *see also* *Island Power Company v. Utah Power and Light Company*, Case No. UPL-E-93-4, Order No. 25528 (1994) (stating, “PacifiCorp did not refuse repeated attempts to negotiate a contract”). In the present case, the Commission can find nothing but delay, intransigence and obduracy by Rocky Mountain Power.

- b. Rocky Mountain Power is not entitled to Summary Judgment on its asserted basis that XRG’s projects are not mature because Commission precedent does not require the level of maturity asserted by Rocky Mountain Power as mandatory and because Rocky Mountain Power’s bad faith negotiations precluded XRG’s projects’ maturity.**

The Commission should reject Rocky Mountain Power’s assertion that a QF must secure firm transmission and interconnection rights prior to being able to create a legally enforceable obligation. Securing firm interconnection and wheeling rights prior to execution of a PURPA PPA is simply not a requirement in Idaho. The PPAs approved in countless orders require an off-system QF to obtain transmission and interconnection rights as a condition to achieving first energy, but not as a precondition to executing the agreement. *See, e.g., Application*, Case No. IPC-E-10-47, Attachment 1, Arts. 4.1.8, 5.7; *see also* Order No. 32144, at p. 4 (noting QF had to reapply for transmission rights after execution and approval of PPAs). Rocky Mountain Power itself has very recently entered into such agreements with QFs. *See, e.g., Application*, Case No. PAC-E-11-01, § 2.2.4 (January 10, 2011) (merely requiring QF to provide Rocky Mountain Power with executed interconnection agreement “ten days prior to delivery of energy”); *see also Application*, Case No. PAC-E-10-05, § 2.2.3 (August 20, 2010) (same); Order No. 32084.

These most recent Commission orders are consistent with long-standing Commission precedent. In the seminal Idaho PURPA case, Idaho Power argued that Afton Energy, Inc. – an

off-system QF located in Wyoming – was not entitled to a PURPA contract because it “ha[d] not demonstrated that it can or will deliver its power generated at its facility to the [Idaho Power] for the full 35-year term.” *Afton Energy, Inc. v. Idaho Power Company*, Case No. U-1006-199, Order No. 17478, at pp. 14 (1982). The Commission acknowledged that there was risk with the proposed wheeling arrangement, which does not appear to have provided Afton with irrevocable wheeling rights. *Id.* But in ordering Idaho Power to execute a PPA, the Commission stated that “the risk of BPA’s exercise of the cancellation clause of the wheeling agreement is one that can reasonably be borne in bringing this project on line.” *Id.* at 15. Further, “[t]his is particularly so in light of the fact that Afton itself has borne the risk of increased costs of transmission and interconnection as well as a major portion of other transmission or interconnection risks by virtue of its agreement to the liquidated damages provision.” *Id.*, affirmed by *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 693 P.2d 427 (1984).¹⁴

The facts of the present case demonstrate that, in addition to long-standing precedent, common sense also dictates that a QF should not be required to secure firm transmission and interconnection rights prior to being able to obligate itself to a PPA. First, the costs to proceed through those processes are substantial. Each interconnection application for each of XRG’s 4 QFs requires a \$2,500 deposit, and each system impact study deposit is \$5,000. *See XRG Exhibit I*, at p. 53. Each Facilities Study deposit is \$7,000. *Id.* XRG understands that the deposit each QF must submit to secure wheeling rights is \$2,600, which would be a total of \$10,400.

¹⁴ Like XRG, Afton alleged that the utility had “‘intentionally and deliberately protracted the negotiation for the purchase of its power’ and had ‘continually employed delaying tactics designed to discourage Jones and destroy his efforts to complete the financing of this plant.’” Order No. 17478, at pp. 1-2.

Combined, the processes could take several months to complete, at which point the QF will begin incurring very substantial expenses for necessary construction. A QF cannot be expected to commit the time and resources to complete each process with no assurance of which rates will be available to its project, or that it will even receive a contract.

Further, XRG *has* been engaged in the interconnection process for these QFs since 2006, and lost its initial queue positions on account of reluctance to incur additional expenses at a time when Rocky Mountain Power refused to execute PPAs. *See XRG Exhibit 1*, at pp. 49-50, 53-55. XRG has also investigated availability of transmission from the projects to the Brady substation at various times since 2006 and is comfortable with its feasibility from a technical and cost perspective. *RMP SJ Exhibit A*, at p. 44, 56, 67, 78, 87; *XRG Exhibit 3*, at p. 12. Rocky Mountain Power's speculation that XRG may be unable to compel BPA to wheel the output to Brady is unfounded because BPA operates under an OATT.¹⁵ In light of the delays in securing PPAs, XRG recently attempted to commit to a revised online date of January 1, 2013, and XRG has committed to a \$45/kw delay default liquidated damages provision, which would require it to post \$3.15 million as a guarantee that it will achieve the projected online date. *XRG Exhibit 1*, at p. 55; *XRG Exhibit 3*, p. 12-14. XRG is aware of this damages provision because it is included in several PPAs entered into by companies managed by its parent company, Exergy Development Group of Idaho, with Idaho Power. *XRG Exhibit 1*, at pp. 51-52.

In a case not cited by Rocky Mountain Power, the Oregon Court of Appeals approved of

¹⁵ Further, Rocky Mountain Power's speculation that XRG will need three wheels to get the output to Brady is unfounded. XRG is engaged in securing a single wheel over lines operated by BPA or for which BPA possesses transmission rights, and XRG is confident in its ability to deliver the output to Brady.

the approach long used by the Idaho Commission and advocated by XRG in this case. See *Water Power Co. v. PacifiCorp*, 99 Or.App. 125, 127, 132, 781 P.2d 860, 862, 864 (1989) (approving of PUC ruling that, after the QF filed a complaint in October 1983, “Pacific had to sign a power purchase agreement at 1982 rates, if Water Power would submit a written plan for transmitting power to Pacific’s grid”).¹⁶ Moreover, Rocky Mountain Power’s reliance on *Empire Lumber Company v. Washington Water Power*, 114 Idaho 191, 755 P.2d 1229 (1987), is misplaced. In that case, the Court merely held that a QF is not entitled to “obtain an option to sell some amount of electrical power to be generated at some plant of unknown size or capacity.” *Id.*, 114 Idaho at 194, 755 P.2d at 1232. XRG did not request an option. It requested 4 standard contracts for 4 self-certified QFs of known size, capacity, and location, and for which it had expended substantial sums in developing. Rocky Mountain Power is therefore not entitled to judgment as a matter of law because XRG’s projects were mature at the time of the rate change in Order No. 31025, and were even more mature at the time of the drop in the eligibility cap in Order No. 32176.

According to Rocky Mountain Power, XRG would have had to submit non-refundable deposits of tens of thousands of dollars for interconnection and transmission rights to entitle itself to PPAs, all at a time when Rocky Mountain Power refused to even provide a responsive inquiry on due diligence for any of the projects, or so much as a draft PPA for 3 of the projects. But Rocky Mountain Power cannot have it both ways – if it will require an onerous delay default

¹⁶ The Commission should therefore reject Rocky Mountain Power’s reliance upon *Portland General Electric Co. v. Oregon Energy Co.*, OPUC Docket No. 98-055, 1998 Ore. LEXIS 131, *recons. denied*, Order No. 98-238, because it is a non-binding, out-of-state commission order and it imposes a requirement never utilized in Idaho.

liquidated damages provision to more than protect it and its ratepayers from financial risk, it cannot also require the QF to complete the expensive and time consuming interconnection and transmission processes prior to PPA execution.

c. Rocky Mountain Power is not entitled to summary judgment on its asserted basis of a delay by XRG in filing the Complaint.

i. The pre-filed complaint rule does not compel summary judgment.

Rocky Mountain Power asserts incorrectly that the “pre-filed complaint rule” should apply to this case, where the QF had almost no notice of the change of rates in Order No. 31025 and filed its Complaint prior to the change in the eligibility cap in Order No. 32176. Rocky Mountain Power’s argument fails for many reasons.

First, the pre-filed complaint requirement arose from a procedure where the utility filed a petition to change existing rates well in advance of the effective date of the rate change. *See A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 814, 816, 828 P.2d 841, 843, 845 (1992) (noting that utility filed petition to change rates in January 1985, and rates did not go into effect until late April 1985); *In the Matter of the Application of Idaho Power Company for New Cogeneration/Small Power Production Rates*, Case No. U-1006-248, Order No. 19745, at pp. 1, 3 (1985) (noting that utility filed applications to lower rates in “summer 1984” and January 25, 1985, but cut-off date for filing a complaint for grandfather status at April 29, 1985). Without such advance notice, the pre-filed complaint rule makes no sense, and the rate change in Order No. 31025 occurred with almost no advance notice to XRG or other QFs.

Second, in *A.W. Brown*, the Court merely *approved* of this grandfather test and did not compel it as the Commission’s only available way to test whether a QF had effected a legally

enforceable obligation. Third, the Commission has not required this pre-filed complaint test consistently. *See, e.g., Blind Canyon Aquaranch*, Order No. 25802; *Earth Power Resources, Inc.*, Order No. 27231. Fourth, even if the pre-filed complaint rule applied to two rate changes at issue in XRG's Complaint, XRG filed its Complaint many months before the rate change regarding the eligibility cap in Order No. 32176. And the Complaint has now proven highly meritorious in light of Rocky Mountain Power's subsequent determination that it had been incorrect, and XRG had been correct, regarding the transmission capacity issue.

ii. Rocky Mountain Power has not proven the elements of laches.

As noted above, laches is an affirmative defense which the defendant must prove. The elements are: "(1) defendant's invasion of plaintiff's rights, (2) delay in asserting plaintiff's rights, the plaintiff having had notice and an opportunity to institute a suit, (3) lack of knowledge by defendant that plaintiff would assert his rights, and (4) injury or prejudice to defendant in event relief is accorded to plaintiff or the suit is not held to be barred." *Huppert v. Wolford*, 91 Idaho 249, 257, 420 P.2d 11, 19 (1966). Rocky Mountain Power itself notes that, "Whether a party is guilty of laches primarily is a question of fact. . . ." *See Rocky Mountain Power's Motion for Summary Judgment*, at p. 20 (internal quotation omitted). That admission alone warrants rejecting this argument at summary judgment. Aside from the lack of evidence, however, Rocky Mountain Power does not even have a colorable argument for the second and fourth elements.

XRG engaged in no delay in asserting its position or its claims. As documented above and admitted by Rocky Mountain Power, XRG attempted at all times after March 2009 to convince Rocky Mountain Power to negotiate PPAs for delivery of all 4 QFs at Brady substation. That XRG waited until July 2010 to file a Complaint only demonstrates that XRG filed a

Complaint as a last resort after giving Rocky Mountain Power ample time to recognize what ultimately proved true – that it would have the capacity to accept more than 23 MW all along.

Further, Rocky Mountain Power has not even provided any clearly articulated basis for how it was prejudiced by the July 29, 2010 filing of the Complaint. It took Rocky Mountain Power over a month to even respond to XRG’s last correspondence on March 12, 2010, with a letter dated April 13, 2010. In several cases arising out of the rate change in Order No. 31025, the Commission approved of PPAs with grandfathered rates entered into after the rate change. *See* Order Nos. 32024, 32025, 32026, 32027, 32068, 32104, 32138. It was reasonable for XRG to wait to see if Rocky Mountain Power would resolve the transmission constraint XRG believed to be wholly non-existent all along prior to filing the Complaint. Indeed, Rocky Mountain Power ultimately discovered XRG was correct about transmission – the crucial issue in this case – *after XRG filed the Complaint.*

II

Rocky Mountain Power’s Motion for Protective Order to Stay Discovery should be denied.

Rocky Mountain Power’s request for protective order and stay of discovery is governed by IDAPA 31.01.01.221, and I.R.C.P. 26(c). “The discovery rules are to be used as a means of eliciting unprivileged information that appears reasonably calculated to lead to the discovery of admissible evidence.” *Rosebud v. PacifiCorp*, Case No. UPL-E-92-6, Case No. 25784 (1994). A tribunal may issue a protective order to protect a party from, inter alia, “undue burden,” but only “for good cause shown.” I.R.C.P. 26(c). “If the motion for protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.” *Id.* Rocky Mountain Power is incorrect that a protective

order is justified.

As explained above, the discovery requests still outstanding (Nos. 24-52) pertain to the crucial issue in this case – Rocky Mountain Power’s bad faith investigation into available transmission capacity. XRG’s Motion to Complete Discovery under Rule 56(f) should be granted on that basis alone. *Doe*, 126 Idaho at 1044, 895 P.2d at 1237 (holding court erred in denying Rule 56(f) motion seeking an opportunity to conduct discovery on relevant points before disposition of the summary judgment motion).¹⁷

Additionally, Rocky Mountain Power has over broadly characterized each and every one of XRG’s Production Request Nos. 24-52 as “burdensome.” Some that it lists as “particularly burdensome in both depth and scope” are anything but burdensome. *See Rocky Mountain Power’s Motion for Protective Order*, at p. 4 & n.10 (listing Production Requests Nos. 44-52). Those questions inquire into highly relevant issues, such as an explanation for why Rocky Mountain Power stated in publicly available documents in early 2010 that imports to Brady for bidders into a request for proposal would require \$0 in upgrades, while at the same time telling XRG it could not deliver to Brady without XRG paying for upgrades. *See RMP POD Exhibit A*, at No. 44. Some can be answered with a single word. *See id.* at No. 45(a) (asking if Rocky Mountain Power ever provided XRG with IRP Methodology rates). Even if some requests could

¹⁷ Rocky Mountain Power’s cited cases are so distinguishable that they do not merit serious discussion. *See Rocky Mountain Power’s Motion for Protective Order*, at p. 3 (citing *Selkirk Seed Co. v. Forney*, 134 Idaho 98, 105, 996 P.2d 798,805 (2000) (holding that court’s protective order was appropriate where the plaintiff sought discovery on an “alleged fraud on the court” which “was not part of a ‘case or controversy’ properly before it” and none of applicable documents were evidence of such fraud); *Avila v. Wahlquist*, 126 Idaho 745, 749, 890 P.2d 331, 335 (1995) (holding trial court properly granted summary judgment without additional discovery because plaintiff failed to file notice of tort claim act within applicable statute of limitation).

be considered unduly burdensome, Rocky Mountain Power's recourse is to object to individual questions rather than refuse to answer any questions regarding its investigation into transmission availability.¹⁸

Rocky Mountain Power has served, and XRG has individually responded or objected to 50 production requests in a timely fashion. For the Commission to grant summary judgment without a procedural schedule in this case, and without allowing for XRG to receive the responses to these highly relevant production requests on account of a massive, sophisticated utility's complaint that the requests are "unduly burdensome" would be patently unfair. The Commission should deny Rocky Mountain Power's Motion for Protective Order.

CONCLUSION

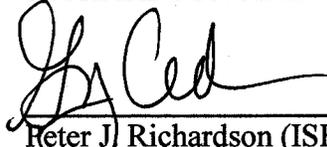
XRG remains committed to entering into a standard power purchase agreement for each of the 4 QFs, and maintains it has the right to 4 contracts containing standard provisions and the published avoided cost rates. XRG respectfully requests that the Commission require Rocky Mountain Power to respond to all pending discovery requests prior to the time XRG must provide a final response to any pleading or motion addressing the merits of the allegations in XRG's Complaint. Further, without waiving its right to the full relief requested in the Complaint, XRG alternatively requests that the Commission simply order Rocky Mountain Power to accept XRG's reasonable settlement offer and execute 4 standard contracts. XRG stands willing to provide whatever evidence or argument the Commission may request regarding

¹⁸ Ironically, Rocky Mountain Power cites *Rosebud v. PacifiCorp*, where the Commission not only ordered a party to respond to discovery requests but also painstakingly itemized the various appropriate bases upon which the party may object to individual questions. *See* Order No. 25784.

the settlement negotiations.

Respectfully submitted this 22nd day of February 2011.

RICHARDSON AND O'LEARY, PLLC



Peter J. Richardson (ISB No: 3195)

Gregory M. Adams (ISB No. 7454)

Attorneys for the XRG LLCs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ^{22nd} day of February, 2011, a true and correct copy of the within and foregoing XRG LLCs' ANSWER IN OPPOSITION TO ROCKY MOUNTAIN POWER'S MOTION FOR PROTECTIVE ORDER TO STAY DISCOVERY AND MOTION FOR SUMMARY JUDGMENT, and XRG LLCs' MOTION TO COMPLETE DISCOVERY PURSUANT TO I.R.C.P. 56(f) was served in the manner shown to:

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By:



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Attorneys for Complainant

ANSWER TO ROCKY MOUNTAIN POWER'S MOTION FOR PROTECTIVE ORDER AND
MOTION FOR SUMMARY JUDGMENT AND XRG LLCs' MOTION TO COMPLETE
DISCOVERY

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**XRG LLCs' ANSWER TO ROCKY MOUNTAIN POWER'S MOTION FOR
SUMMARY JUDGMENT**

EXHIBIT 1

**Excerpts of XRG LLCs' Responses to Rocky Mountain Power's
Production Requests**

PRODUCTION REQUEST NO. 24

On March 15, 2010, did XRG control all of the property rights necessary to construct and operate the XRG projects for twenty years, including property rights to construct and operate all required interconnection facilities, construction access rights, and ongoing wind leases? Please provide documentation of such property rights.

XRG RESPONSE TO REQUEST NO. 24

See the attached land lease agreements and extensions.

WIND PARK LEASE AGREEMENT

THIS WIND PARK LEASE AGREEMENT (the "Agreement") is entered into as of March 14, 2007 (the "Effective Date") by and between J.R. Simplot Company ("Lessor") and XRG-DP8, LLC, an Idaho limited liability company ("Lessee"). Lessor and Lessee are sometimes herein referred to as the "Parties."

RECITALS

A. Lessor owns certain real property located in Cassia County, in the State of Idaho, and more particularly described in Exhibit A attached hereto (the "Property").

B. Lessee desires to lease the Property in order for Lessee to develop, install, own, and operate wind energy generation systems (also referred to as "wind turbines") on the Property.

C. Lessor desires to lease to Lessee the Property on the terms and conditions contained herein.

D. Lessee seeks to provide wind energy to Rocky Mountain Power and is currently in active negotiations to sell up to Twenty megawatts (20 MW) of wind energy to Rocky Mountain Power. Lessor understands, and herein specifically agrees that Lessee's obligation hereunder are contingent upon Lessee's successful negotiation of power sales agreement(s) ("PPA(s)") with Rocky Mountain Power or other acceptable purchaser and that depending upon the nature of said power sales agreements may be required to install less than 20 MW of wind turbines and/or may have to install its wind turbines in phases over a period of years.

NOW, THEREFORE, for a valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Lessor and Lessee hereby agree as follows:

AGREEMENT

1. Lease. Lessor agrees to lease to Lessee the Property subject to the terms and conditions hereof, for the use and purpose of (i) wind resource evaluation, wind energy development, wind energy storage system, energy transmission and related wind energy development uses, as described in Section 3.1 below, (ii) placement on, over, under and across the Property of transmission lines for electricity and communications and related facilities and for one or more substations or interconnection facilities, as described in Section 3.2, and (iii) ingress and egress to and from the Property, as described in Section 3.3 below.

1.1 Representations and Warranties. Lessee accepts the Property included in this Agreement in its present condition, AS IS, without any representation or

warranties, express or implied, except as otherwise set forth in this Lease. It is understood and agreed that Lessee has inspected the Property, and that Lessee has made its determination of the value of the Property and its usefulness for the purposes for which Lessee is authorized to use the Property.

2. Term

2.1 Term. The term of this Agreement (the "Term"), shall begin on the Effective Date and shall continue for thirty (30) years from the commencement of Commercial Operations (the "Commercial Operations Date"); on the last day of such thirty year period the Agreement shall expire (the "Expiration Date"). As used herein, the term "Commercial Operations" shall mean the first production and sale of wind energy or energy credits by Lessee or its successors or assigns on the Property or any portion thereof. Either party may file a supplemental Memorandum of Wind Lease Agreement setting forth the exact Expiration Date of the Term. In the event Lessee fails to commence Commercial Operation of the installed capacity secured by Lessee in the PPA(s) within three (3) years after the Effective Date, Lessor may terminate this Agreement, by providing Lessee notice pursuant to Section 10.3.

3. Permitted Uses of the Property. The rights described above shall permit Lessee to use the Property for the following uses, and no others:

3.1 Scope of Wind Energy and Development Use and Purpose. During the Term, Lessee shall have the exclusive right to erect, install, construct, replace, maintain, repair and operate wind energy generation systems on the Property, including the use of wind that passes over the Property, as Lessee determines in its sole discretion for the MW capacity secured by Lessee in the PPA(s). Without limiting the generality of the foregoing, this Section 3.1 shall include the installation, construction, maintenance and operation of any and all equipment and improvements necessary or useful for the generation of wind energy into electricity, including, but not limited to, wind turbines, distribution wires, transmission wires, electric transformers, energy storage facilities, telecommunications equipment, power generation facilities to be operated in conjunction with wind turbine installations, roads, anemometers, meteorological towers and wind measurement equipment, control buildings, storage facilities, maintenance yards, and related facilities and equipment, but shall not include the construction, installation or erection of any temporary or permanent residential structures. Lessee shall determine the size, type, and manufacturer of such wind energy generation systems in its sole discretion, but Lessee shall not locate, position or place any wind turbines, unless otherwise agreed to by the Parties, within One Thousand Five Hundred feet (1500') of any occupied residence as such residence exists at the time of the installation and construction of the wind turbine without Lessor's prior written consent. In addition, Lessee may conduct such tests and inspections, including wind speed tests and soils and geologic inspections, as Lessee deems necessary or desirable in connection with its development of a wind energy generation system on the Property. Upon Lessor's written request, Lessee shall provide Lessor with the results together with any underlying data of any tests and inspections undertaken by Lessee pursuant to the preceding sentence.

3.1.1 Lessor's Rights to Use the Property. It is understood, however, that Lessor shall retain all rights to engage in all other activities that do not interfere with Lessee's use of the property for wind generation systems. Further, Lessor shall have

the right to install its own wind energy generation systems for MW capacity in excess of the capacity secured by Lessee in its FPA(s) as set forth in Section 6.3.2.

3.2 Scope of Transmission Use and Purpose. Lessee shall have a non-exclusive right to erect, install, construct, replace, maintain, repair, operate and use (i) underground and/or overhead distribution and transmission lines, cables and related facilities for the transmission of electrical energy and communications, and (ii) one or more substations and interconnection or switching facilities from which Lessee and others may interconnect to a utility transmission system or the transmission system of another purchaser of electrical energy, all together with appropriate rights of way on, along and across the Property. This right of use and purpose shall remain in effect only so long as Lessee continues to generate such electric energy on Lessor's property.

3.3 Scope of Access Use and Purpose. Lessee shall have a non-exclusive right of access, ingress and egress to and from the Property and any facilities and equipment installed thereon over and across the Property by means of existing roads or otherwise and by such route or routes as Lessee may construct from time to time. The routes or roads will be approximately fourteen (14) feet in width. Lessee specifically acknowledges that all roads now upon the Property and those roads to be constructed as a part of the wind generation facilities may be used by Lessor. Lessee will consult with Lessor in the siting of new roads on Lessor's property, and Lessor will have final plan approval of new project roads, which approval shall not be unreasonably withheld. Lessor may continue to keep livestock on the Property or engage in other agricultural activities. Such livestock shall have the right of way on all roads and Lessee agrees to pay damages for any livestock killed by its employees, contractors and subcontractors.

3.4 Waiver of Setback Requirements. Lessee may locate wind energy generation systems or related facilities or equipment at any location upon the Property, including at or near the Property lines under the terms and conditions herein. Lessee in good faith shall consult and coordinate with Lessor on placement of wind energy generation systems and all related components to determine if any impact may occur on current agricultural or grazing operating conditions and shall use all commercially reasonable efforts to locate wind generation related systems as to minimally impact Lessor's current operations on the Property. Lessor's consent of final placement of wind energy generation systems or related facilities shall not be unreasonably withheld. Furthermore, in the event that the location of any portion of any wind energy generation system or related facilities or equipment to be installed or constructed on the Property or along or near property lines is limited or restricted by any private agreements or restrictions or any laws, rules or ordinances of any governmental agency, Lessor shall cooperate with and assist Lessee in obtaining waivers or variances from such requirements and shall execute all documents evidencing Lessor's agreement to the elimination of such requirements.

3.5 Ownership of Installed Property. All property installed on the Property by Lessee, its successors or assigns, whether real, personal or mixed, shall remain the property of Lessee and shall be removable by Lessee at any time, subject to Section 8.3 below.

4. Payments to Lessor.

4.1 Payment Due Prior to Commencement of Commercial Operation.

Beginning on the Effective Date and continuing until the Commercial Operation Date, Lessee shall pay to Lessor an annual fee of One Thousand Five Hundred Dollars (\$1,500), such fee to be paid on or before July 1st of each such year, beginning in 2007.

4.2 Minimum Rent. Upon completed installation of each wind turbines, Lessee shall pay to Lessor a one time fee of Four Thousand Dollars (\$4,000) per MW of installed capacity on Lessor's land ("Land Rent Start-Up"). After the Commercial Operation Date (and except as provided in Section 4.2(a), on or around each January 1st that occurs during the duration of the Term, Lessee shall pay to Lessor the amount One Thousand Five Hundred Dollars (\$1,500) per MW of installed capacity for the first year and Two Thousand Dollars (\$2,000) per MW of installed capacity for each subsequent year ("Land Rent") per year, provided that (a) after Lessee terminates the Agreement, Lessee shall pay Lessor a partial Land Rent payment prorated for the partial year between the termination date and the next following January 1st, (b) no later than one (1) month following the Commercial Operation Date, Lessee shall pay Lessor a partial Land Rent payment prorated for the partial year between the Commercial Operation Date and the next following January 1st. In each year following the Commercial Operation Date, the Land Rent shall be paid quarterly. In the event that Lessee installs an electrical substation on the Property, Lessee shall pay to Lessor an additional One Thousand Dollars (\$1,000.00) per year, as and for substation rent, per substation ("Substation Rent"). For each substation, the first rent payment shall be due at the initiation of construction of said substation and on or before January 10th for each subsequent year thereafter during the remaining Term of this Agreement. In the further event that Lessee shall construct a transmission (69kV or larger) line or lines across any portion of Lessor's property pursuant to Section 3.2 above, Lessee shall in addition pay Lessor transmission right-of-way rent annually, calculated at One Thousand Dollars (\$1,000.00) per lease acre, with such lease acres calculated by multiplying the linear feet of transmission lines constructed across Lessor's lands described on Exhibit A attached hereto by a right-of-way width of fifty (50) feet, such product to then be divided by 43,560 square feet ("Transmission Line Rent"). For each transmission right-of-way, the first rent payment shall be due at the initiation of use of said right-of-way and on or before January 10th for each subsequent year thereafter during the remaining Term of this Agreement. The Land Rent, Substation Rent and Transmission Line Rent are collectively referred to as "Minimum Rent".

4.3 Royalty Payment. If during the Term of this Agreement, the Royalty Percentage (defined below) of Gross Revenues (defined below) from the wind generation systems located on the Property during any calendar year exceeds the Minimum Rent applicable to such calendar year, Lessor shall pay such excess to Lessee as additional rent. These additional rent payments are due and payable within sixty (60) days following the end of each calendar year.

4.4 Definition of "Royalty Percentage" and "Gross Revenues". The term "Royalty Percentage" shall be two and one-half percent (2.5%) in years 1 through five of Commercial Operations, three and one-half percent (3.5%) in years 6 through 10 of Commercial Operations, four and one-half percent (4.5%) in years 11 through 15 of Commercial Operations, and five and one-half percent (5.5%) in year 16 and in each subsequent year until the termination of the Agreement.

The term "Gross Revenue" shall mean: any cash receipts actually received by Lessee from 1) the sale of electricity generated from the wind generation facilities to wholesale

and/or retail purchasers of such electricity including any interest or late fees paid thereon; 2) the sale of any environmental benefits or green tags associated with the generation of wind energy; and 3) the proceeds of business interruption or other insurance or warranties or guarantee, to the extent that payment is made thereunder to compensate Lessee for lost or deferred revenue from the generation or sale of electricity from the wind generation facilities. Notwithstanding the foregoing, "Gross Revenue" shall not include the following: 1) any revenue, income, sums or benefits received from any other source; 2) funds received from debt financings and equity investments and any interest earned on such funds; 3) amounts received from a governmental or quasi-governmental body or agency as a payment, subsidy or credit in connection with or arising out of the development or construction of wind generation facilities; 4) parasitic loss (i.e., electrical energy used to power wind turbine generators or any other improvements, or in connection with Lessee's operations on the Property; 5) sales of electrical energy for which payment is delayed or has not been received (including, without limitation, due to a default by the purchaser thereof), except that payment under Section 4.3 shall be paid on any delayed payments when such payments are actually received; 6) proceeds received from the sale, lease or other disposition of any wind turbine generators or from the sale, lease or other disposition of any of Lessee's other improvements, trade fixtures or chattel, or any interest therein; 7) any rental, installment payment or lump sum payment received by Lessee in exchange for Lessee's assigning, subleasing or otherwise transferring all or any interest of Lessee in this Lease; 8) sales of electrical energy generated from wind turbine generators not located on the Property; or 9) tax benefits received by Lessee, including, without limitation, production tax credits.

4.4.1 Lessee will provide to Lessor a compilation of the annual production of electric energy generated on the Property, including copies of the statements received from the purchaser of the electricity, within sixty (60) days following the end of each calendar year to ensure compliance with Lessee's payment obligation. Lessor agrees that such statements are the property of Lessee and that Lessor shall keep such records confidential and shall not disclose such records to any third party without Lessee's prior written consent.

4.5. Number of Wind Turbines on the Property. The Parties hereby recognize and agree that the payments provided for in Sections 4.2 and 4.3 were negotiated with the intent and understanding that Lessee will install and operate wind turbines with an installed capacity of Twenty (20) MW on the Property. The Parties further recognize and agree that the final installed capacity may be more or less than 20 MW. The Parties desire for Lessee to fully build out the wind potential on the Property to 20 MW is limited only to the extent that it is able to secure a PPA(s) from Rocky Mountain Power or other acceptable purchaser. If Lessee installs fewer megawatts of capacity than are called for in the PPA(s), then Lessee will pay Lessor Minimum Rent in an amount calculated as if it had constructed the full amount of capacity called for in the PPA(s).

[Summary chart follows]

4.6 Summary Chart of Payments

Section 4.1	Payment Prior to Commencement of Commercial Operations	\$1,500/yr	Beginning with the Effective Date and Ending Upon Commencement of Commercial Operations
Section 4.2	Land Rent (Start-Up)	\$4,000/MW installed capacity	One Time Fee
	Land Rent (Annual)	\$1,500/MW installed capacity for first year \$2,000/MW installed capacity every year after first year	Annual after Commencement of Commercial Operations; paid in quarterly
	Substation Rent	\$1,000/substation	Annual after initiation of construction
	Transmission Line Rent	\$1,000/lease acre for transmission lines	Annual after initiation of construction
	Minimum Rent = Land Rent Annual, Substation Rent, & Transmission Line Rent		Annual after Commencement of Commercial Operations or initiation of construction
Section 4.3	Royalty Payment	If Royalty Percentage of Gross Revenues exceeds the Minimum Rent (Section 4.2.) applicable to such calendar year, Lessor shall pay such excess to Lessee as additional rent	Annual after Commencement of Commercial Operations

5. Lessee Covenants. Lessee covenants, represents and warrants to Lessor as follows as of the Effective Date:

5.1 Compliance with Law. Lessee shall at all times comply in all material respects with all valid laws, ordinances, rules, regulations and statutes of any governmental agency applicable to Lessee's operations on and use of the Property.

5.2 Payment of Taxes and Other Charges. Lessee shall be responsible for any increase in real property taxes levied against the Property attributable to Lessee's

installation of improvements on the Property owned by, or under the control of, Lessee, which improvements may include the wind energy generation system, power transmission and interconnection facilities, and other fixtures and equipment owned by Lessee and located on the Property. Lessee will also pay the real and personal property taxes associated with the installation of the wind generation systems. Lessee will also pay when due all charges for gas, water, electricity and other utilities used by Lessee on the Property.

5.3 Liens. Lessee shall keep Lessor's interest in the Property free and clear of all liens and claims of liens for labor and services performed on, and materials, supplies and equipment furnished to the Property in connection with Lessee's use of the Property.

5.4 Hazardous Substances. Lessee shall not violate, and shall indemnify Lessor against any violation by Lessee of, any law, statute, order, ordinance, rule or regulation relating to the generation, manufacture, storage, use, release or threatened release, disposal, transportation or presence of any substance which is defined as a "hazardous substance", "deleterious substance", "hazardous material", "toxic substance", "solid waste" or "hazardous waste" in any applicable federal, state or local law, statute or ordinance on or under the Property. This Section is not intended to apply to the legal and appropriate application of substances to mitigate or control weeds pursuant to Section 5.9.

5.5 Indemnification. Lessee shall indemnify, defend (using counsel satisfactory to Lessor) and hold harmless Lessor's members, partners, mortgagees, officers, employees and agents (each, an "Lessor Indemnified Party") against any and all losses, damages, claims, expenses and other liabilities resulting from or arising out of, either wholly or in part, (i) any operations of Lessee on the Property, (ii) any negligent act or negligent failure to act on the part of Lessee or anyone else engaged in doing work for Lessee, or (iii) any breach of this Agreement by Lessee. This indemnification shall survive the termination of this Agreement. This indemnification shall not apply to losses, damages, claims, expenses and other liabilities caused solely by any grossly negligent or deliberate act or omission on the part of any Lessor Indemnified Party.

5.6 Insurance. Lessee agrees to maintain liability insurance covering its activities on the Property and to name Lessor as an additional insured. Such coverage shall have a minimum combined occurrence and annual limitation of Ten Million Dollars (\$10,000,000) provided that such amount may be provided as part of a blanket policy covering other properties. Lessee agrees to supply Lessor with such certificates and other evidence of insurance as Lessor may reasonably request.

5.7 Damage to Lessor's Interests. In the event that Lessee's, its contractors', or subcontractors' activities on the Property pursuant to this Agreement causes damage to any of Lessor's livestock, growing crops, farming or grazing operations on the Property, Lessee agrees to pay to Lessor an amount equal to all of Lessor's out-of-pocket losses due to such damage to such livestock, growing crops, farming or grazing operations which shall be an amount equal to the revenue that Lessor would have received on the open market for said damaged crops or livestock during the growing or grazing season during which crops or livestock were damaged or destroyed. Payment shall be made by Lessee within thirty (30) days after notification from Lessor.

5.8 Waste. Lessee shall not commit or permit to be committed any waste, strip, damage to or misuse of the Property. Lessee shall refrain from practices that will cause unusual erosion to the Property and Lessee shall maintain all the improvements on the Property in good condition and repair and shall maintain the Property in a clean and presentable condition.

5.9 Woods. Lessee agrees to coordinate with Lessor to implement reasonable appropriate wood mitigation measures on the Property in the vicinity of wind generation systems and to solely bear the cost for such measures.

5.10 Fences and Gates. Lessee, its agents, employees, and invitees shall be responsible to open and close any gates accessing Lessor's property, and to repair both the fences and gates from any damage caused by their opening and closing of the gates in the course of gaining access to the Property. Lessee will be responsible for any gates left open and for any time spent by Lessor gathering livestock that strayed from Lessor's property as a result of Lessee's or its agents or employees leaving a gate open.

5.11 Project(s) Expansion. Lessee may take initiative to maximize opportunities to add or otherwise further wind energy generation systems on Lessor's property by negotiating modifications to this Agreement agreeable to both the Parties.

5.12. No Interference. Lessee shall not interfere with Lessor's use of the Property. The Parties shall have the right to remedy any such interference by the other party by any appropriate means and the cost thereof shall be immediately reimbursed to the aggrieved party. Specifically, Lessee shall not place any wind energy generating facilities in such a manner as to interfere the normal operations of Lessor's farming and ranching operations including pivots and irrigation structures.

6. Lessor Covenants. Lessor covenants, represents and warrants to Lessee as follows as of the Effective Date:

6.1 Lessor's Authority. Lessor is the sole owner of the Property. Lessor has the full and unrestricted power and authority to execute and deliver this Agreement.

6.2 Liens and Tenants. Lessor has attached hereto as Exhibit C a list of exceptions to title contained in a preliminary title report dated March 6, 2007 issued by Land Title & Escrow, Inc. of Burley, Idaho. Said preliminary title report covers real property owned as a whole by Lessor in Cassia County, Idaho, of which the Property is a portion. As an accommodation to Lessee and to three other limited liability companies related to Lessee, Lessor is leasing four (4) separate parcels, which as noted are subparts of the whole parcel covered by said title commitment. Consequently, it is possible that some of the exceptions to title listed in Exhibit C do not affect the Property. Subject to the foregoing limitations, there are no liens, encumbrances, leases, mortgages, deeds of trust, fractured interests, mineral or oil and gas rights, or other exceptions to Lessor's fee title ownership of the Property except as specified in Exhibit C attached hereto. Lessor represents and warrants that there are no tenants on the Property except as specified as in Exhibit C. Lessee acknowledges that the leasehold granted to Lessee hereunder is subject to these matters listed on Exhibit C as they may affect the Property. Lessor covenants and agrees that, during the Term, it shall not permit or grant tenancy rights in the Property to any entity or person unless and until both Lessor and such tenant have executed agreements presented by Lessee

subordinating such tenancy to the Agreement and/or protecting Lessee from disturbance by the tenant of Lessee's use of the Property (the "Subordination Agreements"). Furthermore, in the event that any entity or person holds or comes to hold any form of tenancy on the Property during the Term without having previously executed a Subordination Agreements, Lessor shall notify Lessee within ten (10) days of gaining knowledge of such tenancy, and both Lessor and such tenant shall execute Subordination Agreements presented by Lessee within fifteen (15) days of such presentation by Lessee.

6.3 No Interference. As long as no "Event of Default" (as this term is defined in Section 8 below) caused by Lessee has occurred and is continuing, Lessee shall have the quiet use and enjoyment of the Property and all wind that passes over the Property in accordance with the terms of this Agreement without any suit, trouble or interference of any kind by Lessor or any party claiming through Lessor. Lessor may use the Property for agricultural, recreational, or other beneficial purposes as described in Section 3.1.1, including oil and gas exploration and extraction or any other mineral exploration or extraction (see Section 6.3.1, below, for additional limitations on these uses). Lessor will not otherwise use the Property for any use or take any other action which interferes with or is incompatible with Lessee's use of the Property as permitted by this Agreement or which in any way interferes with the wind flow across the Property. Lessor will not grant any license, lease, or other right with respect to the Property which could interfere with Lessee's operations. Notwithstanding the foregoing, Lessor retains the right at its sole discretion to construct or locate wind generation systems or other similar projects on the Property. The Parties shall have the right to remedy any such interference by the other party by any appropriate means and the cost thereof shall be immediately reimbursed to the aggrieved party.

6.3.1 Oil, Gas, and Mineral Exploration and Extraction. Lessor reserves the right to lease the Property for oil and gas exploration, extraction and transportation by pipelines. Any exploration, extraction, or pipeline activities arising from a mineral lease executed by Lessor subsequent to this Agreement must be compatible with Lessee's use of the Property, and will not harm, interfere with, put at risk, or jeopardize the any of Lessee's improvement.

6.3.2 Lessor's Right to Generate. So long as it does not interfere with Lessee's use of the Property, Lessor reserves the right to install and construct wind generation systems for MW capacity in excess of the capacity secured by Lessee in the PPA(s).

6.4 Hazardous Substances. Lessor shall not violate, and shall indemnify Lessee against any violation by Lessor of, any law, statute, order, ordinance, rule or regulation relating to the generation, manufacture, storage, use, release or threatened release, disposal, transportation or presence of any substance which is defined as a "hazardous substance", "deleterious substance" "hazardous material", "toxic substance", or "solid waste", "hazardous waste" in any applicable federal, state or local law, statute or ordinance, on or under the Property. This Section is not intended to apply to the legal and appropriate application of substances to mitigate or control noxious weeds.

6.5 Indemnification. Lessor shall indemnify, defend (using counsel satisfactory to Lessee) and hold harmless Lessee and Lessee's members, partners, mortgagees, officers, employees and agents (each, a "Lessee Indemnified Party")

against any and all losses, damages, claims, expenses and other liabilities resulting solely from or arising solely out of (i) any operations of Lessor on the Property, (ii) any grossly negligent act or grossly negligent failure to act on the part of Lessor or anyone else engaged in doing work for Lessor, or (iii) any breach of this Agreement by Lessor. This indemnification shall survive the termination of this Agreement. This indemnification shall not apply to losses, damages, claims, expenses and other liabilities caused either wholly or in part by any negligent or deliberate act or omission on the part of any Lessee Indemnified Party.

6.5.1 Lessor's responsibility to indemnify Lessee under Section 6.5 is capped at One Million Dollars (\$1,000,000.00), unless an insurance policy is in place which provides for greater coverage. In the event oil, gas, mineral exploration or extraction activities commence on the Property by Lessor or other party, the cap of Lessor's responsibility to indemnify Lessee under Section 6.5 is increased to Five Million Dollars (\$5,000,000.00).

7. Encumbrances; Required Notices to Mortgagees.

7.1 Right to Encumber. Lessee shall have the right at any time to mortgage to any entity (herein, a "Mortgagee") all or any part of Lessee's interest under this Agreement without the consent of Lessor. Lessor shall be provided copies of all such agreements between Lessee and Mortgagees and all such mailing addresses for the purposes of supplying notice as described in Section 7.2(c). Lessor agrees that such documents are the property of Lessee and that Lessor shall keep such records confidential and shall not disclose such records to any third party without Lessee's prior written consent.

7.2 Covenants for Mortgagees Benefit. Should Lessee mortgage any of its interest hereunder as provided in Section 7.1 above, Lessee and Lessor expressly agree between themselves and for the benefit of any Mortgagees as follows:

(a) The Parties will not cancel or modify this Agreement without the prior written consent of each of the Mortgagees, which consent shall not be unreasonably withheld or delayed.

(b) Each Mortgagee shall have the right to do any act or thing required to be performed by Lessee under this Agreement, and Lessor shall accept any such act or thing performed by a Mortgagee under this Agreement as if such act or thing was done by Lessee itself.

(c) If Lessor shall become entitled to terminate this Agreement due to an uncured default by Lessee, Lessor will not terminate this Agreement unless it has first given written notice of such uncured default and of its intent to terminate this Agreement to each Mortgagee which have recorded and/or given Lessor personal notice of their secured interest in Lessee's property and has given each such Mortgagee at least thirty (30) additional days to cure the default to prevent such termination of this Agreement.

(d) In case of the termination of this Agreement as a result of any default or the bankruptcy, insolvency or appointment of a receiver in bankruptcy for Lessee, Lessor shall give prompt notice to all Mortgagees which have recorded and/or given Lessor personal notice of their secured interest in Lessee's property. Lessor may,

at its sole discretion, upon written request of the first priority Mortgagee which has recorded and/or given Lessor personal notice of their secured interest in Lessee's property, made within forty (40) days after notice to such Mortgagee, enter into a new lease agreement with such Mortgagee, or its designee, within twenty (20) days after the receipt of such request. Such new lease agreement shall be effective as of the date of the termination of this Agreement by reason of default by Lessee, and shall be for a term equal to the remainder of the Term of this Agreement and upon the same terms, covenants, conditions and agreements as contained in this Agreement. Upon the execution of any such new lease agreement, such Mortgagee shall (i) pay Lessor any amounts which are due Lessor from Lessee, (ii) pay Lessor any and all amounts which would have been due under this Agreement (had this Agreement not been terminated) from the date of the termination of this Agreement to the date of the new lease agreement, and (iii) agree in writing to perform or cause to be performed all of the other covenants and agreements set forth in this Agreement to be performed by Lessee to the extent that Lessee failed to perform the same prior to the execution and delivery of the new lease agreement.

(e) The sale or other transfer of any interest in the Agreement by any such Mortgagee shall be conditioned on the express written consent of Lessor; and if granted, then such Mortgagee shall have no further duties or obligations hereunder.

8. Defaults: Termination.

8.1 Defaults. Each of the following events shall constitute an "Event of Default" by a party and, subject to Section 7.2 above, shall permit the non-defaulting party to terminate this Agreement and/or pursue all other appropriate remedies available at law or equity:

(a) The failure or omission by either party to pay amounts required to be paid hereunder when due, and such failure or omission has continued for thirty (30) days after written notice from the other party;

(b) The failure or omission by either party to observe, keep or perform any of the other terms, agreements or conditions set forth in this Agreement, and such failure or omission has continued for thirty (30) days (or such longer reasonable period of time required to cure such failure or omission, if such failure or omission cannot reasonably be cured with a thirty (30) day period) after written notice from the other party; or

(c) A party files for protection or liquidation under the bankruptcy laws of the United States or any other jurisdiction or has an involuntary petition in bankruptcy or a request for the appointment of a receiver filed against it and such involuntary petition or request is not dismissed within sixty (60) days after filing.

8.2 Termination by Lessee. Lessee may terminate this Agreement at any other time by giving Lessor at least three (3) months' written notice and paying Lessor a termination fee equal to the Minimum Land Rent for the remainder of the year in which the termination occurs or the amount applicable to a three (3) month time period whichever is greater. Lessor acknowledges that development of the wind generation facilities is dependent upon the completion of, without limitation, environmental studies, federal, state and local permitting processes and the availability of project financing. In the event that Lessee determines, at its sole discretion, that it cannot proceed with the

development of the wind energy facility, whether for permitting, environmental or other considerations, Lessee may terminate this Lease ("Early Termination") before the commencement of construction. In the event of such Early Termination, Lessee will provide Lessor, for Lessor's use, any wind measurement data and any facility permitting documentation developed by Lessee as of the termination date. Within ninety (90) days following any such Early Termination, Lessee will remove its property and installations from the Leased property, including its meteorological towers.

8.3 Surrender of Property. Upon the expiration or earlier termination of this Agreement, Lessee shall peacefully and quietly leave, surrender and return the Property to Lessor in the condition in which it was substantially at the commencement of this Agreement, unless otherwise agreed to by Lessor. Lessee agrees and hereby covenants to dismantle and remove all equipment, improvements, fixtures and other property owned or installed by Lessee or its affiliates on the Property (provided that all footings and foundations shall be to a depth of three (3) feet below the surface of the ground and covered with soil) within one hundred eighty (180) days from the date of termination, all of which shall be at Lessee's sole cost and expense. If Lessee fails to remove such wind power facilities within 180 days of termination of the Agreement, Lessor may do so, in which case Lessee shall reimburse Lessor for reasonable costs of removal and restoration incurred by Lessor. In addition to any other remedies available to Lessor, should Lessee fail to remove such property within one hundred eighty (180) days from the expiration or earlier termination of this Agreement, any and all property remaining on the Property beyond such one hundred eighty (180) day removal period shall be deemed abandoned to Lessor and Lessee hereby agrees to relinquish any and all rights to any such property, it being nonetheless understood and agreed that Lessor shall be under no obligation to accept such abandonment.

8.4 Inspection of the Property. Lessor reserves the right to itself and its agents to go upon the Property at reasonable and proper times to inspect the same for the purpose of determining that this Agreement is being properly observed and that all of the terms are being kept and performed by Lessee.

9. Condemnation. Should title or possession of all of the Property be taken in condemnation proceedings by a government agency, governmental body or other private party under the exercise of the right of eminent domain, or should a partial taking render the remaining portion of the Property wholly unsuitable for Lessee's use, then this Agreement shall terminate upon the vesting of title or taking of possession. All payments made on account of any taking by eminent domain shall be made to Lessor, except that Lessee shall be entitled to any award made for the reasonable removal and relocation costs of any removable property that Lessee has the right to remove, and for the loss and damage to any such property that Lessee elects or is required not to remove, and for the loss of use of the Property by Lessee. It is agreed that Lessee shall have the right to participate in any settlement proceedings and that Lessor shall not enter into any binding settlement agreement without the prior written consent of Lessee, which shall not be unreasonably withheld.

10. Miscellaneous.

10.1 Force Majeure - Delays. If performance of any act required by this Agreement to be performed by either party is prevented or delayed by reason of any act of God, strike, lock-out, labor trouble, inability to secure materials, restrictive

governmental laws or regulations, or any other cause not the fault of the party required to perform the act, the affected party, upon giving notice to the other party, shall be excused from such performance to the extent of and for the duration of such prevention, restriction or delay.

10.2 Assignment. Upon the prior written consent of Lessor, Lessee shall have the right to sell, assign, encumber, transfer, or grant leases to any or all of its rights and interests under this Agreement; provided, however, that any and all such transfers shall be expressly made subject to all of the terms, covenants and conditions of this Agreement. No such sale, assignment, transfer, or lease shall relieve Lessee of its obligations under this Agreement unless Lessee assigns its entire interest hereunder, in which event Lessee shall have no continuing liability, except that Lessee shall remain a guarantor of all obligations assumed by it in Section 8.3 above to return the Property to the condition that it was in at the commencement of this Agreement. With respect to such a transfer, assignment or sublease: (i) the term thereof shall not extend beyond the end of the Agreement term; (ii) the same shall be expressly made subject to all of the terms, covenants and conditions of this Agreement; and (iii) no assignment shall be valid and effective until the assignee shall execute, in form reasonably satisfactory to Lessor, and agreement to be bound by all of the terms, covenants, and agreements of this Agreement. Lessor shall have the right to sell, assign, encumber, or transfer any or all of its rights and interests under this Agreement. Nothing herein shall restrict Lessor's right to sell, encumber or transfer the Property.

10.3 Notices. All notices or other communications required or permitted hereunder, including notices to Mortgagees, shall, unless otherwise provided herein, be in writing, shall be personally delivered, delivered by reputable overnight courier, or sent by registered or certified mail, return receipt requested, and postage prepaid, addressed to the Parties at the following addresses:

If to Lessor:

J.R. Simplot Company
Attn: Corporate Secretary
P.O. Box 27
999 Main Street, Ste. 1300
Boise, ID 83707

If to Lessee:

XRG - DP8, LLC
c/o Exergy Development, LLC
802 W. Bannock, Suite 1200
Boise, ID 83702
Attn: James Carkulis

with a copy to:

XRG - DP8, LLC
c/o Richardson & O'Leary PLLC
515 North 27th Street
Boise, ID 83702
Attn: Peter Richardson

Notices personally delivered shall be deemed given the day so delivered. Notices given by overnight courier shall be deemed given on the first business day following the mailing date. Notices mailed as provided herein shall be deemed given on the third business day following the mailing date. Notice of change of address shall be given by written notice in the manner detailed in this Section 10.3.

10.4 Further Assurances. Each of the Parties to this Agreement agrees to perform all such acts (including but not limited to, executing and delivering such instruments and documents) as reasonably may be necessary to fully effectuate each and all of the purposes and intent of this Agreement. Lessor expressly agrees that it will from time to time enter into reasonable nondisturbance agreements with any Mortgagee which requires such an agreement providing that Lessor shall recognize the rights of the Mortgagee and not disturb its possession of the Property so long as it is not in default of any of the provisions of this Agreement. Lessor agrees that within thirty (30) days after receipt of a written request by Lessee it shall: (a) grant rights-of-way and leases for electric and other public utilities and facilities and any other electric power purpose including any power transmission line on terms acceptable to Lessor and as the Parties shall deem necessary or desirable for Lessee's development and use of the Property; and (b) cooperate with Lessee in connection with requests for any and all zoning changes or other land use permits and/or approvals necessary for Lessee's development and use of the Property as contemplated by this Agreement.

10.5 Estoppel Certificates. Each party agrees that it shall, at any time during the Term of this Agreement within ten (10) days after a written request by the other party, execute, acknowledge and deliver to the requesting party a written statement certifying that this Agreement is unmodified and in full force and effect (or modified and stating the modifications), the dates on which the payments and any other charges have been paid, and that there are no defaults existing or that defaults exist and stating the nature of such defaults.

10.6 No Waiver. No waiver of any right under this Agreement shall be effective for any purpose unless in writing, signed by the party hereto possessing the right, nor shall any such waiver be construed to be a waiver of any subsequent right, term or provision of this Agreement.

10.7 Confidentiality. The Parties agree that the contents of this Agreement and other information exchanged, are confidential and, except as required by law, shall be kept strictly confidential. Such information shall not be disclosed to any person or company without prior written consent of the other party.

10.8 Entire Agreement. This Agreement, together with its attached exhibits, contains the entire agreement between the Parties hereto with respect to the subject matter hereof and any prior agreements, discussions or understandings, written or oral, are superseded by this Agreement and shall be of no force or effect. No addition or modification of any term or provision of this Agreement shall be effective unless set forth in writing and signed by each of the Parties.

10.9 Governing Law. The terms and provisions of this Agreement shall be interpreted in accordance with the laws of the State of Idaho applicable to contracts made and to be performed within such State and without reference to the choice of law principles of such State or any other state. In the event of any dispute between the

Parties hereto, the Idaho state district court for Cassia County, Idaho, shall be the sole venue for any legal proceedings arising therefrom.

10.10 Interpretation. The Parties agree that the terms and provisions of this Agreement embody their mutual intent and that such terms and conditions are not to be construed more liberally in favor, nor more strictly against, either party.

10.11 Partial Invalidity. Should any term or provision of this Agreement, or the application thereof to any person or circumstance, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be effected thereby, and each remaining term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

10.12 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same instrument.

10.13 Attorneys' Fees. The prevailing party in any action or proceeding for the enforcement, protection, or establishment of any right or remedy under this Agreement or for the interpretation of this Agreement shall be entitled to recover its reasonable attorneys' fees and costs in connection with such action or proceeding from the non-prevailing party.

10.14 Memorandum. The Parties shall execute and record a Memorandum of Wind Lease Agreement in the form attached hereto as Exhibit B.

IN WITNESS WHEREOF, Lessor and Lessee enter into this Agreement as of the Effective Date.

Lessor:
J.R. Simplot Company

By 
Lawrence S. Hlobik
President and CEO

Lessee:
XRG - DP8, LLC
An Idaho limited liability company

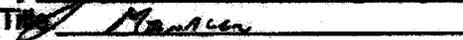
By 
Title 

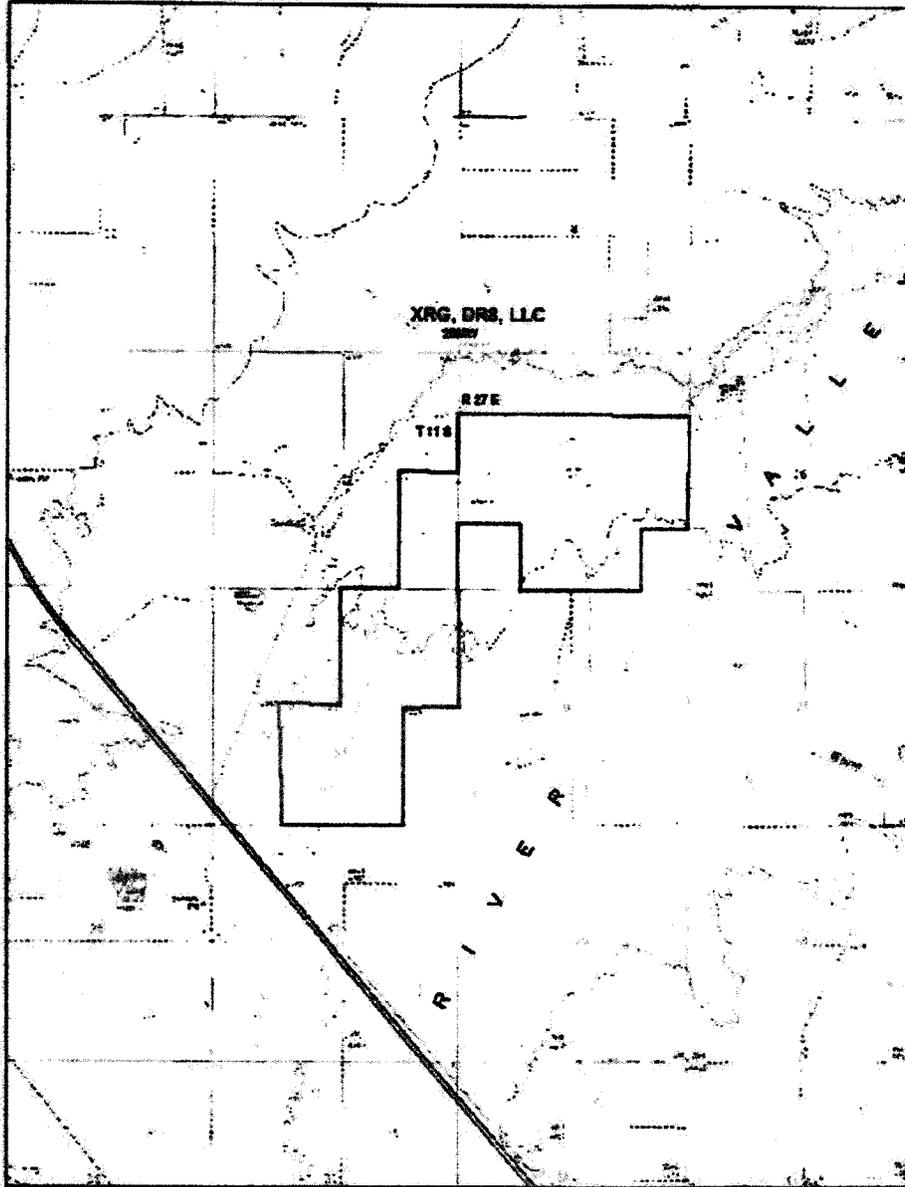
EXHIBIT A

DESCRIPTION OF THE PROPERTY

**S ½ N ½, N ½ S ½, SE ¼ SW ¼, SW ¼ SE ¼ Section 17, E ½ SE ¼ Section 18, and
NE ¼, E ½ SW ¼, W ½ SE ¼ Section 19, Township 11 South, Range 27 East of the
Boise Meridian, Cassia County, Idaho**

EXHIBIT A - Continued

MAP OF PROPERTY



Microsoft Word 2003 6003 (dml) Report (rpt) map.dwg

[Signature]

314846

RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:

2007 APR 2 AM 9 18

XRG - DPB, LLC
c/o Richardson & O'Leary, PLLC
515 North 27th Street
Boise, ID 83702
Attn: Peter Richardson

RECORDED AT THE REQUEST OF
Richardson & O'Leary

(Space above this line for Recorder's use only)

MEMORANDUM OF WIND PARK LEASE AGREEMENT

THIS MEMORANDUM OF WIND PARK LEASE AGREEMENT is made and entered into as of March 14, 2007, by and between J. R. Simplot Company ("Lessor"), and XRG - DPB, an Idaho limited liability company ("Lessee").

WHEREAS:

A. On the date hereof, the Parties have entered into a Wind Park Lease Agreement (the "Agreement") for the use and purposes of wind energy development and related rights, transmission lines and facilities installation, wind and weather monitoring and access on and across certain land which is more particularly described in Exhibit A attached hereto and incorporated by this reference (the "Property");

B. The term of the Agreement (the "Term"), shall begin on the Effective Date and shall continue for thirty (30) years from the commencement of Commercial Operations (the "Commercial Operations Date"); on the last day of such thirty year period the Agreement shall expire (the "Expiration Date"). As used herein, the term "Commercial Operations" shall mean the first production and sale of wind energy or energy credits by Lessee or its successors or assigns on the Property or any portion thereof. Either party may file a supplemental memorandum of the Agreement setting forth the expiration date of the Term. In addition, the parties agree that Lessor may file a notice of termination of this Agreement upon the expiration of the term or in the event of earlier termination of the Agreement.

C. The Parties desire to enter into this Memorandum of Wind Park Lease Agreement which is to be recorded in order that third parties may have notice of the lease of the Property and of the existence of the Agreement.

IN WITNESS WHEREOF, the Parties have executed this Memorandum of Wind Park Lease Agreement as of the date set forth above.

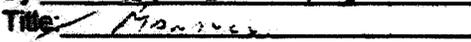
Lessor:

J. R. Simplot Company

By: 
Lawrence S. Hlabik
President and CEO

Lessee:

XRG – DP8
An Idaho limited liability company

By: 
Title: 

NOTARIAL ACKNOWLEDGMENTS

State of IDaho)
County of Ada)

ss.

On March 27 , 2007 , before me, the undersigned Notary Public, personally appeared Lawrence S. Elshik, President & CEO of ~~Chippewa~~ J.R. Simplet personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument; and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.


Vivian L. Stone
My commission Expires: 08 / 12 / 2010

State of ID)
County of Ada)

ss.

On March 27 , 2007 , before me, the undersigned Notary Public, personally appeared James Thomas Carkulis personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument; and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

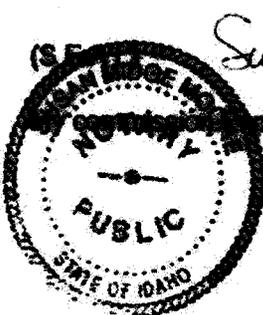

Susan Midge Moon
My commission Expires: 8 / 24 / 12

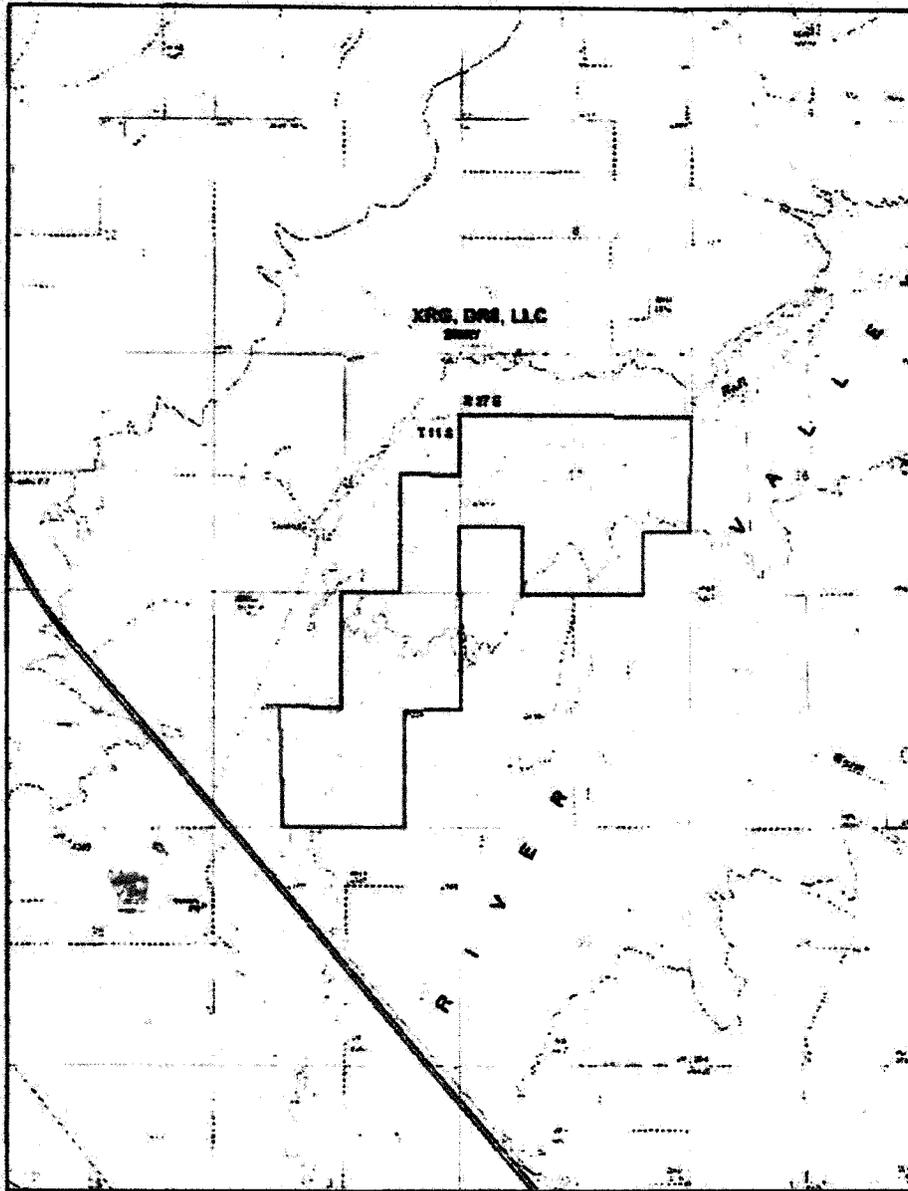
EXHIBIT A

DESCRIPTION OF THE PROPERTY

**S ½ N ½, N ½ S ½, SE ¼ SW ¼, SW ¼ SE ¼ Section 17, E ½ SE ¼ Section 18, and
NE ¼, E ½ SW ¼, W ½ SE ¼ Section 18, Township 11 South, Range 27 East of the
Boise Meridian, Cassia County, Idaho**

EXHIBIT A - Continued

MAP OF PROPERTY



Map and A-7370 0 020 X and 0 000 0 000 0 000 0 000

WIND PARK LEASE AGREEMENT EXTENSION

This Wind Park Lease Agreement Extension is entered into as of March 2010 by and between J. R. Simplot Company ("Lessor") and XRG-DP8, LLC ("Lessee"), collectively, the "Parties". Capitalized terms used herein have the meaning ascribed to them in that Wind Park Lease Agreement entered into by the parties on March 14, 2007:

The Parties entered into a Wind Park Lease Agreement on March 14, 2007 calling for Commercial Operation to begin within three years of its March 14, 2007, Effective Date. The Parties having reviewed the feasibility of achieving Commercial Operation by the targeted date and have agreed to, and hereby do, extend the deadline for achieving Commercial Operation as follows:

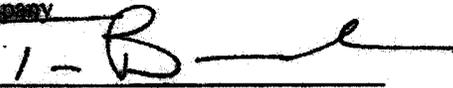
XRG-DP8, LLC will provide proof of Substantial Construction on or before July 1, 2010 with Commercial Operation to begin approximately upon the completion of construction of the project. Substantial Construction is defined as follows: 1) the delivery of a binding Power Purchase Agreement with a reputable utility; 2) the delivery of a binding construction agreement, including a performance bond and which defines the Commercial Operation date; 3) the delivery of all governmental approvals required to complete the project; 4) the delivery of binding purchase agreements for all necessary equipment to complete the project; and 5) actual commencement of construction and installation on the site.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Lessor and Lessee hereby agree to extend the Wind Park Lease Agreement until July 1, 2010, subject to automatic termination if the foregoing conditions have not been met by said date.

IN WITNESS WHEREOF, Lessee and Lessor enter into this Agreement as of the date first written above.

LESSOR:

J. R. Simplot Company

By: 

Tom Basabe

Its: Land and Livestock President

LESSEE:

XRG-DP8, LLC

By: 

Its: 

Notarial Acknowledgments on following page:

XRG-DP8, LLC
Extension Agreement

WIND PARK LEASE AGREEMENT

THIS WIND PARK LEASE AGREEMENT (the "Agreement") is entered into as of March 14, 2007 (the "Effective Date") by and between J.R. Simplot Company ("Lessor") and XRG-DP9, LLC, an Idaho limited liability company ("Lessee"). Lessor and Lessee are sometimes herein referred to as the "Parties."

RECITALS

A. Lessor owns certain real property located in Cassia County, in the State of Idaho, and more particularly described in Exhibit A attached hereto (the "Property").

B. Lessee desires to lease the Property in order for Lessee to develop, install, own, and operate wind energy generation systems (also referred to as "wind turbines") on the Property.

C. Lessor desires to lease to Lessee the Property on the terms and conditions contained herein.

D. Lessee seeks to provide wind energy to Rocky Mountain Power and is currently in active negotiations to sell up to Twenty megawatts (20 MW) of wind energy to Rocky Mountain Power. Lessor understands, and herein specifically agrees that Lessee's obligations hereunder are contingent upon sales agreement or other acceptable the nature of sale required to install may have to install period of years.

1105-37
DP-9 Docs

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NOW, THEREFORE, for a valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Lessor and Lessee hereby agree as follows:

AGREEMENT

1. Lease. Lessor agrees to lease to Lessee the Property subject to the terms and conditions hereof, for the use and purpose of (i) wind resource evaluation, wind energy development, wind energy storage system, energy transmission and related wind energy development uses, as described in Section 3.1 below, (ii) placement on, over, under and across the Property of transmission lines for electricity and communications and related facilities and for one or more substations or interconnection facilities, as described in Section 3.2, and (iii) ingress and egress to and from the Property, as described in Section 3.3 below.

1.1 Representations and Warranties. Lessee accepts the Property included in this Agreement in its present condition, AS IS, without any representation or

warranties, express or implied, except as otherwise set forth in this Lease. It is understood and agreed that Lessee has inspected the Property, and that Lessee has made its determination of the value of the Property and its usefulness for the purposes for which Lessee is authorized to use the Property.

2. Term.

2.1 Term. The term of this Agreement (the "Term"), shall begin on the Effective Date and shall continue for thirty (30) years from the commencement of Commercial Operations (the "Commercial Operations Date"); on the last day of such thirty year period the Agreement shall expire (the "Expiration Date"). As used herein, the term "Commercial Operations" shall mean the first production and sale of wind energy or energy credits by Lessee or its successors or assigns on the Property or any portion thereof. Either party may file a supplemental Memorandum of Wind Lease Agreement setting forth the exact Expiration Date of the Term. In the event Lessee fails to commence Commercial Operation of the installed capacity secured by Lessee in the PPA(s) within three (3) years after the Effective Date, Lessor may terminate this Agreement, by providing Lessee notice pursuant to Section 10.3.

3. Permitted Uses of the Property. The rights described above shall permit Lessee to use the Property for the following uses, and no others:

3.1 Scope of Wind Energy and Development Use and Purpose. During the Term, Lessee shall have the exclusive right to erect, install, construct, replace, maintain, repair and operate wind energy generation systems on the Property, including the use of wind that passes over the Property, as Lessee determines in its sole discretion for the MW capacity secured by Lessee in the PPA(s). Without limiting the generality of the foregoing, this Section 3.1 shall include the installation, construction, maintenance and operation of any and all equipment and improvements necessary or useful for the generation of wind energy into electricity, including, but not limited to, wind turbines, distribution wires, transmission wires, electric transformers, energy storage facilities, telecommunications equipment, power generation facilities to be operated in conjunction with wind turbine installations, roads, anemometers, meteorological towers and wind measurement equipment, control buildings, storage facilities, maintenance yards, and related facilities and equipment, but shall not include the construction, installation or erection of any temporary or permanent residential structures. Lessee shall determine the size, type, and manufacturer of such wind energy generation systems in its sole discretion, but Lessee shall not locate, position or place any wind turbines, unless otherwise agreed to by the Parties, within One Thousand Five Hundred feet (1500') of any occupied residence as such residence exists at the time of the installation and construction of the wind turbine without Lessor's prior written consent. In addition, Lessee may conduct such tests and inspections, including wind speed tests and soils and geologic inspections, as Lessee deems necessary or desirable in connection with its development of a wind energy generation system on the Property. Upon Lessor's written request, Lessee shall provide Lessor with the results together with any underlying data of any tests and inspections undertaken by Lessee pursuant to the preceding sentence.

3.1.1 Lessor's Rights to Use the Property. It is understood, however, that Lessor shall retain all rights to engage in all other activities that do not interfere with Lessee's use of the property for wind generation systems. Further, Lessor shall have

the right to install its own wind energy generation systems for MW capacity in excess of the capacity secured by Lessee in its PPA(s) as set forth in Section 6.3.2.

3.2 Scope of Transmission Use and Purpose. Lessee shall have a non-exclusive right to erect, install, construct, replace, maintain, repair, operate and use (i) underground and/or overhead distribution and transmission lines, cables and related facilities for the transmission of electrical energy and communications, and (ii) one or more substations and interconnection or switching facilities from which Lessee and others may interconnect to a utility transmission system or the transmission system of another purchaser of electrical energy, all together with appropriate rights of way on, along and across the Property. This right of use and purpose shall remain in effect only so long as Lessee continues to generate such electric energy on Lessor's property.

3.3 Scope of Access Use and Purpose. Lessee shall have a non-exclusive right of access, ingress and egress to and from the Property and any facilities and equipment installed thereon over and across the Property by means of existing roads or otherwise and by such route or routes as Lessee may construct from time to time. The routes or roads will be approximately fourteen (14) feet in width. Lessee specifically acknowledges that all roads now upon the Property and those roads to be constructed as a part of the wind generation facilities may be used by Lessor. Lessee will consult with Lessor in the siting of new roads on Lessor's property, and Lessor will have final plan approval of new project roads, which approval shall not be unreasonably withheld. Lessor may continue to keep livestock on the Property or engage in other agricultural activities. Such livestock shall have the right of way on all roads and Lessee agrees to pay damages for any livestock killed by its employees, contractors and subcontractors.

3.4 Waiver of Setback Requirements. Lessee may locate wind energy generation systems or related facilities or equipment at any location upon the Property, including at or near the Property lines under the terms and conditions herein. Lessee in good faith shall consult and coordinate with Lessor on placement of wind energy generation systems and all related components to determine if any impact may occur on current agricultural or grazing operating conditions and shall use all commercially reasonable efforts to locate wind generation related systems as to minimally impact Lessor's current operations on the Property. Lessor's consent of final placement of wind energy generation systems or related facilities shall not be unreasonably withheld. Furthermore, in the event that the location of any portion of any wind energy generation system or related facilities or equipment to be installed or constructed on the Property or along or near property lines is limited or restricted by any private agreements or restrictions or any laws, rules or ordinances of any governmental agency, Lessor shall cooperate with and assist Lessee in obtaining waivers or variances from such requirements and shall execute all documents evidencing Lessor's agreement to the elimination of such requirements.

3.5 Ownership of Installed Property. All property installed on the Property by Lessee, its successors or assigns, whether real, personal or mixed, shall remain the property of Lessee and shall be removable by Lessee at any time, subject to Section 8.3 below.

4. Payments to Lessor.

4.1 Payment Due Prior to Commencement of Commercial Operation.

Beginning on the Effective Date and continuing until the Commercial Operation Date, Lessee shall pay to Lessor an annual fee of One Thousand Five Hundred Dollars (\$1,500), such fee to be paid on or before July 1st of each such year, beginning in 2007.

4.2 Minimum Rent. Upon completed installation of each wind turbines, Lessee shall pay to Lessor a one time fee of Four Thousand Dollars (\$4,000) per MW of installed capacity on Lessor's land ("Land Rent Start-Up"). After the Commercial Operation Date (and except as provided in Section 4.2(a), on or around each January 1st that occurs during the duration of the Term, Lessee shall pay to Lessor the amount One Thousand Five Hundred Dollars (\$1,500) per MW of installed capacity for the first year and Two Thousand Dollars (\$2,000) per MW of installed capacity for each subsequent year ("Land Rent") per year, provided that (a) after Lessee terminates the Agreement, Lessee shall pay Lessor a partial Land Rent payment prorated for the partial year between the termination date and the next following January 1st, (b) no later than one (1) month following the Commercial Operation Date, Lessee shall pay Lessor a partial Land Rent payment prorated for the partial year between the Commercial Operation Date and the next following January 1st. In each year following the Commercial Operation Date, the Land Rent shall be paid quarterly. In the event that Lessee installs an electrical substation on the Property, Lessee shall pay to Lessor an additional One Thousand Dollars (\$1,000.00) per year, as and for substation rent, per substation ("Substation Rent"). For each substation, the first rent payment shall be due at the initiation of construction of said substation and on or before January 10th for each subsequent year thereafter during the remaining Term of this Agreement. In the further event that Lessee shall construct a transmission (69kV or larger) line or lines across any portion of Lessor's property pursuant to Section 3.2 above, Lessee shall in addition pay Lessor transmission right-of-way rent annually, calculated at One Thousand Dollars (\$1,000.00) per lease acre, with such lease acres calculated by multiplying the linear feet of transmission lines constructed across Lessor's lands described on Exhibit A attached hereto by a right-of-way width of fifty (50) feet, such product to then be divided by 43,560 square feet ("Transmission Line Rent"). For each transmission right-of-way, the first rent payment shall be due at the initiation of use of said right-of-way and on or before January 10th for each subsequent year thereafter during the remaining Term of this Agreement. The Land Rent, Substation Rent and Transmission Line Rent are collectively referred to as "Minimum Rent".

4.3 Royalty Payment. If during the Term of this Agreement, the Royalty Percentage (defined below) of Gross Revenues (defined below) from the wind generation systems located on the Property during any calendar year exceeds the Minimum Rent applicable to such calendar year, Lessor shall pay such excess to Lessee as additional rent. These additional rent payments are due and payable within sixty (60) days following the end of each calendar year.

4.4 Definition of "Royalty Percentage" and "Gross Revenues". The term "Royalty Percentage" shall two and one-half percent (2.5%) in years 1 through five of Commercial Operations, three and one-half percent (3.5%) in years 6 through 10 of Commercial Operations, four and one-half percent (4.5%) in years 11 through 15 of Commercial Operations, and five and one-half percent (5.5%) in year 16 and in each subsequent year until the termination of the Agreement.

The term "Gross Revenue" shall mean: any cash receipts actually received by Lessee from 1) the sale of electricity generated from the wind generation facilities to wholesale

and/or retail purchasers of such electricity including any interest or late fees paid thereon; 2) the sale of any environmental benefits or green tags associated with the generation of wind energy; and 3) the proceeds of business interruption or other insurance or warranties or guarantees, to the extent that payment is made thereunder to compensate Lessee for lost or deferred revenue from the generation or sale of electricity from the wind generation facilities. Notwithstanding the foregoing, "Gross Revenue" shall not include the following: 1) any revenue, income, sums or benefits received from any other source; 2) funds received from debt financings and equity investments and any interest earned on such funds; 3) amounts received from a governmental or quasi-governmental body or agency as a payment, subsidy or credit in connection with or arising out of the development or construction of wind generation facilities; 4) parasitic loss (i.e., electrical energy used to power wind turbine generators or any other improvements, or in connection with Lessee's operations on the Property; 5) sales of electrical energy for which payment is delayed or has not been received (including, without limitation, due to a default by the purchaser thereof), except that payment under Section 4.3 shall be paid on any delayed payments when such payments are actually received; 6) proceeds received from the sale, lease or other disposition of any wind turbine generators or from the sale, lease or other disposition of any of Lessee's other improvements, trade fixtures or chattel, or any interest therein; 7) any rental, installment payment or lump sum payment received by Lessee in exchange for Lessee's assigning, subleasing or otherwise transferring all or any interest of Lessee in this Lease; 8) sales of electrical energy generated from wind turbine generators not located on the Property; or 9) tax benefits received by Lessee, including, without limitation, production tax credits.

4.4.1 Lessee will provide to Lessor a compilation of the annual production of electric energy generated on the Property, including copies of the statements received from the purchaser of the electricity, within sixty (60) days following the end of each calendar year to ensure compliance with Lessee's payment obligation. Lessor agrees that such statements are the property of Lessee and that Lessor shall keep such records confidential and shall not disclose such records to any third party without Lessee's prior written consent.

4.5. Number of Wind Turbines on the Property. The Parties hereby recognize and agree that the payments provided for in Sections 4.2 and 4.3 were negotiated with the intent and understanding that Lessee will install and operate wind turbines with an installed capacity of Twenty (20) MW on the Property. The Parties further recognize and agree that the final installed capacity may be more or less than 20 MW. The Parties desire for Lessee to fully build out the wind potential on the Property to 20 MW is limited only to the extent that it is able to secure a PPA(s) from Rocky Mountain Power or other acceptable purchaser. If Lessee installs fewer megawatts of capacity than are called for in the PPA(s), then Lessee will pay Lessor Minimum Rent in an amount calculated as if it had constructed the full amount of capacity called for in the PPA(s).

[Summary chart follows]

4.6 Summary Chart of Payments

Section 4.1	Payment Prior to Commencement of Commercial Operations	\$1,500/yr	Beginning with the Effective Date and Ending Upon Commencement of Commercial Operations
Section 4.2	Land Rent (Start-Up)	\$4,000/MW installed capacity	One Time Fee
	Land Rent (Annual)	\$1,500/MW installed capacity for first year \$2,000/MW installed capacity every year after first year	Annual after Commencement of Commercial Operations; paid in quarterly
	Substation Rent	\$1,000/substation	Annual after initiation of construction
	Transmission Line Rent	\$1,000/lease acre for transmission lines	Annual after initiation of construction
	Minimum Rent = Land Rent Annual, Substation Rent, & Transmission Line Rent		Annual after Commencement of Commercial Operations or initiation of construction
Section 4.3	Royalty Payment	If Royalty Percentage of Gross Revenues exceeds the Minimum Rent (Section 4.2.) applicable to such calendar year, Lessor shall pay such excess to Lessee as additional rent	Annual after Commencement of Commercial Operations

5. Lessee Covenants. Lessee covenants, represents and warrants to Lessor as follows as of the Effective Date:

5.1 Compliance with Law. Lessee shall at all times comply in all material respects with all valid laws, ordinances, rules, regulations and statutes of any governmental agency applicable to Lessee's operations on and use of the Property.

5.2 Payment of Taxes and Other Charges. Lessee shall be responsible for any increase in real property taxes levied against the Property attributable to Lessee's

installation of improvements on the Property owned by, or under the control of, Lessee, which improvements may include the wind energy generation system, power transmission and interconnection facilities, and other fixtures and equipment owned by Lessee and located on the Property. Lessee will also pay the real and personal property taxes associated with the installation of the wind generation systems. Lessee will also pay when due all charges for gas, water, electricity and other utilities used by Lessee on the Property.

5.3 Liens. Lessee shall keep Lessor's interest in the Property free and clear of all liens and claims of liens for labor and services performed on, and materials, supplies and equipment furnished to the Property in connection with Lessee's use of the Property.

5.4 Hazardous Substances. Lessee shall not violate, and shall indemnify Lessor against any violation by Lessee of, any law, statute, order, ordinance, rule or regulation relating to the generation, manufacture, storage, use, release or threatened release, disposal, transportation or presence of any substance which is defined as a "hazardous substance", "deleterious substance", "hazardous material", "toxic substance", "solid waste" or "hazardous waste" in any applicable federal, state or local law, statute or ordinance on or under the Property. This Section is not intended to apply to the legal and appropriate application of substances to mitigate or control weeds pursuant to Section 5.9.

5.5 Indemnification. Lessee shall indemnify, defend (using counsel satisfactory to Lessor) and hold harmless Lessor's members, partners, mortgagees, officers, employees and agents (each, an "Lessor Indemnified Party") against any and all losses, damages, claims, expenses and other liabilities resulting from or arising out of, either wholly or in part, (i) any operations of Lessee on the Property, (ii) any negligent act or negligent failure to act on the part of Lessee or anyone else engaged in doing work for Lessee, or (iii) any breach of this Agreement by Lessee. This indemnification shall survive the termination of this Agreement. This indemnification shall not apply to losses, damages, claims, expenses and other liabilities caused solely by any grossly negligent or deliberate act or omission on the part of any Lessor Indemnified Party.

5.6 Insurance. Lessee agrees to maintain liability insurance covering its activities on the Property and to name Lessor as an additional insured. Such coverage shall have a minimum combined occurrence and annual limitation of Ten Million Dollars (\$10,000,000) provided that such amount may be provided as part of a blanket policy covering other properties. Lessee agrees to supply Lessor with such certificates and other evidence of insurance as Lessor may reasonably request.

5.7 Damage to Lessor's Interests. In the event that Lessee's, its contractors', or subcontractors' activities on the Property pursuant to this Agreement causes damage to any of Lessor's livestock, growing crops, farming or grazing operations on the Property, Lessee agrees to pay to Lessor an amount equal to all of Lessor's out-of-pocket losses due to such damage to such livestock, growing crops, farming or grazing operations which shall be an amount equal to the revenue that Lessor would have received on the open market for said damaged crops or livestock during the growing or grazing season during which crops or livestock were damaged or destroyed. Payment shall be made by Lessee within thirty (30) days after notification from Lessor.

5.8 Waste. Lessee shall not commit or permit to be committed any waste, strip, damage to or misuse of the Property. Lessee shall refrain from practices that will cause unusual erosion to the Property and Lessee shall maintain all the improvements on the Property in good condition and repair and shall maintain the Property in a clean and presentable condition.

5.9 Woods. Lessee agrees to coordinate with Lessor to implement reasonable appropriate wood mitigation measures on the Property in the vicinity of wind generation systems and to solely bear the cost for such measures.

5.10 Fences and Gates. Lessee, its agents, employees, and invitees shall be responsible to open and close any gates accessing Lessor's property, and to repair both the fences and gates from any damage caused by their opening and closing of the gates in the course of gaining access to the Property. Lessee will be responsible for any gates left open and for any time spent by Lessor gathering livestock that strayed from Lessor's property as a result of Lessee's or its agents or employees leaving a gate open.

5.11 Project(s) Expansion. Lessee may take initiative to maximize opportunities to add or otherwise further wind energy generation systems on Lessor's property by negotiating modifications to this Agreement agreeable to both the Parties.

5.12. No Interference. Lessee shall not interfere with Lessor's use of the Property. The Parties shall have the right to remedy any such interference by the other party by any appropriate means and the cost thereof shall be immediately reimbursed to the aggrieved party. Specifically, Lessee shall not place any wind energy generating facilities in such a manner as to interfere the normal operations of Lessor's farming and ranching operations including pivots and irrigation structures.

6. Lessor Covenants. Lessor covenants, represents and warrants to Lessee as follows as of the Effective Date:

6.1 Lessor's Authority. Lessor is the sole owner of the Property. Lessor has the full and unrestricted power and authority to execute and deliver this Agreement.

6.2 Liens and Tenants. Lessor has attached hereto as Exhibit C a list of exceptions to title contained in a preliminary title report dated March 6, 2007 issued by Land Title & Escrow, Inc. of Burley, Idaho. Said preliminary title report covers real property owned as a whole by Lessor in Cassia County, Idaho, of which the Property is a portion. As an accommodation to Lessee and to three other limited liability companies related to Lessee, Lessor is leasing four (4) separate parcels, which as noted are subparts of the whole parcel covered by said title commitment. Consequently, it is possible that some of the exceptions to title listed in Exhibit C do not affect the Property. Subject to the foregoing limitations, there are no liens, encumbrances, leases, mortgages, deeds of trust, fractured interests, mineral or oil and gas rights, or other exceptions to Lessor's fee title ownership of the Property except as specified in Exhibit C attached hereto. Lessor represents and warrants that there are no tenants on the Property except as specified as in Exhibit C. Lessee acknowledges that the leasehold granted to Lessee hereunder is subject to those matters listed on Exhibit C as they may affect the Property. Lessor covenants and agrees that, during the Term, it shall not permit or grant tenancy rights in the Property to any entity or person unless and until both Lessor and such tenant have executed agreements presented by Lessee

subordinating such tenancy to the Agreement and/or protecting Lessee from disturbance by the tenant of Lessee's use of the Property (the "Subordination Agreements"). Furthermore, in the event that any entity or person holds or comes to hold any form of tenancy on the Property during the Term without having previously executed a Subordination Agreements, Lessor shall notify Lessee within ten (10) days of gaining knowledge of such tenancy, and both Lessor and such tenant shall execute Subordination Agreements presented by Lessee within fifteen (15) days of such presentation by Lessee.

6.3 No Interference. As long as no "Event of Default" (as this term is defined in Section 2 below) caused by Lessee has occurred and is continuing, Lessee shall have the quiet use and enjoyment of the Property and all wind that passes over the Property in accordance with the terms of this Agreement without any suit, trouble or interference of any kind by Lessor or any party claiming through Lessor. Lessor may use the Property for agricultural, recreational, or other beneficial purposes as described in Section 3.1.1, including oil and gas exploration and extraction or any other mineral exploration or extraction (see Section 6.3.1, below, for additional limitations on these uses). Lessor will not otherwise use the Property for any use or take any other action which interferes with or is incompatible with Lessee's use of the Property as permitted by this Agreement or which in any way interferes with the wind flow across the Property. Lessor will not grant any license, lease, or other right with respect to the Property which could interfere with Lessee's operations. Notwithstanding the foregoing, Lessor retains the right at its sole discretion to construct or locate wind generation systems or other similar projects on the Property. The Parties shall have the right to remedy any such interference by the other party by any appropriate means and the cost thereof shall be immediately reimbursed to the aggrieved party.

6.3.1 Oil, Gas, and Mineral Exploration and Extraction. Lessor reserves the right to lease the Property for oil and gas exploration, extraction and transportation by pipelines. Any exploration, extraction, or pipeline activities arising from a mineral lease executed by Lessor subsequent to this Agreement must be compatible with Lessee's use of the Property, and will not harm, interfere with, put at risk, or jeopardize the any of Lessee's improvement.

6.3.2 Lessor's Right to Generate. So long as it does not interfere with Lessee's use of the Property, Lessor reserves the right to install and construct wind generation systems for MW capacity in excess of the capacity secured by Lessee in the PPA(s).

6.4 Hazardous Substances. Lessor shall not violate, and shall indemnify Lessee against any violation by Lessor of, any law, statute, order, ordinance, rule or regulation relating to the generation, manufacture, storage, use, release or threatened release, disposal, transportation or presence of any substance which is defined as a "hazardous substance", "deleterious substance" "hazardous material", "toxic substance", or "solid waste", "hazardous waste" in any applicable federal, state or local law, statute or ordinance, on or under the Property. This Section is not intended to apply to the legal and appropriate application of substances to mitigate or control noxious weeds.

6.5 Indemnification. Lessor shall indemnify, defend (using counsel satisfactory to Lessee) and hold harmless Lessee and Lessee's members, partners, mortgagees, officers, employees and agents (each, a "Lessee Indemnified Party")

against any and all losses, damages, claims, expenses and other liabilities resulting solely from or arising solely out of (i) any operations of Lessor on the Property, (ii) any grossly negligent act or grossly negligent failure to act on the part of Lessor or anyone else engaged in doing work for Lessor, or (iii) any breach of this Agreement by Lessor. This indemnification shall survive the termination of this Agreement. This indemnification shall not apply to losses, damages, claims, expenses and other liabilities caused either wholly or in part by any negligent or deliberate act or omission on the part of any Lessee Indemnified Party.

6.5.1 Lessor's responsibility to indemnify Lessee under Section 6.5 is capped at One Million Dollars (\$1,000,000.00), unless an insurance policy is in place which provides for greater coverage. In the event oil, gas, mineral exploration or extraction activities commence on the Property by Lessor or other party, the cap of Lessor's responsibility to indemnify Lessee under Section 6.5 is increased to Five Million Dollars (\$5,000,000.00).

7. Encumbrances; Required Notices to Mortgagees.

7.1 Right to Encumber. Lessee shall have the right at any time to mortgage to any entity (herein, a "Mortgagee") all or any part of Lessee's interest under this Agreement without the consent of Lessor. Lessor shall be provided copies of all such agreements between Lessee and Mortgagees and all such mailing addresses for the purposes of supplying notice as described in Section 7.2(c). Lessor agrees that such documents are the property of Lessee and that Lessor shall keep such records confidential and shall not disclose such records to any third party without Lessee's prior written consent.

7.2 Covenants for Mortgagees Benefit. Should Lessee mortgage any of its interest hereunder as provided in Section 7.1 above, Lessee and Lessor expressly agree between themselves and for the benefit of any Mortgagees as follows:

(a) The Parties will not cancel or modify this Agreement without the prior written consent of each of the Mortgagees, which consent shall not be unreasonably withheld or delayed.

(b) Each Mortgagee shall have the right to do any act or thing required to be performed by Lessee under this Agreement, and Lessor shall accept any such act or thing performed by a Mortgagee under this Agreement as if such act or thing was done by Lessee itself.

(c) If Lessor shall become entitled to terminate this Agreement due to an uncured default by Lessee, Lessor will not terminate this Agreement unless it has first given written notice of such uncured default and of its intent to terminate this Agreement to each Mortgagee which have recorded and/or given Lessor personal notice of their secured interest in Lessee's property and has given each such Mortgagee at least thirty (30) additional days to cure the default to prevent such termination of this Agreement.

(d) In case of the termination of this Agreement as a result of any default or the bankruptcy, insolvency or appointment of a receiver in bankruptcy for Lessee, Lessor shall give prompt notice to all Mortgagees which have recorded and/or given Lessor personal notice of their secured interest in Lessee's property. Lessor may,

at its sole discretion, upon written request of the first priority Mortgagee which has recorded and/or given Lessor personal notice of their secured interest in Lessee's property, made within forty (40) days after notice to such Mortgagee, enter into a new lease agreement with such Mortgagee, or its designee, within twenty (20) days after the receipt of such request. Such new lease agreement shall be effective as of the date of the termination of this Agreement by reason of default by Lessee, and shall be for a term equal to the remainder of the Term of this Agreement and upon the same terms, covenants, conditions and agreements as contained in this Agreement. Upon the execution of any such new lease agreement, such Mortgagee shall (i) pay Lessor any amounts which are due Lessor from Lessee, (ii) pay Lessor any and all amounts which would have been due under this Agreement (had this Agreement not been terminated) from the date of the termination of this Agreement to the date of the new lease agreement, and (iii) agree in writing to perform or cause to be performed all of the other covenants and agreements set forth in this Agreement to be performed by Lessee to the extent that Lessee failed to perform the same prior to the execution and delivery of the new lease agreement.

(e) The sale or other transfer of any interest in the Agreement by any such Mortgagee shall be conditioned on the express written consent of Lessor; and if granted, then such Mortgagee shall have no further duties or obligations hereunder.

8. Defaults; Termination.

8.1 Defaults. Each of the following events shall constitute an "Event of Default" by a party and, subject to Section 7.2 above, shall permit the non-defaulting party to terminate this Agreement and/or pursue all other appropriate remedies available at law or equity:

(a) The failure or omission by either party to pay amounts required to be paid hereunder when due, and such failure or omission has continued for thirty (30) days after written notice from the other party;

(b) The failure or omission by either party to observe, keep or perform any of the other terms, agreements or conditions set forth in this Agreement, and such failure or omission has continued for thirty (30) days (or such longer reasonable period of time required to cure such failure or omission, if such failure or omission cannot reasonably be cured with a thirty (30) day period) after written notice from the other party; or

(c) A party files for protection or liquidation under the bankruptcy laws of the United States or any other jurisdiction or has an involuntary petition in bankruptcy or a request for the appointment of a receiver filed against it and such involuntary petition or request is not dismissed within sixty (60) days after filing.

8.2 Termination by Lessee. Lessee may terminate this Agreement at any other time by giving Lessor at least three (3) months' written notice and paying Lessor a termination fee equal to the Minimum Land Rent for the remainder of the year in which the termination occurs or the amount applicable to a three (3) month time period whichever is greater. Lessor acknowledges that development of the wind generation facilities is dependent upon the completion of, without limitation, environmental studies, federal, state and local permitting processes and the availability of project financing. In the event that Lessee determines, at its sole discretion, that it cannot proceed with the

development of the wind energy facility, whether for permitting, environmental or other considerations, Lessee may terminate this Lease ("Early Termination") before the commencement of construction. In the event of such Early Termination, Lessee will provide Lessor, for Lessor's use, any wind measurement data and any facility permitting documentation developed by Lessee as of the termination date. Within ninety (90) days following any such Early Termination, Lessee will remove its property and installations from the Leased property, including its meteorological towers.

8.3 Surrender of Property. Upon the expiration or earlier termination of this Agreement, Lessee shall peaceably and quietly leave, surrender and return the Property to Lessor in the condition in which it was substantially at the commencement of this Agreement, unless otherwise agreed to by Lessor. Lessee agrees and hereby covenants to dismantle and remove all equipment, improvements, fixtures and other property owned or installed by Lessee or its affiliates on the Property (provided that all footings and foundations shall be to a depth of three (3) feet below the surface of the ground and covered with soil) within one hundred eighty (180) days from the date of termination, all of which shall be at Lessee's sole cost and expense. If Lessee fails to remove such wind power facilities within 180 days of termination of the Agreement, Lessor may do so, in which case Lessee shall reimburse Lessor for reasonable costs of removal and restoration incurred by Lessor. In addition to any other remedies available to Lessor, should Lessee fail to remove such property within one hundred eighty (180) days from the expiration or earlier termination of this Agreement, any and all property remaining on the Property beyond such one hundred eighty (180) day removal period shall be deemed abandoned to Lessor and Lessee hereby agrees to relinquish any and all rights to any such property, it being nonetheless understood and agreed that Lessor shall be under no obligation to accept such abandonment.

8.4 Inspection of the Property. Lessor reserves the right to itself and its agents to go upon the Property at reasonable and proper times to inspect the same for the purpose of determining that this Agreement is being properly observed and that all of the terms are being kept and performed by Lessee.

9. Condemnation. Should title or possession of all of the Property be taken in condemnation proceedings by a government agency, governmental body or other private party under the exercise of the right of eminent domain, or should a partial taking render the remaining portion of the Property wholly unsuitable for Lessee's use, then this Agreement shall terminate upon the vesting of title or taking of possession. All payments made on account of any taking by eminent domain shall be made to Lessor, except that Lessee shall be entitled to any award made for the reasonable removal and relocation costs of any removable property that Lessee has the right to remove, and for the loss and damage to any such property that Lessee elects or is required not to remove, and for the loss of use of the Property by Lessee. It is agreed that Lessee shall have the right to participate in any settlement proceedings and that Lessor shall not enter into any binding settlement agreement without the prior written consent of Lessee, which shall not be unreasonably withheld.

10. Miscellaneous.

10.1 Force Majeure - Delays. If performance of any act required by this Agreement to be performed by either party is prevented or delayed by reason of any act

of God, strike, lock-out, labor trouble, inability to secure materials, restrictive governmental laws or regulations, or any other cause not the fault of the party required to perform the act, the affected party, upon giving notice to the other party, shall be excused from such performance to the extent of and for the duration of such prevention, restriction or delay.

10.2 Assignment. Upon the prior written consent of Lessor, Lessee shall have the right to sell, assign, encumber, transfer, or grant leases to any or all of its rights and interests under this Agreement; provided, however, that any and all such transfers shall be expressly made subject to all of the terms, covenants and conditions of this Agreement. No such sale, assignment, transfer, or lease shall relieve Lessee of its obligations under this Agreement unless Lessee assigns its entire interest hereunder, in which event Lessee shall have no continuing liability, except that Lessee shall remain a guarantor of all obligations assumed by it in Section 8.3 above to return the Property to the condition that it was in at the commencement of this Agreement. With respect to such a transfer, assignment or sublease: (i) the term thereof shall not extend beyond the end of the Agreement term; (ii) the same shall be expressly made subject to all of the terms, covenants and conditions of this Agreement; and (iii) no assignment shall be valid and effective until the assignee shall execute, in form reasonably satisfactory to Lessor, and agreement to be bound by all of the terms, covenants, and agreements of this Agreement. Lessor shall have the right to sell, assign, encumber, or transfer any or all of its rights and interests under this Agreement. Nothing herein shall restrict Lessor's right to sell, encumber or transfer the Property.

10.3 Notices. All notices or other communications required or permitted hereunder, including notices to Mortgagees, shall, unless otherwise provided herein, be in writing, shall be personally delivered, delivered by reputable overnight courier, or sent by registered or certified mail, return receipt requested, and postage prepaid, addressed to the Parties at the following addresses:

If to Lessor:

J.R. Simplot Company
Attn: Corporate Secretary
P.O. Box 27
999 Main Street, Ste. 1388
Boise, ID 83767

If to Lessee:

XRG - DP9, LLC
c/o Energy Development, LLC
802 W. Benbow, Suite 1200
Boise, ID 83702
Attn: James Cartulis

with a copy to:

XRG - DP9, LLC
c/o Richardson & O'Leary PLLC
515 North 27th Street
Boise, ID 83702
Attn: Peter Richardson

Notices personally delivered shall be deemed given the day so delivered. Notices given by overnight courier shall be deemed given on the first business day following the mailing date. Notices mailed as provided herein shall be deemed given on the third business day following the mailing date. Notice of change of address shall be given by written notice in the manner detailed in this Section 10.3.

10.4 Further Assurances. Each of the Parties to this Agreement agrees to perform all such acts (including but not limited to, executing and delivering such instruments and documents) as reasonably may be necessary to fully effectuate each and all of the purposes and intent of this Agreement. Lessor expressly agrees that it will from time to time enter into reasonable nondisturbance agreements with any Mortgagee which requires such an agreement providing that Lessor shall recognize the rights of the Mortgagee and not disturb its possession of the Property so long as it is not in default of any of the provisions of this Agreement. Lessor agrees that within thirty (30) days after receipt of a written request by Lessee it shall: (a) grant rights-of-way and leases for electric and other public utilities and facilities and any other electric power purpose including any power transmission line on terms acceptable to Lessor and as the Parties shall deem necessary or desirable for Lessee's development and use of the Property; and (b) cooperate with Lessee in connection with requests for any and all zoning changes or other land use permits and/or approvals necessary for Lessee's development and use of the Property as contemplated by this Agreement.

10.5 Estoppel Certificates. Each party agrees that it shall, at any time during the Term of this Agreement within ten (10) days after a written request by the other party, execute, acknowledge and deliver to the requesting party a written statement certifying that this Agreement is unmodified and in full force and effect (or modified and stating the modifications), the dates on which the payments and any other charges have been paid, and that there are no defaults existing or that defaults exist and stating the nature of such defaults.

10.6 No Waiver. No waiver of any right under this Agreement shall be effective for any purpose unless in writing, signed by the party hereto possessing the right, nor shall any such waiver be construed to be a waiver of any subsequent right, term or provision of this Agreement.

10.7 Confidentiality. The Parties agree that the contents of this Agreement and other information exchanged, are confidential and, except as required by law, shall be kept strictly confidential. Such information shall not be disclosed to any person or company without prior written consent of the other party.

10.8 Entire Agreement. This Agreement, together with its attached exhibits, contains the entire agreement between the Parties hereto with respect to the subject matter hereof and any prior agreements, discussions or understandings, written or oral, are superceded by this Agreement and shall be of no force or effect. No addition or modification of any term or provision of this Agreement shall be effective unless set forth in writing and signed by each of the Parties.

10.9 Governing Law. The terms and provisions of this Agreement shall be interpreted in accordance with the laws of the State of Idaho applicable to contracts made and to be performed within such State and without reference to the choice of law

principles of such State or any other state. In the event of any dispute between the Parties hereto, the Idaho state district court for Cassia County, Idaho, shall be the sole venue for any legal proceedings arising therefrom.

10.10 Interpretation. The Parties agree that the terms and provisions of this Agreement embody their mutual intent and that such terms and conditions are not to be construed more liberally in favor, nor more strictly against, either party.

10.11 Partial Invalidity. Should any term or provision of this Agreement, or the application thereof to any person or circumstance, to any extent, be invalid or unenforceable, the remainder of this Agreement or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each remaining term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

10.12 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same instrument.

10.13 Attorneys' Fees. The prevailing party in any action or proceeding for the enforcement, protection, or establishment of any right or remedy under this Agreement or for the interpretation of this Agreement shall be entitled to recover its reasonable attorneys' fees and costs in connection with such action or proceeding from the non-prevailing party.

10.14 Memorandum. The Parties shall execute and record a Memorandum of Wind Lease Agreement in the form attached hereto as Exhibit B.

IN WITNESS WHEREOF, Lessor and Lessee enter into this Agreement as of the Effective Date.

Lessor:
J.R. Simplot Company

By Lawrence S. Hobik
Lawrence S. Hobik
President and CEO

Lessee:
XRG - DP9, LLC
An Idaho limited liability company

By [Signature]
Title MANAGER

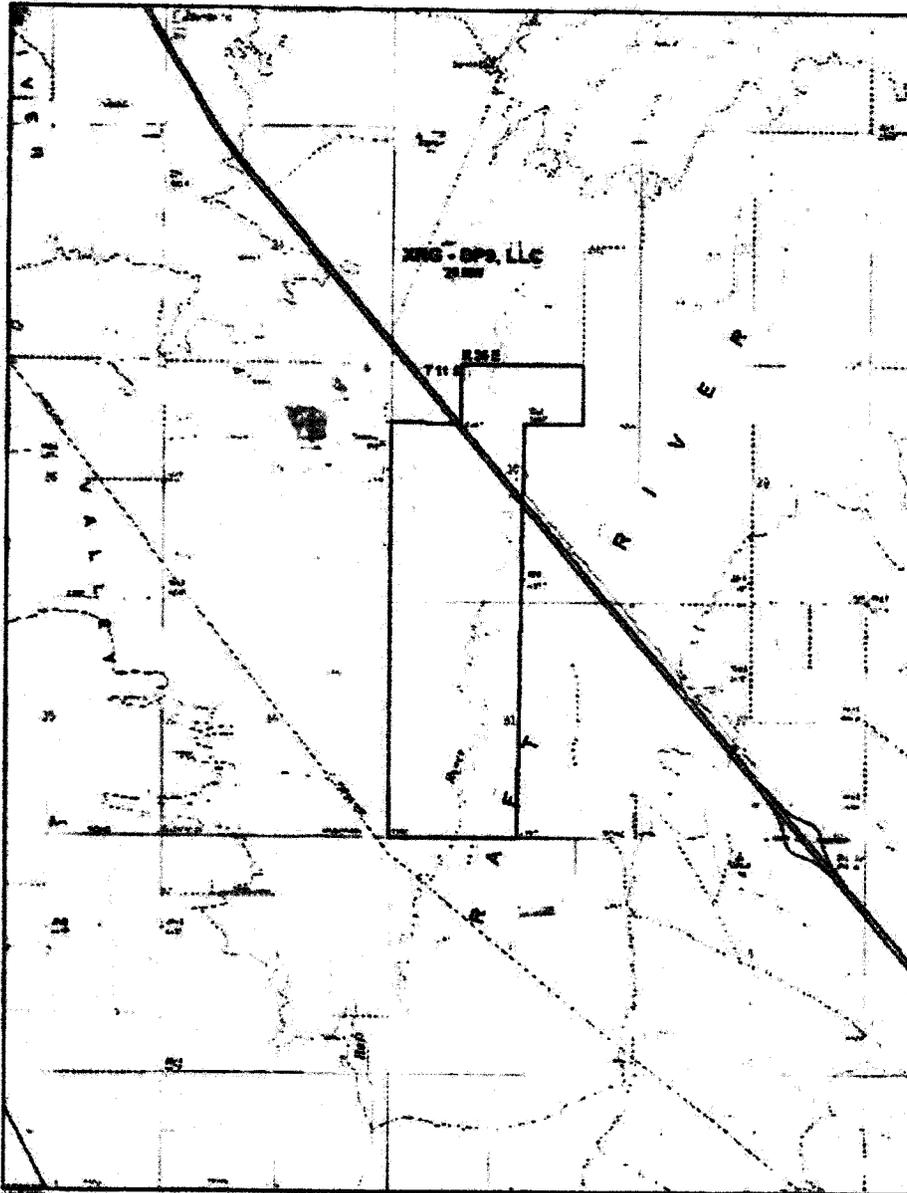
EXHIBIT A

DESCRIPTION OF THE PROPERTY

NW ¼ NE ¼, E ½ NW ¼, Lots 2, 3 and 4, E ½ SW ¼, Section 30 and Lots 1, 2, 3 and 4, E ½ NW ¼, E ½ SW ¼, Section 31, Township 11 South, Range 27 East of the Boise Meridian, Cassia County, Idaho

EXHIBIT A - Continued

MAP OF PROPERTY



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FEE 1500 RECORDER DEPUTY *[Signature]*

314848

RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:

2007 APR 2 AM 9 19

XRG - DP9, LLC
c/o Richardson & O'Leary, PLLC
515 North 27th Street
Boise, ID 83702
Attn: Peter Richardson

RECORDED AT THE REQUEST OF
Richardson & O'Leary

(Space above this line for Recorder's use only)

MEMORANDUM OF WIND PARK LEASE AGREEMENT

THIS MEMORANDUM OF WIND PARK LEASE AGREEMENT is made and entered into as of March 14, 2007, by and between J. R. Simplot Company ("Lessor"), and XRG - DP9, an Idaho limited liability company ("Lessee").

WHEREAS:

A. On the date hereof, the Parties have entered into a Wind Park Lease Agreement (the "Agreement") for the use and purposes of wind energy development and related rights, transmission lines and facilities installation, wind and weather monitoring and access on and across certain land which is more particularly described in Exhibit A attached hereto and incorporated by this reference (the "Property");

B. The term of the Agreement (the "Term"), shall begin on the Effective Date and shall continue for thirty (30) years from the commencement of Commercial Operations (the "Commercial Operations Date"); on the last day of such thirty year period the Agreement shall expire (the "Expiration Date"). As used herein, the term "Commercial Operations" shall mean the first production and sale of wind energy or energy credits by Lessee or its successors or assigns on the Property or any portion thereof. Either party may file a supplemental memorandum of the Agreement setting forth the expiration date of the Term. In addition, the parties agree that Lessor may file a notice of termination of this Agreement upon the expiration of the term or in the event of earlier termination of the Agreement.

C. The Parties desire to enter into this Memorandum of Wind Park Lease Agreement which is to be recorded in order that third parties may have notice of the lease of the Property and of the existence of the Agreement.

IN WITNESS WHEREOF, the Parties have executed this Memorandum of Wind Park Lease Agreement as of the date set forth above.

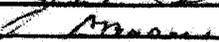
Lessor:

J. R. Simplot Company

By: 
Lawrence S. Miskik
President and CEO

Lessee:

XRG - DP9
An Idaho limited liability company

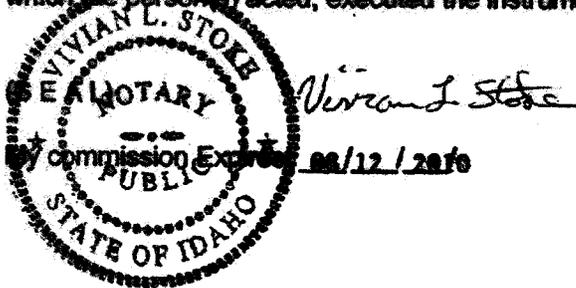
By: 
Title: 

NOTARIAL ACKNOWLEDGMENTS

State of IDAHO)
County of Ada)

ss.

On March 27, 2007, before me, the undersigned Notary Public, personally appeared Lance S. Elshik, President & CEO of J.R. Simple Company personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument; and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



State of Id)
County of Ada)

ss.

On March 27, 2007, before me, the undersigned Notary Public, personally appeared Lance Thomas Carkeulis personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument; and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

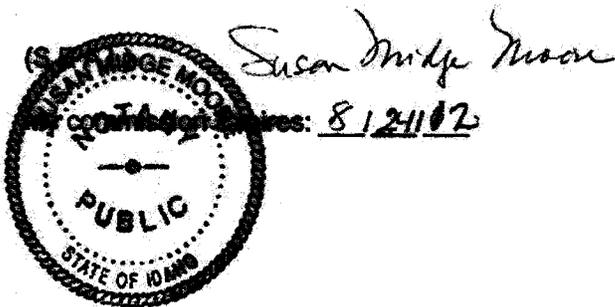


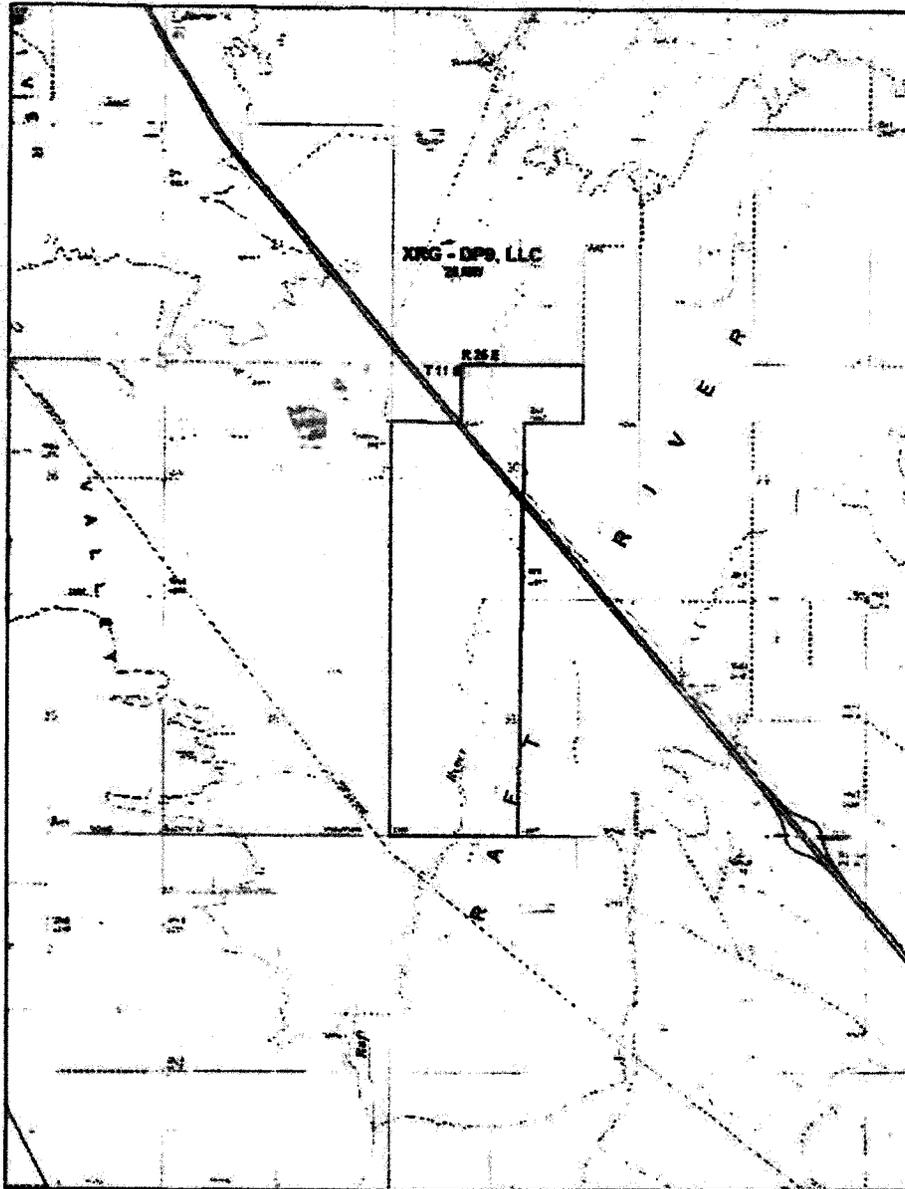
EXHIBIT A

DESCRIPTION OF THE PROPERTY

NW ¼ NE ¼, E ½ NW ¼, Lots 2, 3 and 4, E ½ SW ¼, Section 30 and Lots 1, 2, 3 and 4, E ½ NW ¼, E ½ SW ¼, Section 31, Township 11 South, Range 27 East of the Boise Meridian, Cassia County, Idaho

EXHIBIT A - Continued

MAP OF PROPERTY



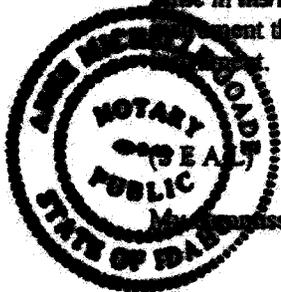
21,000 - 4,000 = 17,000 (Total Acres) (from 20,000 - 3,000)

WIND PARK LEASE AGREEMENT EXTENSION

NOTARIAL ACKNOWLEDGMENTS

State of Idaho)
County of Elmore) ss.

On March 15th, 2010, before me, the undersigned Notary Public, personally appeared [Signature] personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument; and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the



My Commission Expires: 4/13

[Signature]
Notary Public for Idaho

State of Idaho)
County of ADA) ss.

On March 15th, 2010, before me, the undersigned Notary Public, personally appeared JAMES T. CARKULIS personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument; and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



My Commission Expires: 9/12/12

[Signature]
Notary Public for Idaho

WIND PARK LEASE AGREEMENT EXTENSION

This Wind Park Lease Agreement Extension is entered into as of March 2010 by and between J. R. Simplot Company ("Lessor") and XRG-DP9, LLC ("Lessee"), collectively, the "Parties". Capitalized terms used herein have the meaning ascribed to them in that Wind Park Lease Agreement entered into by the parties on March 14, 2007:

The Parties entered into a Wind Park Lease Agreement on March 14, 2007 calling for Commercial Operation to begin within three years of its March 14, 2007, Effective Date. The Parties having reviewed the feasibility of achieving Commercial Operation by the targeted date and have agreed to, and hereby do, extend the deadline for achieving Commercial Operation as follows:

XRG-DP9, LLC will provide proof of Substantial Construction on or before July 1, 2010 with Commercial Operation to begin approximately upon the completion of construction of the project. Substantial Construction is defined as follows: 1) the delivery of a binding Power Purchase Agreement with a reputable utility; 2) the delivery of a binding construction agreement, including a performance bond and which defines the Commercial Operation date; 3) the delivery of all governmental approvals required to complete the project; 4) the delivery of binding purchase agreements for all necessary equipment to complete the project; and 5) actual commencement of construction and installation on the site.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Lessor and Lessee hereby agree to extend the Wind Park Lease Agreement until July 1, 2010, subject to automatic termination if the foregoing conditions have not been met by said date.

IN WITNESS WHEREOF, Lessee and Lessor enter into this Agreement as of the date first written above.

LESSOR:

J. R. Simplot Company

By: [Signature]

Tom Basabe

Its: Land and Livestock President

LESSEE:

XRG-DP9, LLC

By: [Signature]

Its: [Signature]

Notarial Acknowledgments on following page:

XRG-DP9, LLC
Extension Agreement

REQUEST FOR PRODUCTION NO. 31

Did XRG work on aspects of the XRG projects other than the PPA during 2009? If so please list all milestones (e.g. contracts awarded, engineering completed; permits granted, etc.) related to the XRG projects that occurred in 2009.

XRG RESPONSE TO REQUEST NO. 31

Exergy suffered setbacks in its development of the projects in 2009 due to Rocky Mountain Power's resistance to entering into PPAs. Exergy had first submitted BPA interconnection requests on November 1, 2006 (BPA Queue Nos. G0245, G0246, G0247, G0248). XRG paid for and received feasibility studies in November 2007, and continued through the study process retaining those queue numbers until March 2009, when BPA deemed XRG's requests withdrawn due to a misunderstanding regarding payment of an additional \$20,000 for an additional environmental study for each project – a total of \$80,000. At that time, Rocky Mountain Power had expressed its resistance to executing PPAs for all 4 projects, and XRG had to bear the futility of its PPA efforts in mind when committing additional funds to the interconnection process. Rocky Mountain Power's delay was certainly a factor in XRG's inability to remain in the queue under those prior interconnects requests.

Despite Rocky Mountain Power's resistance to PPAs in 2009, XRG did continue to work on the projects in 2009. That work included:

- Engaged in landowner negotiations, and maintained XRG's good standing on its leases.
- Engaged a third party to complete title and survey work on the lease sites to plan construction, turbine and road layouts.
- Continued wind data monitoring and analysis, which was initially commenced July 2006 with erection of met towers.
- Continued Sodar monitoring and analysis of wind, which commenced initially in 2008.
- Resubmitted Interconnection requests to BPA -- Queue Nos. G0388 (XRG-DP7 submitted 11/02/09), G0395 (XRG DP8 submitted 11/23/09).

REQUEST FOR PRODUCTION NO. 32

Did XRG work on aspects of the XRG projects other than the PPA during 2010? If so please list all milestones (e.g. contracts awarded, engineering completed; permits granted, etc.) related to the XRG projects that occurred in 2010.

XRG RESPONSE TO REQUEST NO. 32

Despite Rocky Mountain Power's continued resistance to executing PPAs in 2010, XRG did continue to work on the projects in 2010. That work included:

- Engaged third party environmental consultants who completed investigation into likely endangered species impacts.
- Engaged in landowner negotiations, and maintained XRG's good standing on its leases.
- Continued wind data monitoring and analysis, which was initially commenced July 2006 with erection of met towers.
- Continued Sodar monitoring and analysis of wind, which commenced initially in 2008.
- Resubmitted Interconnection requests to BPA -- G0411 (XRG-DP9 submitted 3/12/10), and G0412 (XRG-DP10 submitted 3/12/10). Due to BPA's rejection of these submittals, XRG resubmitted the requests to comply with BPA's concerns. BPA accepted the submittal for XRG-DP9, which now has a Queue No. G0445 effective on 12/6/10. XRG is still awaiting confirmation from BPA on the submittal and deposit for the XRG-DP10 interconnection, which it signed and sent to BPA on 11/24/10.
- Received completed interconnection system impact studies from BPA for Queue Nos. G0388 (XRG-DP7), G0395 (XRG DP8) and executed Facilities Study Agreements for same.
- Engaged a third party consultant to complete a microwave beam study for all 4 projects, to ensure the projects will not interfere with any microwave tower operations.
- Engaged a third party consultant to complete a study coordinating with the National Telecommunications and Information Administration to ensure all 4 projects will avoid interference with government systems.
- Initiated formal TSR process in order to become a BPA transmission customer and engaged in discussions with BPA transmission personnel regarding PTP transmission from the XRG projects to Brady substation.

REQUEST FOR PRODUCTION NO. 34

How many projects did Exergy develop to the point it obtained one or more fully executed PPAs with a counterparty in 2009? Please list each project, counterparty, and PPA execution date.

XRG RESPONSE TO REQUEST NO. 34

XRG objects on the ground this request calls for irrelevant information. Without waiving this objection, XRG states as follows.

Exergy developed the following projects to the point of fully execute PPA in 2009:

- Yahoo Creek Wind Park with Idaho Power Company, executed 7/9/2009
- Camp Reed Wind Park with Idaho Power Company, executed 7/9/2009
- Payne's Ferry Wind Park with Idaho Power Company, executed 7/9/2009

REQUEST FOR PRODUCTION NO. 35

How many projects did Exergy develop to the point it obtained one or more fully executed PPAs with a counterparty in 2010? Please list each project, counterparty, and PPA execution date.

XRG RESPONSE TO REQUEST NO. 35

XRG objects on the ground this request calls for irrelevant information. Without waiving this objection, XRG states as follows.

Exergy developed the following projects to the point of fully execute PPA in 2010:

- Big Blue Wind Farm with Northern States Power Company d/b/a Xcel Energy, executed in 7/10 and approved by the PUC on 8/26/2010
- Deep Creek Wind Park with Idaho Power Company, executed 12/10/2010
- Cottonwood Wind Park with Idaho Power Company, executed 12/10/2010
- Salmon Creek Wind Park with Idaho Power Company, executed 12/10/2010
- Rogerson Flats Wind Park with Idaho Power Company, executed 12/10/2010

REQUEST FOR PRODUCTION NO. 37

Does XRG currently have rights to interconnect the XRG projects to Bonneville Power Administration's (BPA's) system? If yes, did XRG control such rights on December 14, 2010? On March 15, 2010? On November 10, 2009? On October 2, 2009? On January 21, 2009? Please answer separately for each date.

XRG RESPONSE TO REQUEST NO. 37

XRG objects on the ground this request calls for irrelevant information. XRG maintains its right to obligate itself to PPAs, and the risks inherent therewith, prior to securing interconnection rights and transmission rights for the entire output. Reference, e.g., IPUC Order No. 32144. XRG further objects on the ground that the request is ambiguous as to the meaning of "rights." Without waiving these objections, XRG states as follows.

See XRG's Response to Request Nos. 31 and 32 for XRG's efforts and rights obtained regarding interconnection. The timing of the interconnection process with the PPA process has been difficult, and has been made no easier by Rocky Mountain Power's reluctance to execute PPAs for these projects since the PPA requests submitted January 21, 2009. XRG has initiated and paid for several interconnection applications and studies since 2006. Each interconnection application requires a \$2,500 deposit, and each system impact study deposit is \$5,000. Each Facilities Study deposit is \$7,000. BPA additionally requested a \$20,000 deposit for an environmental study for each project in January 2009, which would have been an \$80,000 deposit at a time when Rocky Mountain Power maintained it could not accept the output of all 4 projects. XRG has incurred substantial interconnection study costs, and, largely as a result of the delay in securing PPAs, has been bumped out of its initial queue positions for these projects. Nevertheless, XRG has continued to proceed through BPA's interconnection process and has current rights to interconnection proceeding through BPA's study processes.

In preparing this response, XRG discovered additional correspondence with BPA not provided in XRG's initial response to Request No. 6. XRG has omitted confidential study materials for the reasons explained in XRG's Response to Request No. 49. XRG hereby provides that additional correspondence as XRG Attachment to RMP Request No. 37.

REQUEST FOR PRODUCTION NO. 38

Does XRG currently have Firm rights as defined in the transmission service provider's OATT to deliver all output from the XRG projects across the transmission services provider's system to Rocky Mountain Power at Brady for the full 20-year term requested in the PPAs? If yes, please describe the specific transmission provider(s) and did XRG control such rights on December 14, 2010? On March 15, 2010? On November 10, 2009? On October 2, 2009? On January 21, 2009? Please answer separately for each date. If no, please explain current status of transmission service request(s) with the transmission services provider(s).

XRG RESPONSE TO REQUEST NO. 38

XRG objects on the ground this request calls for irrelevant information. XRG maintains its right to obligate itself to PPAs, and the risks inherent therewith, prior to securing interconnection rights and transmission rights for the entire output. Reference, e.g., IPUC Order No. 32144. Without waiving this objection, XRG states as follows.

See XRG's Response to Request No. 32 for XRG's efforts and rights to PTP transmission. As expressed to Rocky Mountain Power many times previously, and most recently at the meeting between the parties on December 7, 2010 and in XRG's letter and attachments dated December 14, 2010, XRG is confident that transmission to Rocky Mountain Power will be achievable and cost-effective. [REDACTED]

(Redacted reference to settlement negotiations.)

REQUEST FOR PRODUCTION NO. 39

What is the earliest date at which firm transmission for the XRG projects to Rocky Mountain Power's system will be available? Please explain.

XRG RESPONSE TO REQUEST NO. 39

As stated in XRG's letter to Rocky Mountain Power on December 14, 2010, XRG has proposed an online date of January 1, 2013, and rights will be available at that time.

RECEIVED

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UTILITIES COMMISSION

**XRG LLCs' ANSWER TO ROCKY MOUNTAIN POWER'S MOTION FOR
SUMMARY JUDGMENT**

EXHIBIT 2

**Excerpts of Rocky Mountain Power's Responses to XRG LLCs'
Production Requests**

PAC-E-10-08/Rocky Mountain Power

September 27, 2010

XRG Data Request 1

XRG Data Request 1

Please identify and provide all documents (including correspondence, internally or externally distributed), and all studies regarding XRG's request for PURPA PPAs and interconnection with Rocky Mountain Power's system in Idaho for the XRG QF projects referenced in the *Complaint* in this case. Please organize documents chronologically.

Response to XRG Data Request 1

Rocky Mountain Power objects to XRG's Data Request 1 to the extent that it calls for *all* documents and studies on the grounds that it is unduly burdensome, overly broad, and may seek irrelevant and or privileged information. Notwithstanding and without waiving the foregoing objections, Rocky Mountain Power responds as follows.

Please refer to Attachment XRG 1.

Recordholder: Bruce Griswold
Sponsor: To Be Determined

Rocky Mountain Power provided two attachments in response to XRG

Request No. 1.

As pages 7-301 of Exhibit A to Rocky Mountain Power's Motion for Summary Judgment, Rocky Mountain Power submitted only "Attach XRG 1 Part 1," which contains correspondence between XRG and Rocky Mountain Power.

XRG hereby includes for the Commission only "Attach XRG 1 Part 2," which Rocky Mountain Power provided in response to XRG's request for all internally generated correspondence and documents.

Griswold, Bruce (Mkt Function)

From: Younie, John
Sent: Friday, January 23, 2009 10:24 AM
To: Griswold, Bruce (Mkt Function)
Subject: FW: Exergy Projects

Jim's response.

From: Portouw, Jim
Sent: Friday, January 23, 2009 7:24 AM
To: Younie, John
Subject: RE: Exergy Projects

Ever since Idaho Power split Borah and Brady there are new issues with Brady deliveries. We currently have 250 MW of PTP import capability from Brady, but we have sold an option to APS to use this capacity so it will not always be available. We could do a long-term firm redirect to get enough additional capacity for one of the small units (20 MWs). We could use short-term redirects to have daily capacity for other units but there would be no long-term guarantee that it will be available.

Jim

From: Younie, John
Sent: Thursday, January 22, 2009 12:11 PM
To: Portouw, Jim
Subject: Exergy Projects

Jim attached is a summary of 6 proposed wind projects totaling approximately 235 MW. The proposed point of delivery is the Brady Substation located in southern Idaho. Are there any issues with this much capacity being delivered to Brady? Thanks for your help.

Younie, John

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-7 (Simplot) - Proposed QF Transaction

PAC is considering the following standard Idaho QF wind transaction located near Malta Idaho. The project will be connected to the BPA system and will deliver to PAC at the Brady Substation. Below is the project summary.

- **Buyer:** PAC
- **Seller:** XRG-DP-7, LLC (Simplot)
- **POD:** Brady Substation, ID
- **Term:** 20 years, December 31, 2010 through December 30, 2030
- **Product:** Firm QF purchase
- **Quantity:** 19.8 MW approximately 50,004 MWH annually
- **Price:** Idaho fixed avoided cost prices
- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$77 million over 20 year term

Younie, John

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-10, LLC (Newcomb West) - Proposed QF Transaction

PAC is considering the following standard Idaho QF wind transaction located near Malta Idaho. The project will be connected to the BPA system and will deliver to PAC at the Brady Substation. Below is the project summary.

- **Buyer:** PAC
- **Seller:** XRG-DP-10, LLC (Newcomb West)
- **POD:** Brady Substation, ID
- **Term:** 20 years, December 31, 2010 through December 30, 2030
- **Product:** Firm QF purchase
- **Quantity:** 19.8 MW approximately 54,806 MWH annually
- **Price:** Idaho fixed avoided cost prices
- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$84.4 million over 20 year term

Younie, John

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-9, LLC (Newcomb East) - Proposed QF Transaction

PAC is considering the following standard Idaho QF wind transaction located near Malta Idaho. The project will be connected to the BPA system and will deliver to PAC at the Brady Substation. Below is the project summary.

- **Buyer:** PAC
- **Seller:** XRG-DP-9, LLC (Newcomb East)
- **POD:** Brady Substation, ID
- **Term:** 20 years, December 31, 2010 through December 30, 2030
- **Product:** Firm QF purchase
- **Quantity:** 19.8 MW approximately 56,315 MWH annually
- **Price:** Idaho fixed avoided cost prices
- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$86.7 million over 20 year term

Younie, John

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-8, LLC (Pickett) - Proposed QF Transaction

PAC is considering the following standard Idaho QF wind transaction located near Malta Idaho. The project will be connected to the BPA system and will deliver to PAC at the Brady Substation. Below is the project summary.

- **Buyer:** PAC
- **Seller:** XRG-DP-8, LLC (Pickett)
- **POD:** Brady Substation, ID
- **Term:** 20 years, December 31, 2010 through December 30, 2030
- **Product:** Firm QF purchase
- **Quantity:** 19.8 MW approximately 57,507 MWH annually
- **Price:** Idaho fixed avoided cost prices
- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$88.5 million over 20 year term

Younie, John

From: Wessling, Nathalie
Sent: Thursday, January 29, 2009 12:36 PM
To: Younie, John
Cc: Papousek, Chris
Subject: RE: XRG-DP-7 (Simplot) - Proposed QF Transaction

Please provide the exact, legal name of the counterparty and the data needed to run the PPE.

What attorney is working on this? We want to ensure we are covered from a credit standpoint on these Idaho QFs going forward. Not sure if we are still precluded from getting credit security.

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-7 (Simplot) - Proposed QF Transaction

PAC is considering the following standard Idaho QF wind transaction located near Malta Idaho. The project will be connected to the BPA system and will deliver to PAC at the Brady Substation. Below is the project summary.

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- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$77 million over 20 year term

Younie, John

From: Wessling, Nathalie
Sent: Thursday, January 29, 2009 12:37 PM
To: Younie, John
Cc: Papousek, Chris
Subject: RE: XRG-DP-10, LLC (Newcomb West) - Proposed QF Transaction

Please provide the exact, legal name of the counterparty and the data needed to run the PPE.

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-10, LLC (Newcomb West) - Proposed QF Transaction

PAC is considering the following standard Idaho QF wind transaction located near Malta Idaho. The project will be connected to the BPA system and will deliver to PAC at the Brady Substation. Below is the project summary.

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- **POD:** Brady Substation, ID
- **Term:** 20 years, December 31, 2010 through December 30, 2030
- **Product:** Firm QF purchase
- **Quantity:** 19.8 MW approximately 54,806 MWH annually
- **Price:** Idaho fixed avoided cost prices
- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$64.4 million over 20 year term

Younie, John

From: Wessling, Nathalie
Sent: Thursday, January 29, 2009 12:38 PM
To: Younie, John
Cc: Papousek, Chris
Subject: RE: XRG-DP-9, LLC (Newcomb East) - Proposed QF Transaction

Please provide the exact, legal name of the counterparty and the data needed to run the PPE.

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Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-9, LLC (Newcomb East) - Proposed QF Transaction

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- **Price:** Idaho fixed avoided cost prices
- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$86.7 million over 20 year term

Younie, John

From: Wessling, Nathalie
Sent: Thursday, January 29, 2009 12:38 PM
To: Younie, John
Subject: RE: XRG-DP-8, LLC (Pickett) - Proposed QF Transaction

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To: _C&T PreTransaction Approval
Subject: XRG-DP-8, LLC (Pickett) - Proposed QF Transaction

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- **Product:** Firm QF purchase
- **Quantity:** 19.8 MW approximately 57,507 MWH annually
- **Price:** Idaho fixed avoided cost prices
- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$88.5 million over 20 year term

Younie, John

From: Heim, Darren
Sent: Thursday, January 29, 2009 3:28 PM
To: Younie, John; _C&T PreTransaction Approval
Subject: RE: XRG-DP-7 (Simplot) - Proposed QF Transaction

Preliminary accounting determination:

Lease accounting: Not a lease as the price is considered fixed

Derivative accounting: Nonderivative since the contract lacks a notional

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-7 (Simplot) - Proposed QF Transaction

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- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$77 million over 20 year term

Younie, John

From: Heim, Darren
Sent: Thursday, January 29, 2009 3:33 PM
To: Younie, John; _C&T PreTransaction Approval
Subject: RE: XRG-DP-10, LLC (Newcomb West) - Proposed QF Transaction

Preliminary accounting determination:

Lease accounting: Not a lease as the price is considered fixed
Derivative accounting: Nonderivative since the contract lacks a notional

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-10, LLC (Newcomb West) - Proposed QF Transaction

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- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$84.4 million over 20 year term

Younie, John

From: Helm, Darren
Sent: Thursday, January 29, 2009 3:33 PM
To: Younie, John; _C&T PreTransaction Approval
Subject: RE: XRG-DP-9, LLC (Newcomb East) - Proposed QF Transaction

Preliminary accounting determination:

Lease accounting: Not a lease as the price is considered fixed
Derivative accounting: Nonderivative since the contract lacks a notional

From: Younie, John
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To: _C&T PreTransaction Approval
Subject: XRG-DP-9, LLC (Newcomb East) - Proposed QF Transaction

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- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$86.7 million over 20 year term

Younie, John

From: Heim, Darren
Sent: Thursday, January 29, 2009 3:35 PM
To: Younie, John; _C&T PreTransaction Approval
Subject: RE: XRG-DP-8, LLC (Pickett) - Proposed QF Transaction

Preliminary accounting determination:

Lease accounting: Not a lease as the price is considered fixed
Derivative accounting: Nonderivative since the contract lacks a notional

From: Younie, John
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To: _C&T PreTransaction Approval
Subject: XRG-DP-8, LLC (Pickett) - Proposed QF Transaction

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- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$88.5 million over 20 year term

Griswold, Bruce (Mkt Function)

From: Portouw, Jim
Sent: Thursday, January 29, 2009 3:56 PM
To: Younie, John; _C&T PreTransaction Approval
Subject: RE: XRG-DP-7 (Simplot) - Proposed QF Transaction

Transmission

Import to Utah system on a firm basis limited to 23 MW total for these transactions (would do redirect of existing Borah reservation to Brady to facilitate transaction). Another 250 MW exists but APS has first rights to schedule on the path. If APS schedules from Brady we could attempt to wheel through Borah but this would be non-firm.

Import to Goshen is possible but will be limited by Goshen area load and resource balance. There will be hours when Goshen load can not use some or all of these resources. A study will be needed to provide number of hours load will be insufficient. This problem may be exacerbated by BPA load shift to Three Mile Knoll.

Will need to request Network Resource status for this resource. Please notify when you want request for Network Resource status submitted (will need to have signed attestation of C&T commitment). Suggest PPA be contingent upon receiving Network Resource status. Without Network Resource status for this resource, we will need to use PacifiCorp PTP capacity and schedule the energy to load on the PTP reservation.

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-7 (Simplot) - Proposed QF Transaction

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- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$77 million over 20 year term

Griswold, Bruce (Mkt Function)

From: Portouw, Jim
Sent: Thursday, January 29, 2009 3:56 PM
To: Younie, John; _C&T PreTransaction Approval
Subject: RE: XRG-DP-10, LLC (Newcomb West) - Proposed QF Transaction

Transmission

Import to Utah system on a firm basis limited to 23 MW total for these transactions (would do redirect of existing Borah reservation to Brady to facilitate transaction). Another 250 MW exists but APS has first rights to schedule on the path. If APS schedules from Brady we could attempt to wheel through Borah but this would be non-firm.

Import to Goshen is possible but will be limited by Goshen area load and resource balance. There will be hours when Goshen load can not use some or all of these resources. A study will be needed to provide number of hours load will be insufficient. This problem may be exacerbated by BPA load shift to Three Mile Knoll.

Will need to request Network Resource status for this resource. Please notify when you want request for Network Resource status submitted (will need to have signed attestation of C&T commitment). Suggest PPA be contingent upon receiving Network Resource status. Without Network Resource status for this resource, we will need to use PacifiCorp PTP capacity and schedule the energy to load on the PTP reservation.

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-10, LLC (Newcomb West) - Proposed QF Transaction

PAC is considering the following standard Idaho QF wind transaction located near Malta Idaho. The project will be connected to the BPA system and will deliver to PAC at the Brady Substation. Below is the project summary.

- **Buyer:** PAC
- **Seller:** XRG-DP-10, LLC (Newcomb West)
- **POD:** Brady Substation, ID
- **Term:** 20 years, December 31, 2010 through December 30, 2030
- **Product:** Firm QF purchase
- **Quantity:** 19.8 MW approximately 54,806 MWH annually
- **Price:** Idaho fixed avoided cost prices
- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$84.4 million over 20 year term

Griswold, Bruce {Mkt Function}

From: Portouw, Jim
Sent: Thursday, January 29, 2009 3:57 PM
To: Younie, John; _C&T PreTransaction Approval
Subject: RE: XRG-DP-9, LLC (Newcomb East) - Proposed QF Transaction

Transmission

Import to Utah system on a firm basis limited to 23 MW total for these transactions (would do redirect of existing Borah reservation to Brady to facilitate transaction). Another 250 MW exists but APS has first rights to schedule on the path. If APS schedules from Brady we could attempt to wheel through Borah but this would be non-firm.

Import to Goshen is possible but will be limited by Goshen area load and resource balance. There will be hours when Goshen load can not use some or all of these resources. A study will be needed to provide number of hours load will be insufficient. This problem may be exacerbated by BPA load shift to Three Mile Knoll.

Will need to request Network Resource status for this resource. Please notify when you want request for Network Resource status submitted (will need to have signed attestation of C&T commitment). Suggest PPA be contingent upon receiving Network Resource status. Without Network Resource status for this resource, we will need to use PacifiCorp PTP capacity and schedule the energy to load on the PTP reservation.

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-9, LLC (Newcomb East) - Proposed QF Transaction

PAC is considering the following standard Idaho QF wind transaction located near Malta Idaho. The project will be connected to the BPA system and will deliver to PAC at the Brady Substation. Below is the project summary.

- **Buyer:** PAC
- **Seller:** XRG-DP-9, LLC (Newcomb East)
- **POD:** Brady Substation, ID
- **Term:** 20 years, December 31, 2010 through December 30, 2030
- **Product:** Firm QF purchase
- **Quantity:** 19.8 MW approximately 56,315 MWH annually
- **Price:** Idaho fixed avoided cost prices
- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$86.7 million over 20 year term

Griswold, Bruce (Mkt Function)

From: Portouw, Jim
Sent: Thursday, January 29, 2009 3:57 PM
To: Younie, John; _C&T PreTransaction Approval
Subject: RE: XRG-DP-8, LLC (Pickett) - Proposed QF Transaction

Transmission

Import to Utah system on a firm basis limited to 23 MW total for these transactions (would do redirect of existing Borah reservation to Brady to facilitate transaction). Another 250 MW exists but APS has first rights to schedule on the path. If APS schedules from Brady we could attempt to wheel through Borah but this would be non-firm.

Import to Goshen is possible but will be limited by Goshen area load and resource balance. There will be hours when Goshen load can not use some or all of these resources. A study will be needed to provide number of hours load will be insufficient. This problem may be exacerbated by BPA load shift to Three Mile Knoll.

Will need to request Network Resource status for this resource. Please notify when you want request for Network Resource status submitted (will need to have signed attestation of C&T commitment). Suggest PPA be contingent upon receiving Network Resource status. Without Network Resource status for this resource, we will need to use PacifiCorp PTP capacity and schedule the energy to load on the PTP reservation.

From: Younie, John
Sent: Thursday, January 29, 2009 12:02 PM
To: _C&T PreTransaction Approval
Subject: XRG-DP-8, LLC (Pickett) - Proposed QF Transaction

PAC is considering the following standard Idaho QF wind transaction located near Malta Idaho. The project will be connected to the BPA system and will deliver to PAC at the Brady Substation. Below is the project summary.

- **Buyer:** PAC
- **Seller:** XRG-DP-8, LLC (Pickett)
- **POD:** Brady Substation, ID
- **Term:** 20 years, December 31, 2010 through December 30, 2030
- **Product:** Firm QF purchase
- **Quantity:** 19.8 MW approximately 57,507 MWH annually
- **Price:** Idaho fixed avoided cost prices
- **LDs:** Replacement Power on annualized basis if MAG is not achieved
- **Agreement:** Idaho Standard QF Off-System MAG PPA
- **Credit:** TBD
- **Strategy:** Obligation to purchase QF Power
- **Nominal Value:** \$88.5 million over 20 year term

11/10/09-TH

Centkulis

I-D projects

4 standard QF1 20
upgrade Raft River lines

138kV BPA Minidoka / Malta

2 780MW 345kV Mid Point to
Humbolt

east on IPC control area lines
CBM - 330MW constraints

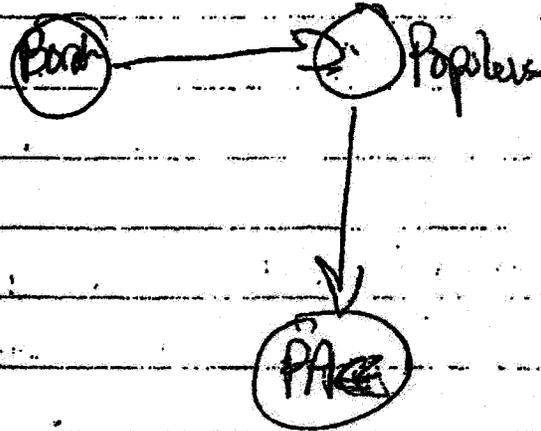
345kV inverter going south (Populus to SIC)
populus to Bradley constraint still exists

AS constraints
critical needs

Bond / 2011
to
Pace
Upgrade

Release of 198 MW - 4 projects
Malta
firm resource at point of receipt.

! Proc Trans / requirement of firm
delivery @ point of receipt



- Avoided cost.

PAC-E-10-08/Rocky Mountain Power
September 27, 2010
XRG Data Request 2

XRG Data Request 2

Reference *Answer*, ¶ 9. Please explain why Rocky Mountain Power delivered a PPA for only one of the XRG projects? Did Rocky Mountain Power receive requests for PPAs for all four XRG projects?

Response to XRG Data Request 2

Rocky Mountain Power objects to XRG's Data Request 2 to the extent that it seeks an expert opinion, a legal opinion, or legal argument and to the extent it calls for Rocky Mountain Power to state an opinion not previously written. See IPUC Rule 225. Notwithstanding and without waiving the foregoing objections, Rocky Mountain Power responds as follows.

Yes, Rocky Mountain Power did receive requests from XRG for four PPAs for the XRG projects.

Rocky Mountain Power previously explained why it prepared only one PPA, in an e-mail from Bruce Griswold to James Carkulis dated October 2, 2009, and in a letter from PacifiCorp's legal counsel, Kenneth Kaufmann, to XRG's attorney, Peter Richardson, on April 13, 2010. Please refer to Exhibits A-19 and A-25 to Rocky Mountain Power's First Production Request to the XRG LLCs, attached as part of Attachment XRG 1.

Furthermore, even if there were no issues with any of the four PPAs requested, PacifiCorp initially would have sent XRG a single PPA, and then prepared individual PPAs at the end of the negotiation, after all terms and conditions had been fully negotiated.

Recordholder: Bruce Griswold
Sponsor: To Be Determined

PAC-E-10-08/Rocky Mountain Power
September 27, 2010
XRG Data Request 5

XRG Data Request 5

Reference *Answer*, ¶ 8. Please provide supporting documents or studies establishing that transmission capacity for no more than 23 MW of net output was available at the time period from January 2009 to March 2010. Please provide supporting documents or studies establishing that transmission capacity for no more than 23 MW would be available at all proposed online dates discussed by XRG, including June 2011.

Response to XRG Data Request 5

Rocky Mountain Power objects to XRG's Data Request 5 to the extent that it calls for *all* documents and studies on the grounds that it is unduly burdensome, overly broad, and may seek irrelevant and or privileged information. Notwithstanding and without waiving the foregoing objections, Rocky Mountain Power responds as follows.

Please refer to Attachment XRG 1, which includes emails from Jim Portouw to Bruce Griswold dated January 29, 2009 and Attachment XRG 5, a letter from Rocky Mountain Power to XRG dated September 21, 2010.

Recordholder: Bruce Griswold
Sponsor: To Be Determined



825 Multnomah, Ste 600
Portland, Oregon 97232

September 21, 2010

Mr. James T. Carkulis
1424 Dodge Ave.
Helena, MT 59601

Re: XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs

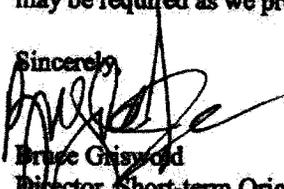
Dear Mr. Carkulis:

On July 15, 2010, PacifiCorp Transmission designated a new Point of Delivery/Point of Receipt for Network Transmission Service under its Open Access Transmission Tariff called "Path C". PacifiCorp Commercial & Trading ("PacifiCorp C&T") became aware of the impact of this change to XRG's projects, above, on September 13, 2010.

The new Point of Delivery/Point of Receipt at Path C effectively increases available firm transmission across Path C and resolves PacifiCorp C&T's concerns at this time about the availability of firm Network Resource Transmission Service for the four QF projects, above, proposed by XRG to deliver to PacifiCorp at Brady, Idaho. Therefore, this letter provides XRG-DP-7 LLC, XRG-DP-8 LLC, XRG-DP-9 LLC, and XRG-DP-10 LLC notice that PacifiCorp C&T is now prepared to enter into a 20-year power purchase agreement with each of these projects, at the current avoided cost rates set forth in OPUC Order No. 31025 (or such successor rates as may be in effect on the date the parties execute power purchase agreements for the projects).¹

Firm capacity for Network Resource Transmission Service across Path C will be allocated by PacifiCorp Transmission on a first come, first served basis. If you would like to move forward with your projects, please contact me at 503-813-5218 as soon as possible. If you decide to pursue all four projects, we would request an update on each project per the attached matrices so that we can correctly and expediently prepare draft PPAs. Each matrix represents critical project specific information for QF PPA preparation but the matrix may not be all inclusive. Additional information may be required as we prepare and exchange drafts.

Sincerely,



Bruce Griswold
Director, Short-term Origination & QF Contracts
PacifiCorp Energy

Enclosures: XRG-DP7-Required Information; XRG-DP8-Required Information; XRG-DP9-Required Information; XRG-DP10-Required Information

CC: Peter Richardson
Daniel Solander
Jeff Erb

¹ PacifiCorp C&T does not guarantee that PacifiCorp Transmission will grant Network Resource Transmission Service to the XRG Projects. However PacifiCorp C&T is no longer aware of any likely fatal flaw that would preclude PacifiCorp Transmission from granting such a request.

XRG – DP7 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

XRG-DP7 - Required Information	Provided – January 21, 2009	Additional Information requested by PacifiCorp:
(a) Demonstration ability to obtain QF status	Provided FERC Form 556 – QF Self Certification	Provide QF number when Form 556 acknowledged by FERC
(b) Design capacity (MW), station service requirements, and net amount of power delivered to the Company's electric system	Ten DeWind D8.2, 2MW turbines totaling 19.8 MW	Estimate station service for each turbine; will separate station service be required?
(c) Generation technology and other related technology applicable to the site	DeWind D8.2, 2MW turbines	Are these still the selected turbines? Provide turbine specification
(d) proposed site location	Cassia County, ID Provided map of turbine locations	Provide coordinates of project and tax lot number. Provide location of substation. Map shows 13 turbines, reconcile information provided in (b),(c), (e), and (g)
(e) Schedule of monthly power deliveries	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Reconcile discrepancy in turbine manufacturer in (b) and (c) and (e) production forecast. Provide the correct 12X24 for the selected turbine. Include the file in excel format.
(f) Calculation or determination of minimum and maximum annual deliveries	No Information Provided	Provide calculation of minimum, maximum, and average annual generation
(g) Motive force or fuel plan	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Confirm data is still valid. Provide wind study for project.
(h) proposed on-line date and other significant dates required to complete milestones	1 st Energy = 12/31/10	Provide updated schedule to achieve these dates including interconnection and construction milestones
(i) proposed contract term and pricing provisions	20 year, non-levelized, non-fuel	
(j) Status of interconnection or transmission arrangement	Interconnection is through BPA	Provide status of Seller's interconnection application with BPA; provide date Seller's application was deemed complete by BPA; provide copy of SIS and other studies, if available; provide documentation of availability of transmission for Project to

XRG – DP7 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

		Brady. If available; provide schedule of remaining interconnection work. Identify procurement lead-times for major interconnection components and indicate whether such interconnection equipment has been ordered
(k) point of delivery	Brady Substation	Provide status of BPA Transmission Service Agreement to Brady Substation
(l) Wind Rights		Provide documentation that Seller has obtained rights to wind at project site (ie, land purchase or lease agreements)
(m) Form of Security to be provided		Specify preferred form of security to be provided for delay security (letter of credit, cash escrow, or guarantee)
(n) Required Facility Documents		Please list all permits, licenses, and land rights and contracts (e.g. interconnection agreement) required to operate project; provide status of each such required facility document
(o) Creditworthiness		Please provide legal name and 2 years of audited financials for the QF developer or the entity providing credit support to the QF developer so that PacifiCorp can complete creditworthiness review.

XRG – DP8 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

XRG-DP8 - Required Information	Provided – January 21, 2009	Additional Information requested by PacifiCorp:
(a) Demonstration ability to obtain QF status	Provided FERC Form 556 – QF Self Certification	Provide QF number when Form 556 acknowledged by FERC
(b) Design capacity (MW), station service requirements, and net amount of power delivered to the Company's electric system	Ten DeWind D8.2, 2MW turbines totaling 19.8 MW	Estimate station service for each turbine; will separate station service be required?
(c) Generation technology and other related technology applicable to the site	DeWind D8.2, 2MW turbines	Are these still the selected turbines? Provide turbine specification
(d) proposed site location	Cassia County, ID Provided map of turbine locations	Provide coordinates of project and tax lot number. Provide location of substation. Map shows 13 turbines, reconcile information provided in (b),(c), (e), and (g)
(e) Schedule of monthly power deliveries	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Reconcile discrepancy in turbine manufacturer in (b) and (c) and (e) production forecast. Provide the correct 12X24 for the selected turbine. Include the file in excel format.
(f) Calculation or determination of minimum and maximum annual deliveries	No Information Provided	Provide calculation of minimum, maximum, and average annual generation
(g) Motive force or fuel plan	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Confirm data is still valid. Provide wind study for project.
(h) proposed on-line date and other significant dates required to complete milestones	1 st Energy = 12/31/10	Provide updated schedule to achieve these dates including interconnection and construction milestones
(i) proposed contract term and pricing provisions	20 year, non-levelized, non-fuel	
(j) Status of interconnection or transmission arrangement	Interconnection is through BPA	Provide status of Seller's interconnection application with BPA; provide date Seller's application was deemed complete by BPA;

XRG – DP8 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

		provide copy of SIS and other studies, if available; provide documentation of availability of transmission for Project to Brady. If available; provide schedule of remaining interconnection work. Identify procurement lead-times for major interconnection components and indicate whether such interconnection equipment has been ordered
(k) point of delivery	Brady Substation	Provide status of all Transmission Provider's Transmission Service Agreement to Brady Substation
(l) Wind Rights		Provide documentation that Seller has obtained rights to wind at project site (ie, land purchase or lease agreements)
(m) Form of Security to be provided		Specify preferred form of security to be provided for delay security (letter of credit, cash escrow, or guarantee)
(n) Required Facility Documents		Please list all permits, licenses, and land rights and contracts (e.g. interconnection agreement) required to operate project; provide status of each such required facility document
(o) Creditworthiness		Please provide legal name and 2 years of audited financials for the QF developer or the entity providing credit support to the QF developer so that PacifiCorp can complete creditworthiness review.

XRG – DP9 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

XRG-DP9 - Required Information	Provided – January 21, 2009	Additional Information requested by PacifiCorp:
(a) Demonstration ability to obtain QF status	Provided FERC Form 556 – QF Self Certification	Provide QF number when Form 556 acknowledged by FERC
(b) Design capacity (MW), station service requirements, and net amount of power delivered to the Company's electric system	Ten DeWind D8.2, 2MW turbines totaling 19.8 MW	Estimate station service for each turbine; will separate station service be required?
(c) Generation technology and other related technology applicable to the site	DeWind D8.2, 2MW turbines	Are these still the selected turbines? Provide turbine specification
(d) proposed site location	Cassia County, ID Provided map of turbine locations	Provide coordinates of project and tax lot number. Provide location of substation. Map shows 13 turbines, reconcile information provided in (b),(c), (e), and (g)
(e) Schedule of monthly power deliveries	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Reconcile discrepancy in turbine manufacturer in (b) and (c) and (e) production forecast. Provide the correct 12X24 for the selected turbine. Include the file in excel format.
(f) Calculation or determination of minimum and maximum annual deliveries	No Information Provided	Provide calculation of minimum, maximum, and average annual generation
(g) Motive force or fuel plan	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Confirm data is still valid. Provide wind study for project.
(h) proposed on-line date and other significant dates required to complete milestones	1 st Energy = 12/31/10	Provide updated schedule to achieve these dates including interconnection and construction milestones
(i) proposed contract term and pricing provisions	20 year, non-levelized, non-fuel	
(j) Status of interconnection or transmission arrangement	Interconnection is through BPA.	Provide status of Seller's interconnection application with BPA; provide date Seller's application was deemed complete by BPA;

XRG – DP9 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

		provide copy of SIS and other studies, if available; provide documentation of availability of transmission for Project to Brady. If available; provide schedule of remaining interconnection work. Identify procurement lead-times for major interconnection components and indicate whether such interconnection equipment has been ordered
(k) point of delivery	Brady Substation	Provide status of all Transmission Provider's Transmission Service Agreement to Brady Substation
(l) Wind Rights		Provide documentation that Seller has obtained rights to wind at project site (ie, land purchase or lease agreements)
(m) Form of Security to be provided		Specify preferred form of security to be provided for delay security (letter of credit, cash escrow, or guarantee)
(n) Required Facility Documents		Please list all permits, licenses, and land rights and contracts (e.g. interconnection agreement) required to operate project; provide status of each such required facility document
(o) Creditworthiness		Please provide legal name and 2 years of audited financials for the QF developer or the entity providing credit support to the QF developer so that PacifiCorp can complete creditworthiness review.

XRG – DP10 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

XRG-DP10 - Required Information	Provided – January 21, 2009	Additional Information requested by PacifiCorp:
(a) Demonstration ability to obtain QF status	Provided FERC Form 556 – QF Self Certification	Provide QF number when Form 556 acknowledged by FERC
(b) Design capacity (MW), station service requirements, and net amount of power delivered to the Company's electric system	Five DeWind D8.2, 2MW turbines totaling 10 MW	NOTE: FERC 556 shows 5 DeWind turbines total 10MW and 12X24 wind generation shows 19.8MW using Vestas turbines. Estimate station service for each turbine; will separate station service be required?
(c) Generation technology and other related technology applicable to the site	DeWind D8.2, 2MW turbines	NOTE: FERC 556 shows 5 DeWind turbines total 10MW and 12X24 wind generation shows 19.8MW using Vestas turbines. Are these still the selected turbines? Provide turbine specification
(d) proposed site location	Cassia County, ID Provided map of turbine locations	Provide coordinates of project and tax lot number. Provide location of substation. Map shows 13 turbines, reconcile information provided in (b),(c), (e), and (g)
(e) Schedule of monthly power deliveries	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Reconcile discrepancy in turbine manufacturer in (b) and (c) and (e) production forecast. Provide the correct 12X24 for the selected turbine. Include the file in excel format.
(f) Calculation or determination of minimum and maximum annual deliveries	No Information Provided	Provide calculation of minimum, maximum, and average annual generation
(g) Motive force or fuel plan	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Confirm data is still valid. Provide wind study for project.
(h) proposed on-line date and other significant dates required to complete milestones	1 st Energy = 12/31/10	Provide updated schedule to achieve these dates including interconnection and construction milestones
(i) proposed contract term and pricing provisions	20 year, non-levelized, non-fuel	
(j) Status of interconnection	Interconnection is through	Provide status of Seller's

XRG – DP10 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

or transmission arrangement	BPA	interconnection application with BPA; provide date Seller's application was deemed complete by BPA; provide copy of SIS and other studies, if available; provide documentation of availability of transmission for Project to Brady. If available; provide schedule of remaining interconnection work. Identify procurement lead-times for major interconnection components and indicate whether such interconnection equipment has been ordered
(k) point of delivery	Brady Substation	Provide status of all Transmission Provider's Transmission Service Agreement(s) to Brady Substation
(l) Wind Rights		Provide documentation that Seller has obtained rights to wind at project site (ie, land purchase or lease agreements)
(m) Form of Security to be provided		Specify preferred form of security to be provided for delay security (letter of credit, cash escrow, or guarantee)
(n) Required Facility Documents		Please list all permits, licenses, and land rights and contracts (e.g. interconnection agreement) required to operate project; provide status of each such required facility document
(o) Creditworthiness		Please provide legal name and 2 years of audited financials for the QF developer or the entity providing credit support to the QF developer so that PacifiCorp can complete creditworthiness review.

PAC-E-10-08/Rocky Mountain Power
September 27, 2010
XRG Data Request 6

XRG Data Request 6

Does it appear at this date that transmission capacity will exist for over 23 MW at the proposed point of interconnection for the XRG projects at any point prior to the end of 2011? If so, please identify and provide supporting documents establishing when Rocky Mountain Power first became aware of this possibility of additional transmission capacity.

Response to XRG Data Request 6

Rocky Mountain Power objects to XRG's Data Request 6 to the extent that it calls for *all* documents and studies on the grounds that it is unduly burdensome, overly broad, and may seek irrelevant and or privileged information. Rocky Mountain Power objects to XRG's Data Request 6 to the extent that it seeks an expert opinion, a legal opinion, or legal argument and to the extent it calls for Rocky Mountain Power to state an opinion not previously written. *See* IPUC Rule 225. Notwithstanding and without waiving the foregoing objections, Rocky Mountain Power responds as follows.

Yes. It now appears that transmission capacity exists sufficient to accommodate 70 MW of capacity from XRG's four proposed projects delivering net output to Rocky Mountain Power's Brady Substation in Idaho.

Rocky Mountain Power became aware of additional transmission capacity across Path C on July 15, 2010—the date PacifiCorp Transmission Services declared a new Point of Delivery/Point of Receipt called "Path C". On September 14, 2010, Rocky Mountain Power first recognized that the July 15, 2010 change eliminated all identified barriers to accepting all 70 MW output from the XRG projects at Brady Substation. On September 21, 2010, Rocky Mountain Power notified XRG that it is able to purchase output from all four proposed XRG projects at the Brady Substation Point of Delivery at the published avoided cost rates in effect on the date the parties execute PPAs for such projects. Please refer to Attachment XRG 5 for a copy of the September 21, 2010 letter.

Recordholder: Bruce Griswold
Sponsor: To Be Determined

PAC-E-10-08/Rocky Mountain Power
September 27, 2010
XRG Data Request 9

XRG Data Request 9

Reference Answer, FIRST AFFIRMATIVE DEFENSE. Please explain how XRG could execute PPAs when Rocky Mountain Power did not provide XRG's requested PPAs. Please identify and provide the communication from Rocky Mountain Power informing XRG that the one PPA provided for one of the four XRG projects should be used for the remaining XRG projects.

Response to XRG Data Request 9

Rocky Mountain Power objects to XRG's Data Request 9 to the extent that it seeks an expert opinion, a legal opinion, or legal argument and to the extent it calls for Rocky Mountain Power to state an opinion not previously written. See IPUC Rule 225. Notwithstanding and without waiving the foregoing objections, Rocky Mountain Power responds as follows.

XRG could not execute PPAs because XRG did not negotiate PPAs to completion with Rocky Mountain Power prior to the March 15, 2010 rate change.

Rocky Mountain Power did not explain to XRG in writing that the one draft PPA provided by Rocky Mountain Power on May 11, 2009, should be used for the remaining XRG projects. XRG declared, in a July 6, 2009 e-mail, and again in a March 11, 2010 e-mail to Bruce Griswold that it would take the draft PPA provided by Rocky Mountain Power on May 11, 2009 and replicate it to create PPAs for its other three projects. Please refer to Exhibits A-17 and A-23 to Rocky Mountain Power's First Production Request to the XRG LLCs, attached as part of Attachment XRG 1. XRG also declared on March 11, 2010, that it would present Rocky Mountain Power with redline markups of these four draft PPAs for Rocky Mountain Power's review and approval. XRG has never presented the drafts to Rocky Mountain Power.

Recordholder: Bruce Griswold
Sponsor: To Be Determined

PAC-E-10-08/Rocky Mountain Power
September 27, 2010
XRG Data Request 11

XRG Data Request 11

Reference *Answer*, THIRD AFFIRMATIVE DEFENSE. Would Rocky Mountain Power consider action in contradiction with FERC interconnection rules to be bad faith? Would Rocky Mountain Power consider it to be bad faith to refuse to process requests for PPAs on the grounds that transmission capacity is perceived to be lacking at a time when Rocky Mountain Power knew, or could reasonably anticipate, that transmission capacity would not be a problem on the proposed online date in the PPAs?

Response to XRG Data Request 11

Rocky Mountain Power objects to XRG's Data Request 11, on the grounds that it seeks expert opinion, a legal opinion, or legal argument and on the grounds that it calls for Rocky Mountain Power to state an opinion not previously written. See IPUC Rule 225.

Recordholder: Bruce Griswold
Sponsor: To Be Determined

PAC-E-10-08/Rocky Mountain Power
September 27, 2010
XRG Data Request 12

XRG Data Request 12

Does PacifiCorp or any of its affiliates consider transmission upgrades that are likely to occur when it commits itself and its ratepayers to utility-owned generation resources? If so, please explain how Rocky Mountain Power processed XRG's requests for interconnection and PPAs on a nondiscriminatory basis compared to other customers, including utility-owned generation resources. Reference 18 C.F.R. § 292.306(a).

Response to XRG Data Request 12

Rocky Mountain Power considers pending transmission upgrades when considering generation resources that will be owned by Rocky Mountain Power. Rocky Mountain Power has not processed an XRG request for interconnection.

XRG has not proposed to interconnect its projects with Rocky Mountain Power's system. XRG presumably has an interconnection request pending or completed between itself and the utility that owns the system with which XRG proposes to interconnect.

Rocky Mountain Power administered XRG's QF PPA requests in accordance with its PURPA obligations and Idaho Commission rules and orders. Non-QF resources would be administered through the Company-issued Request For Proposal (RFP) process where all resources, including any independent developers (including interested QFs) and utility-owned generation resources who chose to bid into the RFP, are treated in a non-discriminatory manner, with independent evaluator oversight of the process and communication. Rocky Mountain Power's RFP process and documents are posted on its website.

If the QF is not selected under the RFP process, the QF can still request a PPA from Rocky Mountain Power under PURPA obligations. Rocky Mountain Power treats all QFs requesting a PPA under PURPA obligations in the same non-discriminatory manner.

Recordholder: Bruce Griswold
Sponsor: To Be Determined

PAC-E-10-08/Rocky Mountain Power
December 21, 2010
XRG Data Request 16

XRG Data Request 16

Please provide Rocky Mountain Power's policy by which the commercial and trading arm of the Company requests information regarding transmission and requests network resource status from the transmission side of the Company for PPAs. If the policy is different for PURPA PPAs or for off-system PPAs, please provide the separate policy(ies).

Response to XRG Data Request 16

Rocky Mountain Power's Commercial and Trading business unit requests information regarding transmission and network resource requests through PacifiCorp Transmission, the wholesale transmission business unit of PacifiCorp. PacifiCorp's wholesale transmission services are regulated by the Federal Energy Regulatory Commission (FERC) under cost-based regulation subject to PacifiCorp's Open Access Transmission Tariff, which has been on file at the FERC since 1989. PacifiCorp's transmission business operates independently and markets its transmission services on a non-discriminatory basis using the public Open Access Same-time Information System (OASIS). Please refer to Attachment XRG 16 for a copy of Transmission's Business Practice #9: Network Load and Resource Additions and Changes.

Recordholder: Bruce Griswold / Dennis Desmarais
Sponsor: Bruce Griswold

Business Practice #9: Network Load and Resource Additions and Changes

Posted: May 23, 2006

Effective: May 23, 2006

Revision No.: 0.0

Notice to all Entities:

The OATT provides that a Transmission Customer may serve its Network Load utilizing Network Integration Transmission Services. The Network Transmission Customer must submit a Completed Application pursuant to Section 29 for all New Network Loads (Section 31.2).

Section 31.6 of the OATT requires a Network Customer to submit annual load and resource (L&R) forecast updates for its Network Load and Resources. PacifiCorp uses these forecasts for transmission planning, including but not limited to transmission capacity allocation and infrastructure expansion plans to assist PacifiCorp in reliably serving its customer loads. Current ten year L&R information is required to be submitted at least once per year from each Network Customer. Network Customers are also required to submit timely written notice of material changes to any information provided in a Completed Application relating to the Network Customer's Network Loads, Network Resources, its transmission system or other aspects of its facilities or operations affecting the Transmission Provider's ability to provide reliable service. The Network Customer should clearly identify any changes to the annual submission in all intra-year submissions. PacifiCorp transmission will review, study, and accommodate intra-year changes as soon as practicable once received.

This business practice applies to all transmission customers unless explicitly contradicted by contract terms.

Network Load Additions

This business practice clarifies what PacifiCorp considers to be a "new" load or resource, or a "material change" in load.

The following are considered "new" loads and require a separate Completed Application pursuant to Sections 29 and 31 of the OATT:

- Increases in load, not already accounted for in the L&R, to the distribution system (<40 kV) at one site of 2 MW or greater.
- Increases in load, not already accounted for in the L&R, to the transmission system (>40 kV) at one site of 5 MW or greater.

The following are considered "material changes" and require timely written notice to the transmission provider pursuant to 31.6 of the OATT:



Transmission Business Practices

- Increases in load, not already accounted for in the L&R, to the distribution system (<40 kV) at one site greater than 1 MW but less than 2 MW.
- Increases in load, not already accounted for in the L&R, to the transmission system (>40 kV) at one site greater than 1 MW but less than 5 MW.
- Reduction in load, not already accounted for in the L&R, at one site on either the distribution or transmission system of 5 MW or greater.

Load increases under 1 MW are considered organic growth, and do not require timely written notice or a Completed Application.

Network Resource Additions

New Network Resources or changes to the nameplate or contractual ratings of existing Network Resources require an executed interconnection agreement pursuant to Part IV or V of the OATT and a Completed Application pursuant to Sections 29 and 30 of the OATT. Requests for new Network Resource designations shall be made through separate OASIS requests for service to allow PacifiCorp the opportunity to review and respond according to Section 32 of the OATT.

Contacts for Assistance: businesspractices@pacificorp.com

Revision History

Version	Date	Change Summary
0.0	2/20/08	Formatted to current template
0.0	5/23/06	

PAC-E-10-08/Rocky Mountain Power
December 21, 2010
XRG Data Request 17

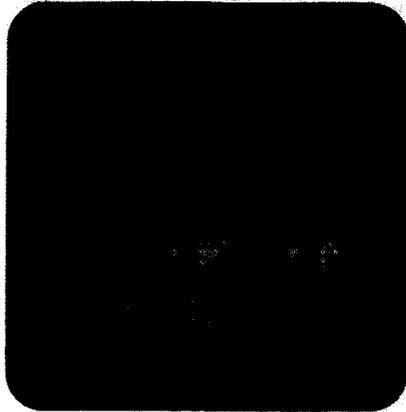
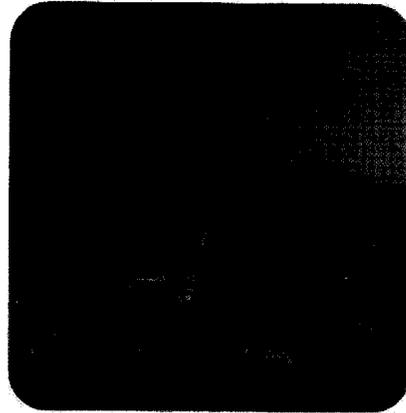
XRG Data Request 17

Please explain how the Company's two arms comply with FERC's requirement that the two not communicate regarding transmission requests.

Response to XRG Data Request 17

Please refer to Attachment XRG 17, a copy of PacifiCorp's Standards of Conduct Compliance Procedures. These Federal Energy Regulatory Commission Standards of Conduct for transmission providers are available on PacifiCorp Transmission's OASIS website.

Recordholder: Bruce Griswold / Dennis Desmarais
Sponsor: Bruce Griswold



Standards of Conduct Compliance Procedures

Posted March 1, 2010

3/2010

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1. Introduction

The Federal Energy Regulatory Commission ("FERC") Standards of Conduct for transmission providers ("Standards of Conduct") are designed to promote four fundamental principles:

1. A transmission provider must treat all transmission customers, affiliated and non-affiliated, on a not unduly discriminatory basis, and must not make or grant any undue preference or advantage to any person or subject any person to undue prejudice or disadvantage with respect to any transmission of electric energy in interstate commerce, or with respect to the wholesale sale of electric energy in interstate commerce.
2. A transmission provider's transmission function employees must function independently from its marketing function employees, except as permitted in the rules or otherwise permitted by FERC order.
3. A transmission provider and its employees, contractors, consultants and agents are prohibited from disclosing, or using a "conduit" to disclose, non-public transmission function information to the transmission provider's marketing function employees.
4. A transmission provider must provide equal access to non-public transmission function information to all its transmission customers, affiliated and non-affiliated, except in the case of confidential customer information or critical energy infrastructure information.

In furtherance of these objectives, FERC has promulgated rules that govern the interaction and communication between certain employees within PacifiCorp, and with regard to certain information. All employees of PacifiCorp and PacifiCorp's affiliates must comply with the Standards of Conduct rules. These Standards of Conduct Compliance Procedures explain FERC's rules and the procedures PacifiCorp and its affiliates will follow in order to comply with the rules.

2. Chief Compliance Officer

PacifiCorp has designated Colt Norrish as the chief compliance officer for Standards of Conduct (503-813-5545). Mr. Norrish shares responsibility for Standards of Conduct and other affiliate compliance issues with Michael Reid, legal counsel and compliance officer (503-813-6052).

3. Key Definitions

The rules govern interactions between transmission function employees and marketing function employees, including situations where an employee who does not fall within either category acts as a conduit for non-public transmission function information. All of these terms have specific meanings under the rules, so careful understanding of FERC's definitions is key to compliance.

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A. Transmission Provider

"Transmission provider" means any public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce. PacifiCorp is a transmission provider.

B. Transmission Function Employee

"Transmission function employee" means an employee, contractor, consultant or agent of a transmission provider who actively and personally engages on a day-to-day basis in transmission functions. Transmission functions include the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests.

Certain Pacific Power employees are transmission function employees (for example, operators, schedulers and employees that work on transmission services and interconnection requests).

C. Marketing Function Employee

"Marketing function employee" means an employee, contractor, consultant or agent of a transmission provider or of an affiliate of a transmission provider who actively and personally engages on a day-to-day basis in marketing functions, which generally means the sale for resale of electric energy or capacity.

Certain PacifiCorp Energy commercial and trading employees are marketing function employees. For a list of PacifiCorp's marketing function employees, please refer to PacifiCorp's Internet web site or its Open Access Same-Time Information System (OASIS) web site: <http://www.oasis.pacificorp.com/oasis/ppw/MarketingFunctionEmployeeList.HTM>

PacifiCorp's marketing function employees can also be identified by e-mail address designation of "(Mkt Function)" following each marketing function employee's name.

D. Affiliate

"Affiliate" of a specified entity means another person who controls, is controlled by or is under common control with the specified entity. An affiliate includes a division of the specified entity that operates as a functional unit.

PacifiCorp has several affiliates including, but not limited to:

PacifiCorp Energy
Commercial & Trading
825 NE Multnomah, Suite 600
Portland, OR 97232



For a complete list of PacifiCorp's affiliates, please refer to PacifiCorp's Internet web site or its OASIS web site: <http://www.oasis.pacificorp.com/oasis/ppw/affiliates.doc>

4. Independent Functioning Rule

PacifiCorp's transmission function employees must function independently of PacifiCorp's marketing function employees. Marketing function employees are prohibited from conducting transmission system operations or reliability functions, and marketing function employees cannot have access to a transmission control center or other transmission facilities or information systems that differ in any way from the access provided to non-affiliated transmission customers. Transmission function employees are prohibited from conducting marketing functions.

A. Physical Separation

Work stations for transmission function employees of PacifiCorp are physically separated from those of marketing function employees, and access is restricted.

PacifiCorp's transmission function employees are located in two places: (1) at the Portland Control Center at 9951 SE Ankeny, and (2) at PacifiCorp's headquarters in the Lloyd Center Tower, on the 16th floor. No marketing function employees are stationed at the Portland Control Center or on the Lloyd Center Tower 16th floor, and access to the transmission facilities and floors is restricted as described in section 4.B. below.

Marketing function employees in Portland are located on the 6th floor of the Lloyd Center Tower. No transmission function employees are stationed on the 6th floor, and transmission function employees do not have badge access into the area of the 6th floor where marketing function employees are located. A visitor log is maintained at this location.

B. Access Restrictions

Visitor logs are maintained at the Portland Control Center. Notice of any visits to the Portland Control Center by marketing function employees are also posted on PacifiCorp's Internet web site or its OASIS, along with a description of the purpose for the visit.

The Lloyd Center Tower building is shared with other companies, therefore access is restricted by floor. In this situation, any employee who is not stationed on a particular floor must either have a badge permitting access to the floor, or must contact an employee on the floor to escort them during any floor access. Badges for marketing function employees do not allow such employees to access a transmission function facility or floor without a personal escort from a transmission function or other non-marketing function employee. Further, badges for transmission function employees do not allow such employees to have access to areas housing marketing function employees without a personal escort.

5. No Conduit Rule

PacifiCorp is prohibited from using anyone as a conduit for the disclosure of non-public transmission function information to its marketing function employees. An employee, contractor, consultant, or agent of PacifiCorp or its affiliates is prohibited from disclosing non-public transmission function information to any of the transmission provider's marketing function employees.

Non-public transmission function information includes information relating to the planning, directing, organizing or carrying out of day-to-day operations, including the granting and denying of transmission service requests, that is not available to the public or on the transmission provider's OASIS.

The no conduit rule applies to all employees, whether or not an employee is designated as a transmission function or marketing function employee. Employees may receive non-public or confidential transmission function information, but they are prohibited from sharing such information with marketing function employees through any non-public or off-OASIS communications.

Who must
comply with
the "no
conduit rule?"

In addition, the no conduit rule applies to communications between PacifiCorp employees and marketing function employees of PacifiCorp affiliates. MidAmerican Energy Company is an affiliated electric transmission provider. PacifiCorp can share information with MidAmerican Energy Company with one exception. MidAmerican Energy Company's electric trading group contains marketing function employees. No non-public transmission function information, either about MidAmerican Energy Company or PacifiCorp, should be shared with those employees. Likewise, no MidAmerican Energy Company non-public transmission function information should be shared with PacifiCorp's commercial and trading marketing function employees. Similarly, Northern Natural Gas and Kern River are affiliated gas transmission providers. Certain MidAmerican and PacifiCorp gas supply and unregulated retail services employees engage in marketing functions on the Northern Natural Gas or Kern River systems. No non-public transmission function information of Northern or Kern should be shared with these employees.

6. Transparency Rule

A. Contemporaneous Disclosure Requirement

If a transmission provider employee discloses non-public transmission function information in a manner contrary to the Standards of Conduct, the employee is required to immediately contact the Regulatory Compliance Hotline at 503-813-5555, press 6, or 801-220-5555, press 6, or any compliance officer. Information disclosed in violation of the Standards of Conduct must be immediately posted on the Internet web site or OASIS.

i. Exemption for Customer Information and Critical Energy Infrastructure Information

Under this exemption, transmission providers are required to post notice of disclosure, but not actual non-affiliated customer information or critical energy infrastructure information on its Internet web site or OASIS. This exemption will also apply to any other information FERC determines is subject to limited dissemination.

ii. Transaction Specific Exemption

Under this exemption, transmission providers do not have to contemporaneously disclose information that relates solely to a marketing function's specific request for transmission service. This exemption permits discussion of technical information regarding the transmission system, and practical operations of the transmission system, if related to the marketing function's transmission request.

iii. Voluntary Consent Exemption

A non-affiliated customer may voluntarily consent in writing to allow the transmission provider to share such customer's information with marketing function employees. In order to ensure customers are not inappropriately pressured to "voluntarily" consent, FERC requires the transmission provider to post notice of the consent on its Internet web site or OASIS, along with a statement that it did not provide any preferences, either operational or rate-related, in exchange for the voluntary consent.

iv. Reliability Standards Compliance Exemption

A transmission provider's transmission function and marketing function employees may exchange information pertaining to compliance with Reliability Standards. Such exchanges must be recorded, except in emergency circumstances where a record must be made as soon as practicable. The record shall be made available to FERC upon request. The record may consist of hand-written or typed notes, electronic records such as e-mails and text messages, or recorded telephone exchanges. The record must be retained for five years.

v. Exemption for Information Necessary to Maintain or Restore Operations

This exemption allows the transmission provider's transmission function employees and marketing function employees to exchange information necessary to maintain or restore

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operation of the transmission system or generating units, or information that may affect the dispatch of generating units. Such exchanges must be recorded except in emergency circumstances where a record must be made as soon as practicable. The record shall be made available to FERC upon request. The record may consist of hand-written or typed notes, electronic records such as e-mails and text messages, or recorded telephone exchanges. The record must be retained for five years.

B. Access to Transmission Function System Information

PacifiCorp has structured its information access systems to ensure marketing function employees of PacifiCorp and its affiliates do not have access to information prohibited under the Standards of Conduct. PacifiCorp's information technology group has implemented controls, which are reviewed on a regular basis, to ensure access restrictions are in compliance.



7. Internet Web Site Posting Requirements

In order to encourage non-discriminatory, transparent practices, FERC requires PacifiCorp to post certain information on its Internet web site. PacifiCorp's Internet web site can be found at www.PacifiCorp.com. Information posted on the Internet web site is retained for five years for FERC audit. PacifiCorp also posts such information on its OASIS.

A. General Requirements and Timing of Posting

- i. A transmission provider must update required information on its Internet web site within seven business days of any change, and post the date on which the information was updated.
- ii. In the event an emergency, such as an earthquake, flood, fire or hurricane, severely disrupts a transmission provider's normal business operations, the posting requirements may be suspended by the transmission provider. If the disruption lasts more than one month, the transmission provider must notify FERC and may seek a further exemption from the posting requirements.
- iii. All required postings must be sufficiently prominent so as to be readily accessible.

B. Written Procedures

PacifiCorp posts current written procedures for implementation of the Standards of Conduct on its Internet web site and OASIS.

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C. Organizational Information

PacifiCorp posts the following organizational information on its Internet web site:

- The names and addresses of PacifiCorp's affiliates that employ or retain marketing function employees;
- A list of facilities shared by transmission function employees and marketing function employees, including the types of facilities shared and their addresses; and
- The job titles and job descriptions of transmission function employees.

D. Merger Information

PacifiCorp must post information concerning potential merger partners as affiliates within seven days after the potential merger is announced. PacifiCorp must also treat any potential merger partner as an affiliate.

What information must be posted on PacifiCorp's OASIS?

E. Employee Transfers

Employees may transfer between the transmission function and the marketing function, so long as such transfer is not used to circumvent the Standards of Conduct. Notices of any employee transfers between the transmission function and the marketing function will be posted on the Internet web site and OASIS and include the following information:

- Name of transferring employee;
- The respective titles held at the prior and new positions; and
- The effective date of the transfer.

Employee transfers shall not be used as a conduit for improper information sharing (i.e., no "cycling" back and forth between the transmission function and the marketing function in order to evade the information disclosure prohibitions). Employee transfer information must remain posted on the Internet web site and OASIS for ninety days.

8. Separate Books and Records

PacifiCorp maintains its books of account and records separately from those of its affiliates that employ or retain marketing function employees. PacifiCorp's books and records are available for FERC inspection at PacifiCorp's headquarters, 825 NE Multnomah, Portland, Oregon, 97232.

9. Standards of Conduct Training

A. Standards of Conduct Training Requirement

The Standards of Conduct require, and PacifiCorp provides, training for all transmission function employees, marketing function employees, officers, directors, supervisory employees, and any other employees likely to become privy to transmission function information. These employees must receive the Standards of Conduct procedures in written form, and must receive Standards of Conduct training within the first thirty days of employment.

B. Annual Training Program

PacifiCorp provides annual training on the Standards of Conduct rules to all employees and contractors with assigned P-numbers. Any exceptions must be approved by the compliance office.

This training may be live or electronic, or a combination of both. Employees will be notified as to the availability and scheduling of such training by business unit management or the legal or compliance department.

C. Certification

All employees that participate in Standards of Conduct training must sign a certification stating that they have completed training. In the case of electronic training, employees will be required to certify electronically that they have participated in the training. Manual training certifications are maintained by the training department in a file for FERC audit.

10. Open Access Transmission Tariff Implementation

The transmission provider must apply all open access transmission tariff (OATT) provisions related to the purchase or sale of transmission service (including, but not limited to, issues of price, curtailments, scheduling, priority, ancillary services or balancing) in a fair, impartial, and non-discriminatory manner. The transmission provider must process all similar transmission service requests in the same manner and within the same time frame.

A. Strict Enforcement of Tariff Provisions

The transmission provider must strictly enforce all OATT provisions that do not expressly provide for the use of discretion.

P A C I F I C O R P

11. Other Information Sharing Restrictions

In addition to the information sharing restrictions required by the Standards of Conduct, FERC's separate Market-Based Rates Affiliate Restrictions ensure that "market information" is not passed between PacifiCorp Energy employees or its contractors and any employees of a market-regulated power sales affiliate such as Cordova Energy Company, directly or indirectly. "Market information" is broadly defined by FERC to mean a communication between a utility and its affiliated power marketer concerning the utility's, or the affiliated power marketer's, power or transmission business, including:

- Positive and negative information such as sales or purchases that will or will not be made;
- Present or future information;
- Concrete or potential information; or
- Information of significant or slight value.

The Affiliate Restrictions also provide that PacifiCorp will not directly or indirectly provide to any affiliated power marketer personnel non-public information regarding transmission availability, terms or rates on PacifiCorp's transmission system unless such information:

- Is provided in response to a request by a power marketing affiliate for transmission service under PacifiCorp's open-access transmission tariff;
- Pertains to the requested service; and
- Is comparable to the information provided to non-affiliated entities in the context of their requests for transmission service.

Who should I call if I have questions about the Standards of Conduct?

PacifiCorp will post on its OASIS the disposition of any request for transmission service by any power marketing affiliate in the same manner as it would post information for a request for service by any non-affiliated eligible entity.

12. Questions and Inquiries

Any questions or concerns related to Standards of Conduct compliance or any compliance requirement described herein should be addressed to Colt Norrish at 503-813-5545. In addition, any employee receiving compliance-related inquiries from external parties, including but not limited to parties representing FERC, other regulatory bodies, companies or competitors, should refer said parties to this number.

P A C I F I C O R P

Appendix

Commission's Standards of Conduct Rule, 18 CFR Part 358

PART 358—STANDARDS OF CONDUCT

Section Contents

- § 358.1 Applicability.
- § 358.2 General principles.
- § 358.3 Definitions.
- § 358.4 Non-discrimination requirements.
- § 358.5 Independent functioning rule.
- § 358.6 No conduit rule.
- § 358.7 Transparency rule.
- § 358.8 Implementation requirements.

Authority: 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

Source: 73 FR 63829, Oct. 27, 2008, unless otherwise noted.

§ 358.1 Applicability.

- (a) This part applies to any interstate natural gas pipeline that transports gas for others pursuant to subparts B or G of part 284 of this chapter and conducts transmission transactions with an affiliate that engages in marketing functions.
- (b) This part applies to any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce and conducts transmission transactions with an affiliate that engages in marketing functions.
- (c) This part does not apply to a public utility transmission provider that is a Commission-approved Independent System Operator (ISO) or Regional Transmission Organization (RTO). If a public utility transmission owner participates in a Commission-approved ISO or RTO and does not operate or control its transmission system and has no access to transmission function information, it may request a waiver from this part.
- (d) A transmission provider may file a request for a waiver from all or some of the requirements of this part for good cause.

§ 358.2 General principles.

- (a) A transmission provider must treat all transmission customers, affiliated and non-affiliated, on a not unduly discriminatory basis, and must not make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage with respect to any transportation of natural gas or transmission of electric energy in interstate commerce, or with respect to the wholesale sale of natural gas or of electric energy in interstate commerce.
- (b) A transmission provider's transmission function employees must function independently from its marketing function employees, except as permitted in this part or otherwise permitted by Commission order.
- (c) A transmission provider and its employees, contractors, consultants and agents are prohibited from disclosing, or using a conduit to disclose, non-public transmission function information to the transmission provider's marketing function employees.

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Standards of Conduct Compliance Procedures

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(d) A transmission provider must provide equal access to non-public transmission function information to all its transmission function customers, affiliated and non-affiliated, except in the case of confidential customer information or Critical Energy Infrastructure Information.

§ 358.3 Definitions.

(a) **Affiliate** of a specified entity means:

- (1) Another person that controls, is controlled by or is under common control with, the specified entity. An affiliate includes a division of the specified entity that operates as a functional unit.
- (2) For any exempt wholesale generator (as defined under §366.1 of this chapter), affiliate shall have the meaning set forth in §366.1 of this chapter, or any successor provision.
- (3) "Control" as used in this definition means the direct or indirect authority, whether acting alone or in conjunction with others, to direct or cause to direct the management policies of an entity. A voting interest of 10 percent or more creates a rebuttable presumption of control.

(b) **Internet Web site** refers to the Internet location where an interstate natural gas pipeline or a public utility posts the information, by electronic means, required under this part 358.

(c) **Marketing functions** means:

- (1) in the case of public utilities and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of electric energy or capacity, demand response, virtual transactions, or financial or physical transmission rights, all as subject to an exclusion for bundled retail sales, including sales of electric energy made by providers of last resort (POLRs) acting in their POLR capacity; and
- (2) in the case of interstate pipelines and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, natural gas, subject to the following exclusions:
 - (i) Bundled retail sales,
 - (ii) Incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities,
 - (iii) Sales of natural gas solely from a seller's own production,
 - (iv) Sales of natural gas solely from a seller's own gathering or processing facilities, and
 - (v) Sales by an intrastate natural gas pipeline, by a Hinshaw interstate pipeline exempt from the Natural Gas Act, or by a local distribution company making an on-system sale.

(d) **Marketing function employee** means an employee, contractor, consultant or agent of a transmission provider or of an affiliate of a transmission provider who actively and personally engages on a day-to-day basis in marketing functions.

(e) **Open Access Same Time Information System or OASIS** refers to the Internet location where a public utility posts the information required by part 37 of this chapter, and where it may also post the information required to be posted on its Internet Web site by this part 358.

(f) **Transmission** means electric transmission, network or point-to-point service, ancillary services or other methods of electric transmission, or the interconnection with jurisdictional transmission facilities, under part 35 of this chapter; and natural gas transportation, storage, exchange, backhaul, or displacement service provided pursuant to subparts B or G of part 284 of this chapter.

(g) **Transmission customer** means any eligible customer, shipper or designated agent that can or does execute a transmission service agreement or can or does receive transmission service, including all persons who have pending requests for transmission service or for information regarding transmission.

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- (h) **Transmission functions** means the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests.
- (i) **Transmission function employee** means an employee, contractor, consultant or agent of a transmission provider who actively and personally engages on a day-to-day basis in transmission functions.
- (j) **Transmission function information** means information relating to transmission functions.
- (k) **Transmission provider** means:
- (1) Any public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce; or
 - (2) Any interstate natural gas pipeline that transports gas for others pursuant to subparts B or G of part 284 of this chapter.
 - (3) A transmission provider does not include a natural gas storage provider authorized to charge market-based rates.
- (l) **Transmission service** means the provision of any transmission as defined in §358.3(f).
- (m) **Waiver** means the determination by a transmission provider, if authorized by its tariff, to waive any provisions of its tariff for a given entity.

§ 358.4 Non-discrimination requirements.

- (a) A transmission provider must strictly enforce all tariff provisions relating to the sale or purchase of open access transmission service, if the tariff provisions do not permit the use of discretion.
- (b) A transmission provider must apply all tariff provisions relating to the sale or purchase of open access transmission service in a fair and impartial manner that treats all transmission customers in a not unduly discriminatory manner, if the tariff provisions permit the use of discretion.
- (c) A transmission provider may not, through its tariffs or otherwise, give undue preference to any person in matters relating to the sale or purchase of transmission service (including, but not limited to, issues of price, curtailments, scheduling, priority, ancillary services, or balancing).
- (d) A transmission provider must process all similar requests for transmission in the same manner and within the same period of time.

§ 358.5 Independent functioning rule.

- (a) **General rule.** Except as permitted in this part or otherwise permitted by Commission order, a transmission provider's transmission function employees must function independently of its marketing function employees.
- (b) **Separation of functions.**
- (1) A transmission provider is prohibited from permitting its marketing function employees to:
 - (i) Conduct transmission functions; or
 - (ii) Have access to the system control center or similar facilities used for transmission operations that differs in any way from the access available to other transmission customers.
 - (2) A transmission provider is prohibited from permitting its transmission function employees to conduct marketing functions.

§ 358.6 No conduit rule.

- (a) A transmission provider is prohibited from using anyone as a conduit for the disclosure of non-public transmission function information to its marketing function employees.
- (b) An employee, contractor, consultant or agent of a transmission provider, and an employee, contractor,

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consultant or agent of an affiliate of a transmission provider that is engaged in marketing functions, is prohibited from disclosing non-public transmission function information to any of the transmission provider's marketing function employees.

§ 358.7 Transparency rule.

(a) Contemporaneous disclosure.

(1) If a transmission provider discloses non-public transmission function information, other than information identified in paragraph (a)(2) of this section, in a manner contrary to the requirements of §358.6, the transmission provider must immediately post the information that was disclosed on its Internet Web site.

(2) If a transmission provider discloses, in a manner contrary to the requirements of §358.6, non-public transmission customer information, critical energy infrastructure information (CEII) as defined in §388.113(c)(1) of this chapter or any successor provision, or any other information that the Commission by law has determined is to be subject to limited dissemination, the transmission provider must immediately post notice on its Web site that the information was disclosed.

(b) Exclusion for specific transaction information. A transmission provider's transmission function employee may discuss with its marketing function employee a specific request for transmission service submitted by the marketing function employee. The transmission provider is not required to contemporaneously disclose information otherwise covered by §358.6 if the information relates solely to a marketing function employee's specific request for transmission service.

(c) Voluntary consent provision. A transmission customer may voluntarily consent, in writing, to allow the transmission provider to disclose the transmission customer's non-public information to the transmission provider's marketing function employees. If the transmission customer authorizes the transmission provider to disclose its information to marketing function employees, the transmission provider must post notice on its Internet Web site of that consent along with a statement that it did not provide any preferences, either operational or rate-related, in exchange for that voluntary consent.

(d) Posting written procedures on the public Internet. A transmission provider must post on its Internet Web site current written procedures implementing the standards of conduct.

(e) Identification of affiliate information on the public Internet.

(1) A transmission provider must post on its Internet Web site the names and addresses of all its affiliates that employ or retain marketing function employees.

(2) A transmission provider must post on its Internet Web site a complete list of the employee-staffed facilities shared by any of the transmission provider's transmission function employees and marketing function employees. The list must include the types of facilities shared and the addresses of the facilities.

(3) The transmission provider must post information concerning potential merger partners as affiliates that may employ or retain marketing function employees, within seven days after the potential merger is announced.

(f) Identification of employee information on the public Internet.

(1) A transmission provider must post on its Internet Web site the job titles and job descriptions of its transmission function employees.

(2) A transmission provider must post a notice on its Internet Web site of any transfer of a transmission function employee to a position as a marketing function employee, or any transfer of a marketing function employee to a position as a transmission function employee. The information posted under this section must remain on its Internet Web site for 90 days. No such job transfer may be used as a means to circumvent any provision of this part. The information to be posted must include:

P A C I F I C O R P

- (i) The name of the transferring employee,
- (ii) The respective titles held while performing each function (i.e., as a transmission function employee and as a marketing function employee), and
- (iii) The effective date of the transfer.

(g) Timing and general requirements of postings on the public Internet.

- (1) A transmission provider must update on its Internet Web site the information required by this part 358 within seven business days of any change, and post the date on which the information was updated. A public utility may also post the information required to be posted under part 358 on its OASIS, but is not required to do so.
- (2) In the event an emergency, such as an earthquake, flood, fire or hurricane, severely disrupts a transmission provider's normal business operations, the posting requirements in this part may be suspended by the transmission provider. If the disruption lasts longer than one month, the transmission provider must so notify the Commission and may seek a further exemption from the posting requirements.
- (3) All Internet Web site postings required by this part must be sufficiently prominent as to be readily accessible.

(h) Exclusion for and recordation of certain information exchanges.

- (1) Notwithstanding the requirements of §§358.5(a) and 358.6, a transmission provider's transmission function employees and marketing function employees may exchange certain non-public transmission function information, as delineated in §358.7(h)(2), in which case the transmission provider must make and retain a contemporaneous record of all such exchanges except in emergency circumstances, in which case a record must be made of the exchange as soon as practicable after the fact. The transmission provider shall make the record available to the Commission upon request. The record may consist of hand-written or typed notes, electronic records such as e-mails and text messages, recorded telephone exchanges, and the like, and must be retained for a period of five years.
- (2) The non-public information subject to the exclusion in §358.7(h)(1) is as follows:
 - (i) Information pertaining to compliance with Reliability Standards approved by the Commission, and
 - (ii) Information necessary to maintain or restore operation of the transmission system or generating units, or that may affect the dispatch of generating units.

(i) **Posting of waivers.** A transmission provider must post on its Internet Web site notice of each waiver of a tariff provision that it grants in favor of an affiliate, unless such waiver has been approved by the Commission. The posting must be made within one business day of the act of a waiver. The transmission provider must also maintain a log of the acts of waiver, and must make it available to the Commission upon request. The records must be kept for a period of five years from the date of each act of waiver.

§ 358.8 Implementation requirements.

- (a) **Effective date.** A transmission provider must be in full compliance with the standards of conduct on the date it commences transmission transactions with an affiliate that engages in marketing functions.
- (b) **Compliance measures and written procedures.**
 - (1) A transmission provider must implement measures to ensure that the requirements of §§358.5 and 358.6 are observed by its employees and by the employees of its affiliates.
 - (2) A transmission provider must distribute the written procedures referred to in §358.7(d) to all its transmission function employees, marketing function employees, officers, directors, supervisory employees, and any other employees likely to become privy to transmission function information.

P A C I F I C O R P

(c) Training and compliance personnel.

(1) A transmission provider must provide annual training on the standards of conduct to all the employees listed in paragraph (b)(2) of this section. The transmission provider must provide training on the standards of conduct to new employees in the categories listed in paragraph (b)(2) of this section, within the first 30 days of their employment. The transmission provider must require each employee who has taken the training to certify electronically or in writing that s/he has completed the training.

(2) A transmission provider must designate a chief compliance officer who will be responsible for standards of conduct compliance. The transmission provider must post the name of the chief compliance officer and provide his or her contact information on its Internet Web site.

(d) **Books and records.** A transmission provider must maintain its books of account and records (as prescribed under parts 101, 125, 201 and 225 of this chapter) separately from those of its affiliates that employ or retain marketing function employees, and these must be available for Commission inspections.



3/2010

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XRG Data Request 18

Please explain how the Company complied with the policies discussed in response to production requests 16 and 17 in its negotiations with XRG for the PPAs at issue in the *Complaint*.

Response to XRG Data Request 18

The Company's merchant function utilized transmission information publicly available on the PacifiCorp Transmission OASIS website, following the Standards of Conduct procedure provided in Attachment XRG 17.

Recordholder: Bruce Griswold / Dennis Desmarais
Sponsor: Bruce Griswold

PAC-E-10-08/Rocky Mountain Power
December 21, 2010
XRG Data Request 19

XRG Data Request 19

Reference Rocky Mountain Power's Response to XRG's First Production Request, Attachment XRG 1, Part 2. Please provide the job title and description for the following individuals during the time frame of the correspondence provided by Rocky Mountain Power.

- a. John Younie
- b. Bruce Griswold
- c. Nathalie Wessling
- d. Chris Papousek
- e. Jim Portouw
- f. Darren Heim

Response to XRG Data Request 19

Name, position, department, business unit

- a. John Younie, Contract Administrator, Commercial and Trading, PacifiCorp
- b. Bruce Griswold, Director, Short-Term Origination and QF Contracts, Commercial and Trading, PacifiCorp Energy
- c. Nathalie Wessling, Manager, Credit, Credit, PacifiCorp
- d. Chris Papousek, Director, Risk Management, Credit, PacifiCorp
- e. Jim Portouw, Trader, Energy Marketing, Commercial and Trading, PacifiCorp
- f. Darren Heim, Analyst, Financial/Accounting, Commercial and Trading, PacifiCorp

Recordholder: Bruce Griswold / Dennis Desmarais
Sponsor: Bruce Griswold

PAC-E-10-08/Rocky Mountain Power
December 21, 2010
XRG Data Request 20

XRG Data Request 20

Did Rocky Mountain Power inform XRG during a telephone conversation on or about November 10, 2009, that transmission may be available for all four XRG projects if the projects came online on or after June 2011? If so, please identify and provide supporting documents establishing when Rocky Mountain Power first became aware of this possibility of additional transmission capacity.

Response to XRG Data Request 20

No. The parties discussed transmission constraints during a November 10, 2009 conference call during which XRG suggested that adopting a June 2011 commercial online date for its proposed projects might address the transmission constraint issue. Rocky Mountain Power did not agree that a June 2011 online date would adequately address the transmission constraint issue.

During the November 10, 2009 conference call, the parties discussed that Rocky Mountain Power's transmission function ("PacifiCorp Transmission Services" or "PTS") is scheduled to complete a series of transmission system improvements between Populus Substation and Terminal Substation by January 2011.

However, the parties also discussed the fact that Rocky Mountain Power's merchant function ("Commercial and Trading" or "C&T") does not control the PTS construction schedule regarding such transmission system improvements and that C&T has no assurance that such improvements will be available in January 2011 or at any time in 2011. Moreover, completion of the Populus-Terminal upgrade likely would not alleviate constraints across Path C sufficiently to accommodate all 70 MW of XRG's proposed output at Brady without causing Rocky Mountain Power to curtail a corresponding amount of firm imports from Network Resources utilizing the limited Path C transmission capacity.

Recordholder: Bruce Griswold
Sponsor: Bruce Griswold

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December 21, 2010
XRG Data Request 21

XRG Data Request 21

Reference Rocky Mountain Power's Response to XRG's First Production Request, Attachment XRG 5.

- a. Please explain how PacifiCorp C&T became aware of Path C on September 13, 2010.
- b. Please explain when PacifiCorp Transmission first became aware that Path C would exist.
- c. Did PacifiCorp Transmission first become aware that Path C may provide future transmission service when it officially designated it on July 15, 2010, or at some earlier date?
- d. Please provide the policy or internal review process by which PacifiCorp Transmission designates new transmission paths, such as Path C. Please explain how long the process takes. Please provide a timeline setting forth the critical steps in designating Path C.
- e. Please explain whether PacifiCorp Transmission considers proposed paths in responding to requests for transmission service. Does PacifiCorp Transmission provide applicants for transmission service with information about future upgrades such as Path C that may affect the applicant's ability to secure transmission service? Did PacifiCorp Transmission provide such notice regarding the XRG projects?
- f. Please explain why it took PacifiCorp C&T almost two months after designation of Path C to discover Path C as a means of providing transmission availability for the XRG projects.
- g. Did PacifiCorp C&T have any knowledge of the possibility of Path C being designated prior September 13, 2010? Please explain the date and nature of such knowledge.

Response to XRG Data Request 21

- a. PacifiCorp C&T reviewed the available transmission capacity information for Path C on PacifiCorp Transmission's OASIS website.
- b. PacifiCorp Transmission first determined it would designate Path C as a Point of Service (for network reservations) on OASIS a few weeks prior to July 15, 2010, when it discovered that Idaho Power had split its OASIS point named "BOBR," which is adjacent to Path C, into separate and distinct scheduling points named "Borah" and "Brady." PacifiCorp Transmission implemented the change on July 15, 2010.

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- c. Neither. PacifiCorp Transmission was not aware, at the time it designated Path C as a Point of Service, that the change would have any effect on the ability to provide future transmission service to XRG.
- d. The change referred to on July 15, 2010 was not a new transmission path posting but instead was a remapping of the already existing Path C posting.
- e. (i) Yes, PacifiCorp Transmission considers proposed paths in responding to requests for transmission service.
- (ii) Yes, PacifiCorp Transmission provides applicants for transmission service with information about future transmission system upgrades that may affect an applicant's ability to secure transmission service. However, the July 15, 2010 modification to Path C as a Point of Service was not a transmission system upgrade.
- (iii) No, as of December 20, 2010 there has been no transmission service request for the XRG projects.
- f. PacifiCorp Transmission designated Path C as a Point of Service (for network reservations) on July 15, 2010. This change provided additional firm scheduling flexibility, with the unanticipated result that more resources using different firm paths to Path C Point of Service could be scheduled using the same firm path from Path C Point of Service to Utah loads even though no physical upgrade occurred. Because there was no physical upgrade related to the July 15, 2010 change, and because the increase in scheduling flexibility that resulted from the July 15, 2010 change was not expected, C&T did not look for or discover new flexibility across Path C until XRG's First Data Request caused C&T to review Path C OASIS details in September 2010.
- g. No, PacifiCorp C&T had no knowledge of available capacity across Path C prior to September 13, 2010. Prior to September 13, 2010, C&T believed that all Path C available capacity had been reserved and had no expectation that capacity would become available. In responding to XRG discovery requests, PacifiCorp C&T made OASIS inquiries on September 13, 2010 and discovered the available capacity. C&T immediately requested all available capacity from PacifiCorp Transmission and requested that PacifiCorp Transmission allocate the capacity to C&T as Network transmission to deliver Network resources to Network load.

Recordholder: Griswold / Desmarais
Sponsor: Bruce Griswold

PAC-E-10-08/Rocky Mountain Power
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XRG Data Request 22

XRG Data Request 22

Reference Rocky Mountain Power's Response to XRG's First Production Request, request No. 7.

- a. Does Rocky Mountain Power admit that it did not provide its description of the "patent flaws and omissions in XRG's application materials" until its September 21, 2010 letter?
- b. If not, please identify and provide the correspondence from Rocky Mountain Power describing such "patent flaws and omissions" earlier.
- c. Is it Rocky Mountain Power's policy in PURPA negotiations to wait approximately 1 year and 8 months (January 2009 to September 2010) after a PPA request to provide Rocky Mountain Power's description of the "patent flaws and omissions" in a PURPA PPA application in a manner substantially similar to that attached to the September 21, 2010 letter.
- d. If not, please explain why Rocky Mountain Power waited approximately 1 year and 8 months to respond to XRG's requests at issue in the *Complaint*.

Response to XRG Data Request 22

Rocky Mountain Power objects to XRG's Data Request 22 to the extent that it seeks an expert opinion, a legal opinion, or legal argument and to the extent it calls for Rocky Mountain Power to state an opinion not previously written. See IPUC Rule 225. Notwithstanding and without waiving the foregoing objections, Rocky Mountain Power responds as follows.

- a. No.
- b. PacifiCorp notified XRG of potential "fatal flaws" necessitating XRG's cooperation in further due diligence on October 2, 2009, and again on April 13, 2010. Those writings were provided as Exhibit A-19 and Exhibit A-25, respectively, in Exhibit A to Rocky Mountain Power's First Production Request to XRG.
- c. No.
- d. As discussed in Rocky Mountain Power's Response to XRG's First Production Request, Data Request No. 7, Rocky Mountain Power sent XRG a draft PPA and asked for comments on May 11, 2009. XRG did not respond with comments, revisions, or additional information regarding the draft PPA. Rocky Mountain Power reiterated its request for comments on the draft PPA on October 2, 2009. Again, XRG did not respond. Necessary next steps in

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December 21, 2010
XRG Data Request 22

negotiating the draft PPA are the responsibility of XRG. XRG needs to verify that the information provided by it in January 2009 is still correct (as Rocky Mountain Power requested in October 2009 and April 13, 2010). XRG needs to tell Rocky Mountain Power if any of the terms of the PPA are not acceptable and propose alternative language, if any. XRG also needs to make choices in the draft PPA, such as electing what form of delay default security it will provide and whether it will provide financial information in aid of Rocky Mountain Power's creditworthiness review. Until XRG provides such information, Rocky Mountain Power cannot determine with certainty what project-specific information is missing, what information is incorrect, or what additional information may still be required. As discussed in the response to XRG Data Request No. 10, the process of developing all necessary information for an Idaho PPA is iterative. Any failure to develop such necessary information with regard to XRG's request for PPAs has been the result of XRG's refusal to respond to, or comment on, the draft PPA proposed by Rocky Mountain Power. In effect, XRG has boycotted the process and Rocky Mountain Power has been left to have a dialog with itself. The non-exclusive lists of needed information provided by Rocky Mountain Power on September 21, 2010 were a good faith effort by Rocky Mountain Power to make progress notwithstanding XRG's lack of cooperation. Rocky Mountain Power denies that its September 21, 2010 letter was the first time it communicated with XRG regarding needed information.

Recordholder: Bruce Griswold
Sponsor: Bruce Griswold

PAC-E-10-08/Rocky Mountain Power
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XRG Data Request 23

XRG Data Request 23

Reference *Answer* FOURTH AFFIRMATIVE DEFENSE. Please identify and provide all documents or evidence supporting the assertion that XRG's projects were not sufficiently mature.

Response to XRG Data Request 23

Rocky Mountain Power objects to XRG's Data Request 23 to the extent that it calls for *all* documents and studies on the grounds that it is unduly burdensome, overly broad, and may seek irrelevant and or privileged information. Rocky Mountain Power objects to XRG's Data Request 23 to the extent it seeks expert opinion, a legal opinion, or legal argument and to the extent that it calls for Rocky Mountain Power to state an opinion not previously written. *See* IPUC Rule 225. Notwithstanding and without waiving the foregoing objections, Rocky Mountain Power responds as follows.

Rocky Mountain Power has already provided XRG with all non-privileged documents responsive to XRG's Data Request 23.

Recordholder: Bruce Griswold / Dennis Desmarais
Sponsor: Bruce Griswold

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IDAHO PUBLIC
UTILITIES COMMISSION

**XRG LLCs' ANSWER TO ROCKY MOUNTAIN POWER'S MOTION FOR
SUMMARY JUDGMENT**

EXHIBIT 3

**Rocky Mountain Power's September 21, 2010 letter regarding transmission
availability**

and

XRG,LLCs' December 13, 2010 letter -- REDACTED

Greg Adams

From: Jeff Lovinger [lovinger@lklaw.com]
Sent: Tuesday, September 21, 2010 5:43 PM
To: Peter Richardson
Cc: Ken Kaufmann; Greg Adams
Subject: Re: XRG
Attachments: PacifiCorp Notice of available transmission 21Sept2010.pdf; ATT02188.txt

Pete:

Sounds good. I'm attaching a copy of a letter that Bruce Griswold just sent to James Carkulis regarding transmission availability.

Thanks,

Jeff



September 21, 2010

Mr. James T. Carkulis
1424 Dodge Ave.
Helena, MT 59601

Re: XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs

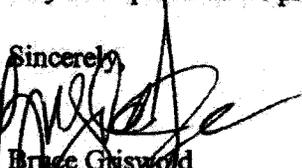
Dear Mr. Carkulis:

On July 15, 2010, PacifiCorp Transmission designated a new Point of Delivery/Point of Receipt for Network Transmission Service under its Open Access Transmission Tariff called "Path C". PacifiCorp Commercial & Trading ("PacifiCorp C&T") became aware of the impact of this change to XRG's projects, above, on September 13, 2010.

The new Point of Delivery/Point of Receipt at Path C effectively increases available firm transmission across Path C and resolves PacifiCorp C&T's concerns at this time about the availability of firm Network Resource Transmission Service for the four QF projects, above, proposed by XRG to deliver to PacifiCorp at Brady, Idaho. Therefore, this letter provides XRG-DP-7 LLC, XRG-DP-8 LLC, XRG-DP-9 LLC, and XRG-DP-10 LLC notice that PacifiCorp C&T is now prepared to enter into a 20-year power purchase agreement with each of these projects, at the current avoided cost rates set forth in OPUC Order No. 31025 (or such successor rates as may be in effect on the date the parties execute power purchase agreements for the projects).¹

Firm capacity for Network Resource Transmission Service across Path C will be allocated by PacifiCorp Transmission on a first come, first served basis. If you would like to move forward with your projects, please contact me at 503-813-5218 as soon as possible. If you decide to pursue all four projects, we would request an update on each project per the attached matrices so that we can correctly and expediently prepare draft PPAs. Each matrix represents critical project specific information for QF PPA preparation but the matrix may not be all inclusive. Additional information may be required as we prepare and exchange drafts.

Sincerely,



Bruce Griswold
Director, Short-term Origination & QF Contracts
PacifiCorp Energy

Enclosures: XRG-DP7-Required Information; XRG-DP8-Required Information; XRG-DP9-Required Information; XRG-DP10-Required Information

CC: Peter Richardson
Daniel Solander
Jeff Erb

¹ PacifiCorp C&T does not guarantee that PacifiCorp Transmission will grant Network Resource Transmission Service to the XRG Projects. However PacifiCorp C&T is no longer aware of any likely fatal flaw that would preclude PacifiCorp Transmission from granting such a request.

XRG – DP7 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

XRG-DP7 - Required Information	Provided – January 21, 2009	Additional Information requested by PacifiCorp:
(a) Demonstration ability to obtain QF status	Provided FERC Form 556 – QF Self Certification	Provide QF number when Form 556 acknowledged by FERC
(b) Design capacity (MW), station service requirements, and net amount of power delivered to the Company's electric system	Ten DeWind D8.2, 2MW turbines totaling 19.8 MW	Estimate station service for each turbine; will separate station service be required?
(c) Generation technology and other related technology applicable to the site	DeWind D8.2, 2MW turbines	Are these still the selected turbines? Provide turbine specification
(d) proposed site location	Cassia County, ID Provided map of turbine locations	Provide coordinates of project and tax lot number. Provide location of substation. Map shows 13 turbines, reconcile information provided in (b),(c), (e), and (g)
(e) Schedule of monthly power deliveries	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Reconcile discrepancy in turbine manufacturer in (b) and (c) and (e) production forecast. Provide the correct 12X24 for the selected turbine. Include the file in excel format.
(f) Calculation or determination of minimum and maximum annual deliveries	No Information Provided	Provide calculation of minimum, maximum, and average annual generation
(g) Motive force or fuel plan	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Confirm data is still valid. Provide wind study for project.
(h) proposed on-line date and other significant dates required to complete milestones	1 st Energy = 12/31/10	Provide updated schedule to achieve these dates including interconnection and construction milestones
(i) proposed contract term and pricing provisions	20 year, non-levelized, non-fuel	
(j) Status of interconnection or transmission arrangement	Interconnection is through BPA	Provide status of Seller's interconnection application with BPA; provide date Seller's application was deemed complete by BPA; provide copy of SIS and other studies, if available; provide documentation of availability of transmission for Project to

XRG – DP7 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

		Brady. If available; provide schedule of remaining interconnection work. Identify procurement lead-times for major interconnection components and indicate whether such interconnection equipment has been ordered
(k) point of delivery	Brady Substation	Provide status of BPA Transmission Service Agreement to Brady Substation
(l) Wind Rights		Provide documentation that Seller has obtained rights to wind at project site (ie, land purchase or lease agreements)
(m) Form of Security to be provided		Specify preferred form of security to be provided for delay security (letter of credit, cash escrow, or guarantee)
(n) Required Facility Documents		Please list all permits, licenses, and land rights and contracts (e.g. interconnection agreement) required to operate project; provide status of each such required facility document
(o) Creditworthiness		Please provide legal name and 2 years of audited financials for the QF developer or the entity providing credit support to the QF developer so that PacifiCorp can complete creditworthiness review.

XRG - DP8 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

XRG-DP8 - Required Information	Provided - January 21, 2009	Additional Information requested by PacifiCorp:
(a) Demonstration ability to obtain QF status	Provided FERC Form 556 - QF Self Certification	Provide QF number when Form 556 acknowledged by FERC
(b) Design capacity (MW), station service requirements, and net amount of power delivered to the Company's electric system	Ten DeWind D8.2, 2MW turbines totaling 19.8 MW	Estimate station service for each turbine; will separate station service be required?
(c) Generation technology and other related technology applicable to the site	DeWind D8.2, 2MW turbines	Are these still the selected turbines? Provide turbine specification
(d) proposed site location	Cassia County, ID Provided map of turbine locations	Provide coordinates of project and tax lot number. Provide location of substation. Map shows 13 turbines, reconcile information provided in (b),(c), (e), and (g)
(e) Schedule of monthly power deliveries	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Reconcile discrepancy in turbine manufacturer in (b) and (c) and (e) production forecast. Provide the correct 12X24 for the selected turbine. Include the file in excel format.
(f) Calculation or determination of minimum and maximum annual deliveries	No Information Provided	Provide calculation of minimum, maximum, and average annual generation
(g) Motive force or fuel plan	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Confirm data is still valid. Provide wind study for project.
(h) proposed on-line date and other significant dates required to complete milestones	1 st Energy = 12/31/10	Provide updated schedule to achieve these dates including interconnection and construction milestones
(i) proposed contract term and pricing provisions	20 year, non-levelized, non-fuel	
(j) Status of interconnection or transmission arrangement	Interconnection is through BPA	Provide status of Seller's interconnection application with BPA; provide date Seller's application was deemed complete by BPA;

XRG – DP8 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

		provide copy of SIS and other studies, if available; provide documentation of availability of transmission for Project to Brady. If available; provide schedule of remaining interconnection work. Identify procurement lead-times for major interconnection components and indicate whether such interconnection equipment has been ordered
(k) point of delivery	Brady Substation	Provide status of all Transmission Provider's Transmission Service Agreement to Brady Substation
(l) Wind Rights		Provide documentation that Seller has obtained rights to wind at project site (ie, land purchase or lease agreements)
(m) Form of Security to be provided		Specify preferred form of security to be provided for delay security (letter of credit, cash escrow, or guarantee)
(n) Required Facility Documents		Please list all permits, licenses, and land rights and contracts (e.g. interconnection agreement) required to operate project; provide status of each such required facility document
(o) Creditworthiness		Please provide legal name and 2 years of audited financials for the QF developer or the entity providing credit support to the QF developer so that PacifiCorp can complete creditworthiness review.

XRG – DP9 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

XRG-DP9 - Required Information	Provided – January 21, 2009	Additional Information requested by PacifiCorp:
(a) Demonstration ability to obtain QF status	Provided FERC Form 556 – QF Self Certification	Provide QF number when Form 556 acknowledged by FERC
(b) Design capacity (MW), station service requirements, and net amount of power delivered to the Company's electric system	Ten DeWind D8.2, 2MW turbines totaling 19.8 MW	Estimate station service for each turbine; will separate station service be required?
(c) Generation technology and other related technology applicable to the site	DeWind D8.2, 2MW turbines	Are these still the selected turbines? Provide turbine specification
(d) proposed site location	Cassia County, ID Provided map of turbine locations	Provide coordinates of project and tax lot number. Provide location of substation. Map shows 13 turbines, reconcile information provided in (b),(c), (c), and (g)
(e) Schedule of monthly power deliveries	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Reconcile discrepancy in turbine manufacturer in (b) and (c) and (e) production forecast. Provide the correct 12X24 for the selected turbine. Include the file in excel format.
(f) Calculation or determination of minimum and maximum annual deliveries	No Information Provided	Provide calculation of minimum, maximum, and average annual generation
(g) Motive force or fuel plan	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Confirm data is still valid. Provide wind study for project.
(h) proposed on-line date and other significant dates required to complete milestones	1 st Energy = 12/31/10	Provide updated schedule to achieve these dates including interconnection and construction milestones
(i) proposed contract term and pricing provisions	20 year, non-levelized, non-fuel	
(j) Status of interconnection or transmission arrangement	Interconnection is through BPA	Provide status of Seller's interconnection application with BPA; provide date Seller's application was deemed complete by BPA;

XRG - DP9 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

		provide copy of SIS and other studies, if available; provide documentation of availability of transmission for Project to Brady. If available; provide schedule of remaining interconnection work. Identify procurement lead-times for major interconnection components and indicate whether such interconnection equipment has been ordered
(k) point of delivery	Brady Substation	Provide status of all Transmission Provider's Transmission Service Agreement to Brady Substation
(l) Wind Rights		Provide documentation that Seller has obtained rights to wind at project site (ie, land purchase or lease agreements)
(m) Form of Security to be provided		Specify preferred form of security to be provided for delay security (letter of credit, cash escrow, or guarantee)
(n) Required Facility Documents		Please list all permits, licenses, and land rights and contracts (e.g. interconnection agreement) required to operate project; provide status of each such required facility document
(o) Creditworthiness		Please provide legal name and 2 years of audited financials for the QF developer or the entity providing credit support to the QF developer so that PacifiCorp can complete creditworthiness review.

XRG – DP10 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

XRG-DP10 - Required Information	Provided – January 21, 2009	Additional Information requested by PacifiCorp:
(a) Demonstration ability to obtain QF status	Provided FERC Form 556 – QF Self Certification	Provide QF number when Form 556 acknowledged by FERC
(b) Design capacity (MW), station service requirements, and net amount of power delivered to the Company's electric system	Five DeWind D8.2, 2MW turbines totaling 10 MW	NOTE: FERC 556 shows 5 DeWind turbines total 10MW and 12X24 wind generation shows 19.8MW using Vestas turbines. Estimate station service for each turbine; will separate station service be required?
(c) Generation technology and other related technology applicable to the site	DeWind D8.2, 2MW turbines	NOTE: FERC 556 shows 5 DeWind turbines total 10MW and 12X24 wind generation shows 19.8MW using Vestas turbines. Are these still the selected turbines? Provide turbine specification
(d) proposed site location	Cassia County, ID Provided map of turbine locations	Provide coordinates of project and tax lot number. Provide location of substation. Map shows 13 turbines, reconcile information provided in (b),(c), (e), and (g)
(e) Schedule of monthly power deliveries	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Reconcile discrepancy in turbine manufacturer in (b) and (c) and (e) production forecast. Provide the correct 12X24 for the selected turbine. Include the file in excel format.
(f) Calculation or determination of minimum and maximum annual deliveries	No Information Provided	Provide calculation of minimum, maximum, and average annual generation
(g) Motive force or fuel plan	Provided 12X24 generation for Vestas V90 1.8 MW WTG	Confirm data is still valid. Provide wind study for project.
(h) proposed on-line date and other significant dates required to complete milestones	1 st Energy = 12/31/10	Provide updated schedule to achieve these dates including interconnection and construction milestones
(i) proposed contract term and pricing provisions	20 year, non-levelized, non-fuel	
(j) Status of interconnection	Interconnection is through	Provide status of Seller's

XRG – DP10 OF PPA Information

Note: Information requested in the matrix is not to be considered inclusive and is not final for PPA preparation until both parties agree on all information.

Prepared by Pac - 9/21/10

or transmission arrangement	BPA	interconnection application with BPA; provide date Seller's application was deemed complete by BPA; provide copy of SIS and other studies, if available; provide documentation of availability of transmission for Project to Brady. If available; provide schedule of remaining interconnection work. Identify procurement lead-times for major interconnection components and indicate whether such interconnection equipment has been ordered
(k) point of delivery	Brady Substation	Provide status of all Transmission Provider's Transmission Service Agreement(s) to Brady Substation
(l) Wind Rights		Provide documentation that Seller has obtained rights to wind at project site (ie, land purchase or lease agreements)
(m) Form of Security to be provided		Specify preferred form of security to be provided for delay security (letter of credit, cash escrow, or guarantee)
(n) Required Facility Documents		Please list all permits, licenses, and land rights and contracts (e.g. interconnection agreement) required to operate project; provide status of each such required facility document
(o) Creditworthiness		Please provide legal name and 2 years of audited financials for the QF developer or the entity providing credit support to the QF developer so that PacifiCorp can complete creditworthiness review.

Greg Adams

From: Greg Adams
Sent: Monday, December 13, 2010 1:45 PM
To: 'Ken Kaufmann'; Jeff Lovinger
Cc: Peter Richardson; Bruce Griswold; 'jcarkulis@exergydevelopment.com'
Subject: XRG DP7, XRG DP8, XRG DP9, and XRG DP10
Attachments: Memorandum of Recording - Raft River Ranch (XRG-DP8).pdf; Memorandum of Recording - XRG-DP7 (XRG-DP9).pdf; Memorandum of Recording - XRG-DP8 (XRG-DP7).pdf; Memorandum of Recording - XRG-DP9 (XRG-DP7).pdf; Memorandum of Recording - XRG-DP10 (XRG-DP10).pdf; 12 x 24 - XRG-DP7.xlsx; 12 x 24 - XRG-DP8.xlsx; 12 x 24 - XRG-DP9.xlsx; 12 x 24 - XRG-DP10.xlsx; Malta Complex Map.jpg; 12-13-10 Letter to Kaufmann.pdf; XRG Data Refresh 12-13-10(2).doc

Ken and Jeff,

Please see the attached letter and documents. We are placing paper copies in the mail today.

Please confirm receipt.

Thanks.

Greg Adams
Richardson & O'Leary PLLC
515 N. 27th Street, 83702
P.O. Box 7218, 83707
Boise, Idaho
Voice: 208.938.2236
Facsimile: 208.938.7904

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Thank you.



RICHARDSON & O'LEARY

ATTORNEYS AT LAW

Tel: 208-938-7900 Fax: 208-938-7904

P.O. Box 7218 Boise, ID 83707 • 515 N. 27th St. Boise, ID 83702

December 13, 2010

Via U.S. Mail and electronic mail

Ken Kaufmann
Lovinger Kaufmann LLP
825 N.E. Multnomah, Suite 925
Portland, Oregon 97232
Office: 503-230-7715
Fax: 503-972-2921

Re: **IPC Docket PAC-E-10-08**
XRG-DP7, XRG-DP8, XRG-DP9, and XRG-DP-10

Dear Mr. Kaufmann:

I write on behalf of the above referenced projects being developed by Exergy Development Group of Idaho, which are the subject of the complaint in Idaho Public Utilities Commission Case No. PAC-E-10-08. [REDACTED]

[REDACTED] we are submitting "refreshed" information for these projects. The basic parameters of the projects have not changed substantially. With this information and with the information already in PacifiCorp's possession, PacifiCorp should be able to quickly complete contracts [REDACTED]

Exergy is working with Bonneville Power Administration to supply you with the written confirmation that delivery to the Brady substation will be achievable. However, Exergy does not believe that such confirmation should stall the execution of the PPAs. Exergy has assumed all cost responsibility for any required transmission system upgrades and has agreed to post delay security. In that light, it is difficult to imagine PacifiCorp's concern. Additionally, neither PURPA nor the Idaho Commission requires such proof as a prerequisite to execution of a PPA.

[REDACTED]

Mr. Kenneth Kaufmann
December 13, 2010
Page 2

[1] [REDACTED]

[2] [REDACTED]
As Exergy suspected as early as November 2009 from a telephone conversation with PacifiCorp Transmission and as confirmed with PacifiCorp's September 21, 2010 letter, transmission capacity is not an issue. Exergy maintains that PacifiCorp's refusal to negotiate PPAs in 2009 was entirely unjustified. Further, there remain unanswered questions in the complaint docket regarding PacifiCorp Commercial and Trading's process for investigating network resource designation on Exergy's behalf in this case, including how that process failed to earlier recognize that transmission would not be a problem, and whether PacifiCorp's own generation resources could experience similar delays to those experienced by Exergy. [3] [REDACTED]

PacifiCorp has an obligation to negotiate with PURPA developers in good faith. [4] [REDACTED]
[5] [REDACTED] Exergy has been ready to execute contracts [6] [REDACTED]

Exergy has no interest in litigating unnecessary issues. [7] [REDACTED]
[REDACTED]
[REDACTED] it
should not take long to complete the requested PPAs.

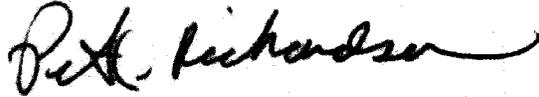
Can we expect executable PPAs [8] [REDACTED] soon? We look forward to your response.

Mr. Kenneth Kaufmann

December 13, 2010

Page 3

Very truly yours,

A handwritten signature in black ink, appearing to read "Peter Richardson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Peter Richardson

Richardson and O'Leary, PLLC

Cc: Bruce Griswold, PacifiCorp
James Carkulis, Exergy Development Group of Idaho, LLC

Enclosure:

Information packet regarding XRG-DP7, XRG-DP8, XRG-DP9, and XRG-DP-10

Greg Adams

From: Ken Kaufmann [kaufmann@kklaw.com]
Sent: Monday, December 13, 2010 1:54 PM
To: Greg Adams
Cc: Jeff Lovinger; Peter Richardson; Bruce Griswold; jcarkulis@exergydevelopment.com
Subject: Re: XRG DP7, XRG DP8, XRG DP9, and XRG DP10

Greg,
I confirm receipt.
Thanks.
Ken

On Dec 13, 2010, at 12:44 PM, Greg Adams wrote:

> Ken and Jeff,
>
> Please see the attached letter and documents. We are placing paper copies in the mail today.
>
> Please confirm receipt.
>
> Thanks.
>
> Greg Adams
> Richardson & O'Leary PLLC
> 515 N. 27th Street, 83702
> P.O. Box 7218, 83707
> Boise, Idaho
> Voice: 208.938.2236
> Facsimile: 208.938.7904
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> Thank you.
>
> <Memorandum of Recording - Raft River Ranch (XRG-DP8).pdf><Memorandum of Recording - XRG-DP7 (XRG-DP9).pdf><Memorandum of Recording - XRG-DP8 (XRG-DP7).pdf><Memorandum of Recording - XRG-DP9 (XRG-DP7).pdf><Memorandum of Recording - XRG-DP10 (XRG-DP10).pdf><12 x 24 - XRG-DP7.xlsx><12 x 24 - XRG-DP8.xlsx><12 x 24 - XRG-DP9.xlsx><12 x 24 - XRG-DP10.xlsx><Malta Complex Map.jpg><12-13-10 Letter to Kaufmann.pdf><XRG Data Refresh 12-13-10(2).doc>

Kenneth Kaufmann
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**XRG LLCs' ANSWER TO ROCKY MOUNTAIN POWER'S MOTION FOR
SUMMARY JUDGMENT**

EXHIBIT 4

Correspondence regarding response time for XRG, LLCs' Production Requests

Nos. 24-63

Greg Adams

From: Greg Adams
Sent: Thursday, January 20, 2011 10:00 AM
To: 'Jeff Lovinger'; Peter Richardson
Cc: Kris Sasser; Ken Kaufmann
Subject: RE: XRG v. PacifiCorp, IPUC Case No. PAC-E-10-08

Confirmed.

Greg Adams
Richardson & O'Leary PLLC
515 N. 27th Street, 83702
P.O. Box 7218, 83707
Boise, Idaho
Voice: 208.938.2236
Facsimile: 208.938.7904

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Thank you.

-----Original Message-----

From: Jeff Lovinger [<mailto:lovinger@lklaw.com>]
Sent: Thursday, January 20, 2011 9:45 AM
To: Peter Richardson; Greg Adams
Cc: Kris Sasser; Ken Kaufmann
Subject: XRG v. PacifiCorp, IPUC Case No. PAC-E-10-08

Peter & Greg:

Thank you for agreeing to an extension of time for PacifiCorp to raise objections and respond to XRG's third set of discovery requests in PAC- E-10-08. Per our conversation, both objections and responses are now due February 15, 2011. Please confirm.

Jeff

Jeffrey S. Lovinger
Lovinger Kaufmann LLP
825 NE Multnomah, Suite 925
Portland, OR 97232-2150
(503) 230-7715 (office)
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Greg Adams

From: Jeff Lovinger [lovinger@lklaw.com]
Sent: Wednesday, February 02, 2011 12:16 PM
To: Peter Richardson
Cc: Greg Adams; Ken Kaufmann
Subject: XRG v. PacifiCorp, IPUC Case no. PAC-E-10-08

Pete:

Rocky Mountain Power intends to file a motion for summary judgment. We don't think the motion implicates any issue on which XRG seeks discovery in the pending third set of discovery requests. For efficiency we recommend a stay of discovery pending resolution of the dispositive motion. Can XRG agree to stay discovery? We would be happy to discuss.

If the parties cannot reach agreement, we may move to stay discovery pending resolution of the dispositive motion.

A response by noon tomorrow would be much appreciated.

Thanks,

Jeff & Ken

Jeffrey S. Lovinger
Lovinger Kaufmann LLP
825 NE Multnomah, Suite 925
Portland, OR 97232-2150
(503) 230-7715 (office)
(503) 972-2921 (fax)
(503) 230-7120 (direct)
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UTILITIES COMMISSION

**XRG LLCs' ANSWER TO ROCKY MOUNTAIN POWER'S MOTION FOR
SUMMARY JUDGMENT**

EXHIBIT 5

**Excerpts of Testimony and Brief of Rocky Mountain Power in
Energy Recovery Group, LLC v. PacifiCorp, dba Pacific Power
Oregon PUC Docket No. UCB 44**

LOVINGER | KAUFMANN LLP

825 NE Multnomah • Suite 925
Portland, OR 97232-2150

office (503) 230-7715
fax (503) 972-2921

April 26, 2010

Via Electronic Filing and U.S. Mail

Public Utility Commission of Oregon
Attention: Filing Center
PO Box 2148
Salem, OR 97308-2148

Re: ENERGY RECOVERY GROUP, LLC, Complainant, vs.
PACIFICORP dba PACIFC POWER, Respondent
OPUC Docket No. UCB 44

Attention Filing Center:

Enclosed for filing in the above-captioned docket are an original and one copy of *PacifiCorp's Motion for Summary Judgment*.

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: UCB 44 Service List

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UCB 44

ENERGY RECOVERY GROUP LLC,

Complainant,

vs.

PACIFICORP dba PACIFIC POWER,

Respondent.

**PACIFICORP'S MOTION FOR
SUMMARY JUDGMENT**

1 Pursuant to OAR 860-013-0031, PacifiCorp d/b/a Pacific Power respectfully
2 moves the Public Utility Commission of Oregon ("Commission") for an order granting
3 summary judgment in the above-captioned matter, denying the relief requested by Energy
4 Recovery Group LLC ("ERG") and dismissing ERG's Complaint with prejudice. ERG
5 filed its *pro se* Complaint on November 10, 2009 asking the Commission to order
6 PacifiCorp to enter into a power purchase agreement ("PPA") with the avoided cost rates
7 in effect prior to September 9, 2009. After delay while ERG sought legal representation
8 and the parties undertook discovery, the Administrative Law Judge for this docket
9 ordered the parties to file dispositive motions by April 26, 2010. See March 25, 2010
10 Ruling in UCB 44 at 2. PacifiCorp respectfully submits this motion in satisfaction of the
11 April 26 deadline.

12 **I. STANDARD OF REVIEW**

13 On motion for summary judgment, the Commission:

14 views the facts and all reasonable inferences that may be drawn from them
15 in favor of the nonmoving party... *Jones v. General Motors Corp.*, 325

1 Or 404, 408 (1997). Summary judgment is appropriate if there is no
2 genuine issue of material fact and the moving party is entitled to judgment
3 as a matter of law. ORCP 47 C.

4 *Vannatta v. Oregon Gov't Ethics Comm'n*, 347 Or 449, 451 (2009) (affirming in part and
5 reversing in part the trial court's grant of summary judgment).

6 II. APPLICABLE LAW

7 In 1978, Congress enacted the Public Utility Regulatory Policies Act ("PURPA"),
8 16 U.S.C. §§ 824a-3 *et seq.*, to encourage alternative forms of energy production.
9 PURPA §§ 201 and 210 (respectively, 16 U.S.C. §§ 796, 824a-3) encourage resource
10 competition and the development of cogeneration and renewable energy technologies by
11 non-utility power producers called qualifying facilities ("QFs"). PURPA § 210(a)
12 required the Federal Energy Regulatory Commission ("FERC") to prescribe rules
13 implementing the legislation, specifically to encourage QFs and to require utilities to
14 offer to purchase electric energy from QFs. FERC regulations, in turn, delegated to the
15 States the responsibility for setting terms of QF PPAs, and determining when a QF
16 becomes entitled to a particular avoided cost rate.¹ In response to PURPA and the FERC
17 regulations, Oregon enacted legislation governing QFs and the Commission promulgated
18 administrative rules in Division 29 that parallel PURPA and its regulations.
19 See ORS 758.505 *et seq.*; OAR 860-029-0001 *et seq.* The Commission initially adopted
20 its PURPA regulations in the early and mid-1980s. See OPUC Order No. 81-755
21 (adopting administrative rules regarding QFs); OPUC Order No. 84-720 (revising
22 administrative rules to modify certain QF contracting policies).

¹ "It is up to the States, not [FERC], 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." *W. Penn Power Co.*, 71 FERC ¶ 61,153, 61,495 (1995); accord *Metropolitan Edison Co.*, 72 FERC ¶ 61,015, 61,050 (1995).

1 On July 23, 1999, the Governor signed SB 1149, the electric industry
2 restructuring bill passed by the 1999 Oregon Legislative Assembly. On
3 February 5, 2001, the Commission promulgated regulations implementing SB 1149.
4 OPUC Order No. 01-154, slip op. at 1 (OPUC Docket No. AR 390, In the Matter of a
5 Proposed Rulemaking to Implement the Code of Conduct, Aggregation, and Allocation
6 of Funds). Those regulations exempted PacifiCorp and Portland General Electric from
7 Oregon PURPA (ORS 768.505 through 758.555) and the Commission's PURPA
8 regulations (Division 29 or the Oregon Administrative Rules). *See* OPUC Order No. 05-
9 584 at 57.

10 In 2005, the Commission overhauled its PURPA regulations.² Commission staff
11 urged the Commission to consider at that time whether and how to modify Division 29 to
12 clarify which rules, if any, apply to electric utilities. The Commission determined that it
13 would postpone revision of Division 29 while it proceeded in UM 1129. OPUC
14 Order No. 05-584 at 58. Through orders issued in UM 1129, the Commission adopted a
15 comprehensive process for implementing PURPA for small QFs, embodied in tariffs filed
16 by each regulated utility and in a set of standard PPAs reviewed and approved by the
17 Commission. UM 1129 produced PacifiCorp Oregon Tariff Schedule 37
18 ("Schedule 37"), which provides procedures for QFs of 10 MW or less to obtain PPAs
19 and interconnection agreements.

20 On June 6, 2007, Senate Bill 838 became law, and eliminated the provision in
21 SB 1149 exempting Oregon utilities' from Oregon PURPA. *See* Notice of Proposed
22 Rulemaking, OPUC Docket No. AR 529 (April 15, 2008). The Commission followed

² *See* OPUC Order No. 05-584 (OPUC Docket No. UM 1129, Investigation Relating to Electric Utility Purchases from Qualifying Facilities).

1 suit and removed language in OAR 860-029-0001 exempting utilities from its Division
2 29 rules. OPUC Order No. 08-355 (July 7, 2008). Order No. 08-355 offers no guidance
3 on how Division 29 rules and the UM 1129 orders, tariffs and PPAs relate to each other.

4 The Commission recently clarified that a QF is not entitled to the published
5 avoided cost rates until a PPA is executed, or the QF and utility agree in writing that a
6 legally enforceable obligation exists, or the QF establishes that the utility negotiated in
7 bad faith. See *International Paper Company v. PacifiCorp*, OPUC Order No. 09-439 at
8 6, OPUC Docket No. UM 1449 (November 4, 2009).

9 III. APPLICABLE FACTS

10 ERG is the developer of a solar QF, to be located near Klamath Falls, Oregon,
11 with a capacity rating under 10 megawatts ("MW"). QFs under 10 MW are eligible to
12 sell net output to PacifiCorp under Schedule 37. ERG initiated the process for
13 negotiating an interconnection agreement in accordance with Schedule 37³ by filing an
14 interconnection application with PacifiCorp Transmission Services on November 17,
15 2008. PacifiCorp Exhibit 101. In April 2009, ERG's Managing Director, Mike
16 Carpenter, met with PacifiCorp Transmission Services representative Laura Raypush.
17 PacifiCorp/100, Raypush/1. At that meeting, Ms. Raypush gave Mr. Carpenter the name
18 and phone number of PacifiCorp Commercial and Trading ("C&T") representative John
19 Younie. *Id.* at 2. Ms. Raypush informed Mr. Carpenter that PacifiCorp Transmission
20 Services does not address PPAs and that he needed to call Mr. Younie to discuss any
21 questions that he had about a PPA. *Id.*

³ At the time ERG applied for its interconnection agreement, in November 2008, the interconnection procedures promulgated by the Commission in AR 521, were not yet in effect. See OPUC Order No. 09-196 (adopting small QF interconnection rules with an August 26, 2009 effective date).

1 In June 2009, Mr. Carpenter contacted PacifiCorp C&T to inquire regarding the
2 process for negotiating a PPA. PacifiCorp/200, Griswold/2. PacifiCorp C&T informed
3 ERG that negotiation of a PPA was governed by Schedule 37 and that ERG could find
4 additional information at PacifiCorp's customer generation website. *Id.* at 2-3;
5 PacifiCorp Exhibit 201. ERG was encouraged to submit the information required by
6 Schedule 37 if and when ERG decided to initiate the Schedule 37 process for negotiating
7 a PPA. PacifiCorp/200, Griswold/2-3.

8 On July 9, 2009, PacifiCorp filed Advice No. 09-012 with the Commission
9 seeking to revise PacifiCorp's published Schedule 37 avoided cost rates in accordance
10 with OPUC Order No. 05-584 (Commission affirmed a two-year cycle for filing avoided
11 cost rates) and in accordance with OAR 860-029-0080(8) (requiring a utility to file new
12 avoided cost rate information at least once every two years). Prior to Advice No. 09-012,
13 PacifiCorp last filed revised avoided cost information on July 12, 2007.
14 See OPUC Advice No. 09-012, Initial Utility Filing at 1 (July 9, 2009). On September 9,
15 2009, PacifiCorp's new Schedule 37 avoided cost rates went into effect.

16 Mr. Carpenter met with Ms. Raypush again on September 16. At that meeting he
17 presented her a partially executed interconnection agreement⁴ and a partially executed
18 PPA for ERG's proposed project. PacifiCorp/100, Raypush/2. Ms. Raypush forwarded
19 the PPA to PacifiCorp C&T by intra-company mail the same day. *Id.* PacifiCorp had no
20 part in preparing this proposed PPA, nor was it aware that ERG had obtained a standard

⁴ The interconnection agreement was fully executed by PacifiCorp Transmission Services and became effective on September 17, 2009. PacifiCorp/100, Raypush/2. To date, ERG has paid PacifiCorp Transmission Services at total of \$10,033.30 to reimburse PacifiCorp Transmission Service's actual cost to conduct a system impact study and a facilities study. PacifiCorp Exhibit 102 (\$3,683.02); PacifiCorp Exhibit 103 (\$6,350.28). ERG has not made any payments to PacifiCorp C&T. PacifiCorp/200, Griswold/6.

1 PPA template and attempted to complete it. *Id.*; PacifiCorp/200, Griswold/4. The receipt
2 of this document was the first written communication PacifiCorp C&T received from
3 ERG manifesting its desire to initiate the Schedule 37 process for obtaining a PPA.
4 *Id.* at 4. The partially executed PPA submitted by ERG contained some, but not all, of
5 the information required by Section (B)(2) of Schedule 37 (located at pages 8 and 9 of the
6 tariff). *Id.* On September 17, 2009, PacifiCorp C&T sent an email to ERG indicating:
7 (1) that PacifiCorp C&T was in receipt of ERG's September 16 proposed PPA; (2) that
8 negotiation of a PPA would be conducted pursuant to the process established in
9 Schedule 37; (3) that ERG needed to provide PacifiCorp C&T with the written
10 information required by Section (B)(2) of Schedule 37; and (4) that PacifiCorp's
11 Schedule 37 rates had changed effective September 9, 2009. PacifiCorp Exhibit 203.

12 On November 10, 2009, the Commission served PacifiCorp with ERG's
13 complaint in this case. On November 13, 2009, ERG informed PacifiCorp C&T that the
14 QF project, as it had been proposed in the materials submitted to PacifiCorp on
15 September 16, was no longer viable because of geotechnical conditions at ERG's site.
16 PacifiCorp Exhibit 204. ERG indicated that it would, instead, propose to continue its
17 application using fixed position panels, rather than panels attached to dual axis
18 trackers. *Id.* PacifiCorp C&T has continued to work diligently with ERG to update the
19 project information accurately and to complete the Schedule 37 process for negotiating a
20 PPA. PacifiCorp/200, Griswold/5. To date, ERG has not provided PacifiCorp C&T with
21 all of the information required by Section (B)(2) of Schedule 37. *Id.* at 6. The parties
22 have not executed a PPA or an agreement regarding the establishment of a legally
23 enforceable obligation. *Id.* at 6.

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IV. ARGUMENT

ERG's request to "order the utility to honor the fee schedule offered in the original Schedule 37 in force and in play prior to September 1, 2009"⁵ should be denied because ERG has not alleged facts which, if true, would establish, as a matter of law, that ERG is entitled to the relief it requests.

A. ERG is not entitled to pre-September 9, 2009 avoided cost rates.

Under the Commission's regulations, a QF is entitled to a specific avoided cost rate only if the QF and the utility have executed a written PPA or if they have agreed in writing that a legally enforceable obligation exists. See OAR 860-029-0040(3) and OAR 860-029-0010(29). In applying these regulations, the Commission has recently confirmed that a legally enforceable obligation requires a fully executed PPA or a written agreement regarding the existence of a legally enforceable obligation. OPUC Order No. 09-439 at 6. However, the Commission also noted that it may determine that a legally enforceable obligation has been incurred – even in the absence of a written agreement – if the Commission determines that a utility negotiated in bad faith or with undue delay. *Id.*⁶

⁵ ERG submitted a complaint *pro se* that does not clearly state the reason why ERG believes it is entitled to the relief it requests. ERG has been represented by counsel for over three months and has not chosen to re-plead its Complaint. PacifiCorp is left in the position of making ERG's arguments for it. The Complaint appears to argue grounds that clearly have no relevance to entitlement to rates (e.g. that ERG paid interconnection costs to PacifiCorp Transmission Services) and PacifiCorp does not address those grounds here. The only potentially relevant allegations set forth in the Complaint relate to ERG's alleged unawareness of the rate change and PacifiCorp's alleged failure to provide notice.

⁶ In OPUC Order 09-439, the Commission stated:

PacifiCorp is required both by Commission rule and by its own Schedule 38 [the large QF analog to Schedule 37] to negotiate in good faith. If PacifiCorp negotiates in bad faith or with undue delay, a QF may file a complaint with the Commission, and if the Commission finds bad faith or undue delay, we may conclude that a [legally enforceable obligation] was incurred in the absence of a written agreement between the parties.

1 ERG does not allege that PacifiCorp and ERG executed a PPA or entered into a
2 written agreement regarding the existence of a legally enforceable obligation. Therefore,
3 ERG is not entitled to pre-September 9, 2009 avoided cost rates, unless it was prevented
4 from reaching a PPA or written agreement prior to that date by PacifiCorp's bad faith or
5 undue delay. Blacks Law Dictionary defines "bad faith" as:

6 [t]he opposite of "good faith," generally implying or involving actual or
7 constructive fraud, or a design to mislead or deceive another or a neglect or
8 refusal to fulfill some duty or some contractual obligation, not prompted by
9 an honest mistake as to one's rights or duties but by some interested or
10 sinister motive.

11 (4th ed. 1968). As discussed below, the facts and all reasonable inferences that may be
12 drawn from them in favor of ERG show that PacifiCorp has not acted in bad faith or with
13 undue delay; therefore ERG is not entitled to be paid PacifiCorp's pre-September 9
14 avoided cost rates.

15 **B. PacifiCorp Transmission Services and PacifiCorp C&T both followed**
16 **Schedule 37 in good faith.**

17 When processing applications for standard small QF PPAs, PacifiCorp follows
18 the process and timelines set forth in Schedule 37. The Commission approved
19 Schedule 37 in OPUC Order No. 07-120. Schedule 37 requires that any QF seeking the
20 Schedule 37 avoided cost rates must enter into both an interconnection agreement and a
21 PPA with PacifiCorp. Schedule 37, at 1. Page 8 of Schedule 37 provides an overview of
22 the contracting procedure:

23 **Interconnection and power purchase agreements are handled by**
24 **different functions within the Company. Interconnection agreements**
25 **(both transmission and distribution level voltages) are handled by the**
26 **Company's transmission function (PacifiCorp Transmission Services)**
27 **while power purchase agreements are handled by the Company's**
28 **merchant function (PacifiCorp Commercial and Trading).**

1 Schedule 37, at 8 (emphasis added). The same passage is repeated, nearly verbatim, on
2 Page 10. Page 10 also explains that PacifiCorp Transmission Services and PacifiCorp
3 C&T are separate functions within PacifiCorp “because of functional separation
4 requirements mandated by the Federal Energy Regulatory Commission.” *Id.* at 10.

5 Motivated by requirements of federal law, and with the approval of the
6 Commission, PacifiCorp administers the interconnection process in nearly complete
7 separation from the PPA process for QFs.⁷ PacifiCorp C&T does not speak to PacifiCorp
8 Transmission Services regarding which QFs have requested interconnection agreements.
9 PacifiCorp/200, Griswold/6. And PacifiCorp Transmission Services does not speak to
10 PacifiCorp C&T regarding terms of its PPA. PacifiCorp/100, Raypush/2-3. While this
11 separation may not be intuitive, it is clearly explained, twice, in Schedule 37.

12 If Mr. Carpenter was not already aware of Schedule 37, PacifiCorp made
13 Mr. Carpenter aware of Schedule 37 in the spring of 2009. Mr. Carpenter met with
14 PacifiCorp Transmission Services representative Laura Raypush in April 2009 to discuss
15 ERG’s interconnection agreement application. PacifiCorp/100, Raypush/1-2. At that

⁷ While functional separation is mandated by FERC in order to facilitate open access to FERC-regulated transmission services, 18 C.F.R. § 358.2, there are other important reasons to observe functional separation in the context of QF negotiations under Schedule 37. First, potential QFs applying for an interconnection agreement or a PPA under Schedule 37 may ultimately decide not to interconnect and sell power as a QF but rather may elect to operate as a FERC-jurisdictional wholesale generator, in which case the functional separation requirements of FERC’s Standards of Conduct would clearly apply. Because many non-utility power producers may elect to be either a QF or a wholesale generator and may even switch this status during the life of the project, it is important for PacifiCorp to observe functional separation and FERC Standards of Conduct even if a non-utility power producer presently seeks to interconnect and sell power as a QF. Second, if functional separation applied only to FERC-jurisdictional wholesale generator transactions and not to state-jurisdictional QF transactions, it would be difficult and problematic for employees working in PacifiCorp’s merchant and transmission functions to accurately and consistently determine when they must observe functional separation and when they need not do so. As a practical matter, compliance with FERC Standards of Conduct is much more effective if PacifiCorp staff observes functional separation for both non-QF wholesale generator and QF generator transactions. Finally, the Commission and Commission Staff have reviewed and approved Schedule 37, which declares PacifiCorp’s functional separation in the context of QF transactions. See OPUC Order No. 07-120 (approving Schedule 37); see also Staff Report, Advice No. 06-019 (March 2, 2007) (recommending that the Commission approve Schedule 37).

1 meeting. Mr. Carpenter asked Ms. Raypush when he could apply for a PPA. *Id.*
2 Ms. Raypush told Mr. Carpenter that PacifiCorp Transmission Services does not
3 administer PPAs.⁵ *Id.* She then wrote the name and telephone number of PacifiCorp
4 C&T QF Contract Administrator John Younie on the back of one of her business cards,
5 handed the card to Mr. Carpenter, and told him to call Mr. Younie regarding a PPA. *Id.*
6 In June 2009, Mr. Carpenter did contact PacifiCorp C&T. PacifiCorp/200, Griswold/2.
7 In response, PacifiCorp C&T contract administrator John Younie sent Mr. Carpenter an
8 email on June 3 that stated:

9 Mike,
10 Below is the link to PacifiCorp's customer generation website. The QF
11 power purchase agreement process starts on page of or [sic] Oregon
12 Schedule 37. Let me know if you have any questions.

13 PacifiCorp Exhibit 201. Mr. Carpenter and Mr. Younie exchanged further email that
14 same day regarding the correct web link to Schedule 37. PacifiCorp Exhibit 202.
15 Mr. Carpenter thanked Mr. Younie and did not contact Mr. Younie further. *Id.* On June
16 23, Mr. Carpenter called PacifiCorp C&T and reached the Director of QF Contracts,
17 Bruce Griswold, who was covering for John Younie while Mr. Younie took vacation.
18 PacifiCorp/200, Griswold/2. In accordance with his standard practice, Mr. Griswold
19 pointed Mr. Carpenter to the Company's website to read Schedule 37, encouraged
20 Mr. Carpenter to call with any questions, and encouraged Mr. Carpenter to submit a
21 written request for a PPA containing the information required by Schedule 37. *Id.* at 2-3.

⁵ At the time, Ms. Raypush had no knowledge that PacifiCorp would seek a rate revision in July 2009. PacifiCorp/100, Raypush/3.

1 Schedule 37, pages 8-9, lists project specific information that a QF must provide
2 PacifiCorp C&T along with its request for a PPA.⁹ Unless and until the QF provides
3 such information in writing, PacifiCorp is not obligated to prepare a project PPA.
4 Schedule 37, at 8 (“In order to obtain a project specific draft power purchase agreement
5 the owner must provide in writing to the Company, general project information required
6 for the completion of a power purchase agreement, including, but not limited to [items a-
7 k, supra note 9]”). Mr. Carpenter made no attempt to comply with Schedule 37. Instead
8 of making such a written request for a PPA, Mr. Carpenter obtained a copy of
9 PacifiCorp’s generic PPA template, attempted to complete all of the missing terms
10 unilaterally, and then presented a partially-executed original to PacifiCorp Transmission
11 Services.¹⁰

12 Although it had no duty to do so, PacifiCorp Transmission Services promptly
13 forwarded the partially executed PPA to PacifiCorp C&T. *Id.* When PacifiCorp C&T
14 received ERG’s partially executed PPA, it tried to help Mr. Carpenter by telling him what
15 he needed to do to follow the Schedule 37 process. Using the email address provided in

⁹ Section B(2) on pages 8 and 9 of Schedule 37 provides:

In order to obtain a project specific draft power purchase agreement the owner must provide in writing to the Company, general project information required for the completion of a power purchase agreement, including, but not limited to:

- (a) demonstration of ability to obtain QF status;
- (b) design capacity (MW), station service requirements, and net amount of power to be delivered to the Company’s electric system;
- (c) generation technology and other related technology applicable to the site;
- (d) proposed site location;
- (e) schedule of monthly power deliveries;
- (f) calculation or determination of minimum and maximum annual deliveries;
- (g) motive force or fuel plan;
- (h) proposed on-line date and other significant dates required to complete the milestones;
- (i) proposed contract term and pricing provisions (i.e., fixed, deadband, gas indexed);
- (j) status of interconnection or transmission arrangements;
- (k) point of delivery or interconnection.

¹⁰ Mr. Carpenter attached a copy of the pre-September 9 version of Schedule 37 to the partially executed PPA submitted September 16, 2009. PacifiCorp/100, Griswold/4.

1 the partially executed PPA, Mr. Younie sent Mr. Carpenter an email response on
2 September 17, 2009 acknowledging receipt of ERG's PPA materials, informing ERG that
3 PacifiCorp would follow the PPA negotiation process in Schedule 37, asking ERG to
4 provide the information required by Section (B)(2) of Schedule 37, and clarifying that the
5 avoided cost rates stated in the PPA materials submitted by ERG had been superseded by
6 new rates, effective September 9, 2009. PacifiCorp Exhibit 203. From the time it
7 received ERG's September 17, 2009 materials initiating the Schedule 37 PPA process
8 through the present date, and notwithstanding ERG's pending complaint, PacifiCorp
9 C&T has worked in diligent, cooperative and timely fashion to process ERG's PPA
10 application.

11 None of the facts above, alone or in combination, shows PacifiCorp acted in bad
12 faith. PacifiCorp did not conceal Schedule 37 from Mr. Carpenter; it revealed it to him
13 via Ms. Raypush's instruction to call Mr. Younie, Mr. Younie's email instructing
14 Mr. Carpenter to read Schedule 37, and Mr. Griswold's similar instructions on the
15 telephone. PacifiCorp did not neglect Mr. Carpenter – it responded to him punctually.
16 And PacifiCorp did not violate Schedule 37 because it had no duty to negotiate a PPA
17 with Mr. Carpenter unless and until he submitted a written request to PacifiCorp and
18 provided the information required by pages 8 and 9 of Schedule 37.

19 PacifiCorp C&T was surprised, on September 17, 2009, when PacifiCorp
20 Transmission Services forwarded to it a copy of partially executed PPA between ERG
21 and PacifiCorp. PacifiCorp/200, Griswold/4. PacifiCorp C&T did not prepare the PPA;
22 did not have an open file pertaining to ERG; and did not know anything about the QF
23 described in the PPA or the promoter behind it. PacifiCorp C&T at first did not recall

1 ever speaking with Mr. Carpenter about his proposed QF project. *Id.* While a review of
2 its records did reveal that PacifiCorp C&T spoke with Mr. Carpenter in June 2009, those
3 conversations were unremarkable. *Id.* PacifiCorp C&T receives numerous inquiries
4 about PPAs and the application process that do not culminate in a written application for
5 a PPA. *Id.* at 3. Often callers merely request a blank PPA as part of preliminary project
6 planning. *Id.* PacifiCorp C&T receives calls from journalists, power marketers, lenders,
7 regulators and students, in addition to serious developers. *Id.* Therefore, and in
8 accordance with Schedule 37, PacifiCorp does not open a file or begin project specific
9 communications with a QF until PacifiCorp C&T receives a written request for a
10 PPA.¹¹ *Id.* Mr. Carpenter had notice of the Schedule 37 tariff and either forgot to follow
11 it or chose to ignore it. Had he submitted to PacifiCorp a written request for a PPA in
12 June 2009, he would have learned about the pending rate changes much sooner. When
13 PacifiCorp C&T finally did receive ERG's partially executed PPA, it construed that
14 document as a written request for a PPA, under Schedule 37, and gave Mr. Carpenter
15 notice of the status of QF avoided cost rates the same day. *Id.* at 4-5.

16 PacifiCorp empathizes with Mr. Carpenter's frustration that PacifiCorp
17 Transmission Services did not inform him of PacifiCorp's rate change request, but this
18 fact was not the result of bad faith. PacifiCorp C&T, under its Schedule 37 process
19 approved by the Commission, does not tell PacifiCorp Transmission Services when the
20 Company requests new rates. Ms. Raypush did not know, when she met with
21 Mr. Carpenter in April 2009, that PacifiCorp C&T would file a rate change request in
22 July 2009. PacifiCorp/100, Raypush/3. In fact, Ms. Raypush first learned that

¹¹ See Schedule 37, at 8 ("Unless otherwise directed by the Company, all communications to the Company regarding QF power purchase agreements should be directed in writing to [Manager-QF Contracts].")

1 PacifiCorp's avoided cost rates had changed from Mr. Carpenter, in
2 September 2009.¹² *Id.* Ms. Raypush acted in good faith in April 2009 by putting
3 Mr. Carpenter in touch with Mr. Younie, who in turn referred him to Schedule 37.

4 C. Negotiation did not occurred until after the rate change.

5 In order to establish a legally enforceable obligation to the pre-September 9 rates,
6 ERG must establish that PacifiCorp engaged in bad faith negotiations or undue delay and
7 that such improper behavior deprived ERG of the pre-September 9 rates. In other words,
8 any bad faith negotiations or undue delay must have occurred *before* the rates changed on
9 September 9, 2009. Because ERG initiated Schedule 37 PPA negotiations with
10 PacifiCorp C&T on September 16, 2009 – seven days after the September 9 change in
11 Schedule 37 rates – any alleged improper behavior occurring after ERG initiated PPA
12 negotiations on September 16, 2009, would not give rise to a legally enforceable
13 obligation for pre-September 9, 2009 rates.

14 V. CONCLUSION

15 ERG is entitled to a PPA with pre-September 9, 2009 avoided cost rates only if
16 ERG can demonstrate to the Commission's satisfaction that PacifiCorp negotiated in bad
17 faith or engaged in unreasonable delay that deprived ERG of a fully executed PPA or a
18 written agreement regarding the existence of a legally enforceable obligation before

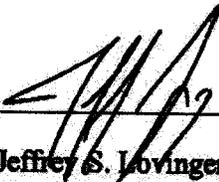
¹² PacifiCorp has since changed how it disseminates notice of upcoming rate changes, in response to OPUC Order No. 09-439 issued November 4, 2009 in OPUC Docket No. UM 1449. PacifiCorp C&T now posts notice of pending rate change requests on its customer generation web page (see, <http://www.pacificorp.com/es/cg/cqfp.html>). At its generation interconnection web page under the section pertaining to QF generation interconnection (see <http://www.pacificorp.com/trans/gip.html>), PacifiCorp Transmission Services now indicates that PacifiCorp's avoided cost rates in Oregon are subject to change under the relevant Oregon administrative rules and points interconnection customers to PacifiCorp C&T's customer generation web page for notice of any pending application by PacifiCorp to revise avoided cost rates in Oregon. However the Commission's instructions in Order No. 09-439 were articulated after the events at issue in the instant case, and should not be applied retroactively as a basis for finding that PacifiCorp acted in bad faith.

1 September 9, 2009. For the reasons discussed above, the facts in this case (and all
2 reasonable inferences to be drawn from those facts), even when viewed in the light most
3 favorable to ERG, do not support a finding that PacifiCorp acted in bad faith or with
4 undue delay.

5 WHEREFORE, PacifiCorp respectfully requests that the Commission find that
6 there are no genuine issues of material fact and that PacifiCorp is entitled to summary
7 judgment as a matter of law, and requests that the Commission dismiss ERG's complaint
8 with prejudice.

Dated this 26th day of April 2010.

Respectfully submitted,

By  _____

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CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2010, I served a true and correct copy of the foregoing *PacifiCorp's Motion for Summary Judgment* on the following named persons/entities by First Class Mail:

MIKE CARPENTER MANAGING DIRECTOR ENERGY RECOVERY GROUP LLC PO BOX 21420 SALEM OR 97307	ED DURRENBERGER PUBLIC UTILITY COMMISSION OF OREGON PO BOX 2148 SALEM OR 97308-2148
---	--

I hereby certify that, on April 26, 2010, I served a true and correct copy of the foregoing *PacifiCorp's Motion for Summary Judgment* on the following named persons/entities by electronic mail:

JORDAN A WHITE (W) SENIOR COUNSEL PACIFIC POWER & LIGHT 1407 W NORTH TEMPLE STE 320 SALT LAKE CITY UT 84116 jordan.white@pacificorp.com	OREGON DOCKETS (W) PACIFICORP OREGON DOCKETS 825 NE MULTNOMAH ST STE 2000 PORTLAND OR 97232 oregondockets@pacificorp.com
THOMAS H NELSON (W) PO BOX 1211 WELCHES OR 97067-1211 nelson@thnelson.com ziezactom@email.com	


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April 26, 2010

Via Electronic Filing and U.S. Mail

Public Utility Commission of Oregon

Attention: Filing Center

PO Box 2148

Salem, OR 97308-2148

Re: ENERGY RECOVERY GROUP, LLC, Complainant, vs.
PACIFICORP dba PACIFC POWER, Respondent
OPUC Docket No. UCB 44

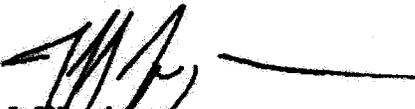
Attention Filing Center:

Enclosed for filing in the above-captioned docket are an original and five copies of the *Direct Testimony and Exhibits of Laura Raypush (PacifiCorp/100-103)* and the *Direct Testimony and Exhibits of Bruce Griswold (PacifiCorp/200-204)*.

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: UCB 44 Service List

Enclosures

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UCB 44

ENERGY RECOVERY GROUP LLC,

Complainant,

vs.

PACIFICORP dba PACIFIC POWER,

Respondent.

DIRECT TESTIMONY OF

BRUCE GRISWOLD

ON BEHALF OF

PACIFICORP

April 26, 2010

1 Q. Please state your name and business address.

2 A. Bruce Griswold. PacifiCorp, 825 NE Multnomah, Suite 600, Portland, Oregon
3 97232.

4 Q. What is your occupation and by whom are you employed?

5 A. I am employed by PacifiCorp full-time in the Commercial & Trading department
6 as Director of Short-Term Origination and Qualifying Facility ("QF") Contracts.

7 Q. Please briefly describe your education and business experience.

8 A. I have a B.S. and M.S. degree in Agricultural Engineering from Montana State
9 University and Oregon State University, respectively. I have been employed with
10 PacifiCorp over twenty years in various positions of responsibility in retail energy
11 services, engineering, marketing and wholesale energy services. I have also
12 worked in private industry and with an environmental firm as a project engineer.
13 I currently work in the Commercial and Trading business unit of PacifiCorp
14 Energy ("PacifiCorp C&T"). My responsibilities are wholesale, QF and large
15 retail transactions including the negotiation and management of the non-tariff
16 power supply and resource acquisition agreements with various counterparties.

17 Q. What is the purpose of your testimony today?

18 A. The purpose of my testimony is to relate my interactions with Energy Recovery
19 Group LLC ("ERG"), authenticate various written communications between
20 PacifiCorp and ERG, and describe how PacifiCorp administers applications from
21 small QFs for power purchase agreements ("PPAs") pursuant to Schedule 37.

22 Q. Please describe your familiarity with ERG's communication with PacifiCorp
23 C&T relating to ERG's interest in a PPA for ERG's proposed solar project
24 near Klamath Falls, Oregon (the "Project").

- 1 A. I participated in certain communications between ERG and PacifiCorp C&T. As
2 Director of QF Contracts and supervisor to John Younie, QF Contract
3 Administrator, I was generally aware of communications between ERG and
4 PacifiCorp C&T.
- 5 Q. Are you aware of any contacts between ERG or its representatives and any
6 employee of PacifiCorp C&T prior to June 2009 relating to ERG's Project?
- 7 A. No, to the best of my knowledge ERG had no contact with any employees of
8 PacifiCorp C&T regarding its Project prior to June 2009.
- 9 Q. When did ERG first make contact with PacifiCorp C&T?
- 10 A. Mike Carpenter, on behalf of ERG, called Mr. Younie for the first time on or
11 about June 3, 2009. Attached as Exhibit PacifiCorp/201 and Exhibit
12 PacifiCorp/202 is the exchange of emails between Mr. Younie and Mr. Carpenter
13 on June 3 in which Mr. Younie directed Mr. Carpenter to PacifiCorp's customer
14 generation web page.
- 15 Q. Did you have any contact with ERG in June 2009? If yes, please describe to
16 the best of your recollection.
- 17 A. Yes, I spoke with Mike Carpenter, Managing Director of ERG, by phone on a
18 June 23, 2009 phone call. Normally, Mr. Younie would have handled such a
19 phone call, but he was on vacation. My regular practice, when speaking to
20 potential applicants for a Schedule 37 PPA is to email the potential applicant a
21 copy of Schedule 37, urge the applicant to call with any questions, and instruct the
22 applicant to submit a written request for a PPA containing the information
23 required by Schedule 37 if he decides to seek a PPA. Mr. Carpenter told me
24 about his project and told me that he talked previously with Mr. Younie. I am
25 confident that I asked Mr. Carpenter if Mr. Younie sent him a link to Schedule 37,

1 asked him if he had any questions, and told him to submit a written request for a
2 PPA containing the information required by Schedule 37 if he decides to seek a
3 PPA.

4 **Q. How would you characterize the nature of ERG's contacts in June 2009 in**
5 **the context of your experience with QF contracts?**

6 **A. The June 2009 contacts were unremarkable. PacifiCorp C&T receives many**
7 **inquiries about PPAs and the application process that do not culminate in written**
8 **requests for a PPA. Many callers merely request a blank PPA as part of**
9 **preliminary project planning. PacifiCorp C&T receives calls from journalists,**
10 **power marketers, lenders, regulators and students in addition to serious**
11 **developers.**

12 **Q. Did PacifiCorp C&T open a file on ERG based on ERG's June 2009**
13 **contacts? If not, why not?**

14 **A. No, PacifiCorp C&T did not open a file on ERG based on the June 2009 contacts.**
15 **As noted in the answer to the previous question, PacifiCorp C&T receives**
16 **numerous informal contacts. It is not PacifiCorp's practice to open a file on a**
17 **potential QF until the potential QF submits a written request for a PPA pursuant**
18 **to Schedule 37.**

19 **Q. To the best of your knowledge, did ERG contact PacifiCorp C&T between**
20 **June 23, 2009 and September 17, 2009?**

21 **A. No, it did not.**

22 **Q. What happened on September 17, 2009?**

23 **A. PacifiCorp C&T received what looked like a standard PPA that was partially**
24 **filled-out with information regarding the Project and signed by ERG.**

1 **Q. Was PacifiCorp C&T expecting this proposed September 17, 2009 PPA from**
2 **ERG? If not, why not?**

3 **A. PacifiCorp C&T was not expecting the PPA and was not aware that ERG was**
4 **preparing a PPA. Pages 8 and 9 of Schedule 37 make it clear that PacifiCorp, not**
5 **the QF, should prepare the first draft of the PPA. This is necessary so that**
6 **PacifiCorp can be certain that the PPA is identical to its standard PPA approved**
7 **by the Commission. The September 17, 2009 PPA was the first written indication**
8 **PacifiCorp C&T received from ERG that it desired a Schedule 37 PPA.**
9 **PacifiCorp C&T had no part in preparing the project-specific information in**
10 **ERG's September 17, 2009 PPA, nor was it aware that ERG had obtained a**
11 **standard PPA template and had attempted to complete it. Mr. Younie and myself**
12 **at first did not recall ever speaking with Mr. Carpenter about his proposed Project**
13 **until we reviewed our records.**

14 **Q. Was the September 17, 2009 PPA complete?**

15 **A. No, it contained some, but not all, of the information required by Section (B)(2) at**
16 **pages 8 and 9 of Schedule 37. Also, it contained avoided cost rates, as well as a**
17 **copy of the Schedule 37, that were in effect prior to September 9, 2009 but no**
18 **longer effective when ERG submitted the materials received by PacifiCorp C&T**
19 **on September 17, 2009.**

20 **Q. How did PacifiCorp respond to ERG's September 17, 2009 PPA**
21 **submittal?**

22 **A. Although ERG did not follow Schedule 37, PacifiCorp understood his submittal**
23 **of the PPA on September 17, 2009 to be a written request to begin the Schedule**
24 **37 process. That same day, John Younie sent Mr. Carpenter an email (attached**

1 Exhibit PacifiCorp/203) indicating: (1) that PacifiCorp C&T was in receipt of
2 ERG's September 16 proposed PPA; (2) that negotiation of a PPA would be
3 conducted pursuant to the process established in Schedule 37; (3) that ERG
4 needed to provide PacifiCorp C&T with the written information required by
5 Section (B)(2) of Schedule 37; and (4) that PacifiCorp's Schedule 37 rates had
6 changed effective September 9, 2009.

7 **Q. Please describe Exhibit PacifiCorp/204 to this testimony.**

8 **A. Exhibit PacifiCorp/204 is a November 13, 2009 email from Mr. Carpenter to Mr.**
9 **Younie and myself in which he informed PacifiCorp C&T that the ERG Project as**
10 **it had been proposed in the materials received by PacifiCorp C&T on September**
11 **17, 2009 was no longer viable because of geotechnical conditions at the Project's**
12 **site. In the email, ERG instead proposed to continue its application using fixed**
13 **position panels, rather than panels attached to dual axis trackers.**

14 **Q. Why is the November 13, 2009 email, above, relevant to ERG's complaint?**

15 **A. For one thing, it demonstrates that ERG had not completed preliminary**
16 **engineering for the project on September 17, 2009, when Mr. Carpenter attempted**
17 **to bind PacifiCorp to a standard PPA. Most developers would deem it too risky to**
18 **sign a long-term PPA with damages for underdelivery until they had verified that**
19 **the proposed project was technically feasible. Also, it raises questions as to**
20 **whether ERG ever had, or now has, an economically feasible project, at the old**
21 **Schedule 37 prices or the current Schedule 37 prices.**

1 **Q. Has ERG attempted to fix the shortcomings in the September 17, 2009 PPA**
2 **and complete the Schedule 37 process to obtain a PPA?**

3 **A. PacifiCorp C&T has continued to work diligently with ERG to update the project**
4 **information accurately and complete the Schedule 37 process for negotiating a**
5 **PPA. To date, ERG has not provided PacifiCorp C&T with all of the information**
6 **required by Section (B)(2) of Schedule 37. Therefore, the parties have not**
7 **executed a PPA or an agreement regarding the establishment of a legally**
8 **enforceable obligation.**

9 **Q. Please briefly explain how PacifiCorp C&T and PacifiCorp Transmission**
10 **Services share information.**

11 **A. PacifiCorp C&T does not communicate to PacifiCorp Transmission Services**
12 **regarding a QF's interconnection status unless authorized by the QF. ERG did**
13 **not authorize such communications until September 17, when it provided**
14 **PacifiCorp with written authorization attached to the September 17, 2009 PPA.**

15 **Q. Has PacifiCorp C&T ever requested or received money from ERG?**

16 **A. No, PacifiCorp C&T has neither requested nor received money from ERG.**

17 **Q. Does this conclude your testimony?**

18 **A. Yes.**

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UCB 44

ENERGY RECOVER GROUP LLC,

Complainant,

vs.

PACIFICORP dba PACIFIC POWER,

Respondent.

DIRECT TESTIMONY OF

LAURA RAYPUSH

ON BEHALF OF

PACIFICORP

April 26, 2010

1 **Q. Please state your name and business address.**

2 **A. Laura Raypush. PacifiCorp, 825 NE Multnomah, Suite 1600, Portland, Oregon**
3 **97232.**

4 **Q. What is your occupation and by whom are you employed?**

5 **A. I am employed by PacifiCorp full-time in the Transmission department**
6 **(PacifiCorp Transmission Services) as a Transmission Consultant.**

7 **Q. Please describe your familiarity with Energy Recovery Group LLC's**
8 **("ERG") communications with PacifiCorp Transmission Services relating to**
9 **ERG's proposed solar generation facility near Klamath Falls, Oregon**
10 **("Project").**

11 **A. I have been PacifiCorp Transmission Service's primary contact with ERG for**
12 **matters relating ERG's interconnection request for its Project since October 16,**
13 **2007, when I was contacted by ERG's consultant (Bartosz Wojszczyk) with**
14 **questions on completing the application form for the interconnection of the**
15 **generation facility.**

16 **Q. Please describe Exhibit PacifiCorp/101 to this testimony.**

17 **A. Exhibit PacifiCorp/101 is the first page and signature page of the small generator**
18 **interconnection request for ERG's Project submitted by ERG to PacifiCorp**
19 **Transmission Services on November 17, 2008. By submitting this request, ERG**
20 **initiated the process for negotiating an interconnection agreement.**

21 **Q. Do you recall ever discussing a power purchase agreement ("PPA") with**
22 **ERG prior to September of 2009? If so, please explain.**

23 **A. Yes, I recall a conversation that I had with Mr. Carpenter that I believe took place**
24 **in April 2009, when I met with Mr. Carpenter regarding the interconnection**
25 **agreement application and the execution of the Facilities Study agreement. I**

1 believe it was during that meeting, where Mr. Carpenter asked me when he could
2 apply for a PPA. I informed him that PacifiCorp Transmission Services does not
3 administer PPAs. I provided the name and phone number of PacifiCorp
4 Commercial and Trading ("PacifiCorp C&T") representative John Younie on the
5 back of one of my business cards, gave the card to Mr. Carpenter, and told him
6 that he would need to call Mr. Younie to discuss any questions that he would have
7 about a PPA.

8 **Q. Do you recall ever discussing a PPA with ERG during September of 2009? If**
9 **so, please explain.**

10 **A. Yes, I met with Mr. Carpenter on September 16, 2009. At that time he provided**
11 **me with a partially executed interconnection agreement and a partially executed**
12 **PPA for ERG's Project. I reiterated to Mr. Carpenter that PacifiCorp**
13 **Transmission Service does not handle the negotiation or administration of PPAs**
14 **and I offered to forward the document to PacifiCorp C&T representative John**
15 **Younie. Mr. Carpenter indicated that he would like me to do so. On the same**
16 **day, I forwarded the PPA to Mr. Younie through inter-office mail. On the**
17 **following day, September 17, 2009, PacifiCorp Transmission Services executed**
18 **the interconnection agreement.**

19 **Q. Were you expecting the PPA on September 16, 2009? Please explain.**

20 **A. No, I was not expecting the PPA. PacifiCorp Transmission Services had no role**
21 **in preparing the PPA (or any PPAs) and had no knowledge that ERG would be**
22 **submitting the PPA when returning the partially executed interconnection**
23 **agreement.**

24 **Q. Please explain briefly how PacifiCorp Transmission Services and PacifiCorp**
25 **C&T share information?**

1 A. PacifiCorp Transmission Services does not communicate with PacifiCorp C&T
2 regarding the interconnection of a generation facility unless the customer has
3 provided a voluntary consent notice to PacifiCorp Transmission Services
4 authorizing such communication. To the best of my knowledge, ERG has not
5 provided such a release for PacifiCorp Transmission Services to discuss the
6 Project with PacifiCorp C&T.

7 Q. At the time of your April 2009 meeting with ERG, were you aware that
8 PacifiCorp would file an avoided cost rate change with the Public Utility
9 Commission of Oregon in July 2009?

10 A. No, I was not aware that PacifiCorp would file a rate change request in July 2009.

11 Q. When and how did you become aware that the Schedule 37 avoided cost rates
12 had changed?

13 A. I first learned that PacifiCorp's Schedule 37 avoided cost rates had changed when
14 Mr. Carpenter included me in an email to Bruce Griswold of PacifiCorp C&T in
15 October 2009, regarding information that was needed to complete the PPA.

16 Q. What is the status of ERG's interconnection request?

17 A. PacifiCorp Transmission Services conducted both a system impact study and a
18 facility study regarding interconnection of ERG's Project. ERG was required to
19 pay a deposit toward PacifiCorp Transmission Service's costs to conduct these
20 studies before each study began and reimburse actual costs after study
21 completion. ERG ultimately paid \$10,033.30 to reimburse PacifiCorp
22 Transmission Service's cost to evaluate the application and study the
23 interconnection of ERG's proposed project. PacifiCorp Transmission Services
24 has not required ERG to pay any additional costs beyond the \$10,033.30 required
25 to reimburse the actual costs incurred to complete the evaluation and studies.

1 PacifiCorp and ERG executed an interconnection agreement for ERG's Project
2 effective September 17, 2009.

3 **Q. Please describe Exhibit PacifiCorp/102 to this testimony.**

4 **A. Exhibit PacifiCorp/102 is a letter dated May 28, 2009 from PacifiCorp**
5 **Transmission Services to ERG providing an accounting of the actual costs to**
6 **complete the system impact study.**

7 **Q. Please describe Exhibit PacifiCorp/103 to this testimony.**

8 **A. Exhibit PacifiCorp/103 is a November 6, 2009 letter from PacifiCorp**
9 **Transmission Services to ERG providing an accounting of the actual costs to**
10 **complete the facilities study.**

11 **Q. Does this conclude your testimony?**

12 **A. Yes.**

