

Peter J. Richardson
Gregory M. Adams
Richardson & O'Leary, PLLC
515 N. 27th Street
P.O. Box 7218
Boise, Idaho 83702
Telephone: (208) 938-7901
Fax: (208) 938-7904
peter@richardsonandoleary.com
greg@richardsonandoleary.com

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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-DP-7, XRG-DP-8, XRG-DP-9,
XRG-DP-10, LLCs' PETITION FOR
RECONSIDERATION OF
COMMISSION ORDER NO. 32553

INTRODUCTION

XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs (referred to collectively as "XRG" or "Exergy") hereby files this Petition for Reconsideration of the Commission's Order No. 32553 (the "Order") pursuant to Rule 331 of the Idaho Public Utilities Commission's Rules of Procedure ("IPUCRP"). *See also* I.C. § 61-626. The XRG projects are qualifying facilities

("QFs") that filed a complaint against Rocky Mountain Power alleging Rocky Mountain Power had refused to enter into power purchase agreements ("PPAs") pursuant to the Idaho Public Utilities Commission's ("Commission" or "IPUC") implementation of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Rocky Mountain Power moved for summary judgment, which XRG opposed. The Order denied Rocky Mountain Power's Motion for Summary Judgment because "there are genuine issues of material fact related to the underlying complaint that do not permit determination of the case through use of summary judgment." Order at 7. Yet the Order stated, "we find that the record provided through pleadings and at oral argument presents ample evidence for the Commission to decide the underlying disputed matters alleged in XRG's original complaint." *Id.* The Order dismissed XRG's complaint. For the reasons described below, the Commission's dismissal of XRG's complaint should be reconsidered because it is unreasonable, unlawful, erroneous or not in conformance with the law. *See* IPUCRP 331.

XRG therefore respectfully requests that the Commission reconsider its previous Order, and issue an order which:

- Denies Rocky Mountain Power's Motion for Summary Judgment;
- Reinstates XRG's original claim in its complaint for rates in Order No. 30744;
- Grants XRG's request for leave to amend its complaint to alternatively claim right to the rates in Order No. 31025 (should the Commission construe the existing complaint not to include such relief);
- Grants XRG's Motion to Complete Discovery by ordering Rocky Mountain Power to respond to XRG's revised discovery requests; and
- Provides XRG an opportunity to file its own motion for summary judgment at the close of discovery.

FACTUAL AND PROCEDURAL BACKGROUND

1. XRG's Fruitless Attempts to Obtain Four 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 to 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. 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 Open Access Transmission Tariff ("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, the Bonneville Power Administration ("BPA") required completion of environmental studies costing \$20,000 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 reluctance to executing PPAs for all 4 projects beginning February 25, 2009, 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.

2. 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.

3. Rocky Mountain Power’s Admission that Network Transmission Was Available

The parties commenced discovery, and XRG’s First Set of Production Requests (Requests Nos. 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 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. . . . 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, 2009, 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.

4. XRG's Renewed Attempt to Secure Four PPAs Without Further Litigation

Despite the highly suspicious nature of 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. 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 breakdown 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. 11-15.¹ 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.

5. The 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 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-

¹ 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.

33.

XRG also requested an 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 for 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. 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 could not 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 did not respond to transmission questions (Nos. 24-52).

XRG filed an extensive Answer to Rocky Mountain Power's Motions, wherein it opposed the motions (hereinafter "*XRG's SJ Answer*"). XRG also moved pursuant to I.R.C.P. 56(f) to complete discovery, and requested leave to amend its Complaint to expressly include a request for alternative relief of entitlement to the avoided cost rates in Order No. 31025, which had become unavailable during the pendency of litigation and XRG's fruitless settlement attempts. Rocky Mountain Power then filed a Reply to XRG's Answer.

Over two months after briefing on Rocky Mountain Power's motions was complete, the Commission issued a scheduling order on May 18, 2011, setting the matter for oral argument to be held on June 9, 2011. *See* Order No. 32246. The Commission's scheduling order stated, "Specifically, the Commission seeks argument on whether there is a genuine issue as to any material fact regarding XRG's complaint. *See* I.R.C.P. 56(c)." *Id.* at 2 (emphasis added). At oral argument, Rocky Mountain Power maintained that XRG had not committed itself to the four requested PPAs prior to the rate change in Order No. 30744 in March 2010. *See* Order No.

32553 at 5-6.

In response to the Commission request to address any disputed material facts, XRG presented oral argument regarding several material, disputed facts that existed and compelled rejection of Rocky Mountain Power's Motion for Summary Judgment. Tr. at 27-38. XRG argued Rocky Mountain Power either knowingly, or through negligence or ineptitude, "acted so as to prevent the QF from obtaining a contract." Order No. 32553 at 6. XRG stated, "XRG's theory of this case is that Rocky Mountain Power abused its role as a PURPA negotiator and network transmission service provider to stall PURPA negotiations from March 2009 until September 2010 by failing to acknowledge the availability of the Populus to Terminal upgrades for XRG's projects." *Id.* (citing Tr. at 31-32). XRG also withdrew several of its pending discovery requests so that the outstanding requests at issue were reduced from 30 questions to 14 questions. Tr. at 3-4.

6. The Commission's Order No. 32553 Dismissing XRG's Complaint

On May 18, 2012 – almost an entire year after oral argument on summary judgment was held on June 9, 2011 – the Commission issued its Final Order No. 32553, dismissing XRG's Complaint. The Order denied Rocky Mountain Power's Motion for Summary Judgment because "there are genuine issues of material fact related to the underlying complaint that do not permit determination of the case through use of summary judgment." Order at 7. Yet the Order stated, "we find that the record provided through pleadings and at oral argument presents ample evidence for the Commission to decide the underlying disputed matters alleged in XRG's original complaint." *Id.*

Despite concluding summary judgment was not warranted, the Order's dismissal of

XRG's complaint relied upon the record for several factual determinations. The Commission found "no evidence in the record that Rocky Mountain Power was refusing to negotiate in March 2009." *Id.* at 7. The Order states, "Rocky Mountain Power reasonably held its position that transmission in the area of XRG's requested interconnection was constrained." *Id.* at 9. The Order appears to have concluded that Rocky Mountain Power acted in good faith and reasonably even though Rocky Mountain Power completely ignored the publicly available evidence that the Populus to Terminal upgrade would resolve the perceived transmission problem over the critical network transmission path. *Id.* at 9-10. The Order concludes, "Based on these facts, we cannot find that Rocky Mountain Power was attempting to impede negotiations with XRG by failing to acknowledge the Populus to Terminal transmission upgrades." *Id.* at 10.

The Order did not rule on XRG's Motion to Complete Discovery pursuant to I.R.C.P. 56(f). The Order did not rule on XRG's entitlement to the rates contained in Order No. 31025, which XRG argued precluded dismissal. *See XRG's SJ Answer* at 18 & n.9, 28-29. Nor did it rule on XRG's request for leave to amend its complaint to expressly include entitlement to the avoided cost rates from Order No. 31025 in effect on the date XRG filed its complaint, to the extent the Commission might find such amendment necessary.

LEGAL STANDARD

IPUCRP 331.01 provides, "Petitions for reconsideration must set forth specifically the ground or grounds why the petitioner contends that the order or any issue decided in the order is unreasonable, unlawful, erroneous, or not in conformity with the law, and a statement of the nature and quantity of evidence or argument the petition will offer if reconsideration is granted."

See also I.C. § 61-626.

GROUNDS FOR RECONSIDERATION

1. The Commission Should Grant Reconsideration Because Order No. 32553 Relied on an Unreasonable and Arbitrary Legal Standard That Is Not in Conformity With the Commission's Own Rules, or Other Applicable Rules and Laws.

Order No. 32553 is erroneous because it failed to address the matters presented, and instead relied upon some unspecified and therefore completely arbitrary legal standard. As noted above, Rocky Mountain Power moved for summary judgment, and XRG filed a response applying the summary judgment rule. The Commission issued a scheduling order requesting oral argument on the summary judgment rule. The parties then presented extensive oral argument based upon the summary judgment rule.

“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).

XRG's argument that Rocky Mountain Power failed to meet the summary judgment standard was apparently convincing. The Commission denied Rocky Mountain Power's Motion for Summary Judgment because "there are genuine issues of material fact related to the underlying complaint that do not permit determination of the case through use of summary judgment." Order at 7. Nevertheless, the Order somehow concluded, "we find that the record provided through pleadings and at oral argument presents ample evidence for the Commission to decide the underlying disputed matters alleged in XRG's original complaint." *Id.* (citing IPUCRP 327). Despite purporting not to grant summary judgment, the Order reached several factual determinations by citing extensively to the record. *Id.* at 7-10. This is a completely arbitrary application of some hybrid form of summary judgment where only one party is provided with the opportunity to obtain and present evidence necessary for summary judgment.

Parties to Commission proceedings are entitled to know what standards will apply to their case. In this case, no such standard supporting the Commission's Order No. 32553 was provided before the parties presented their case. It is still unclear what legal standard the Commission applied to conclude there were material issues of fact that would preclude summary judgment, yet the extensive record nevertheless supported dismissal. Order No. 32553 does not state the obvious alternative to summary judgment – a motion for judgment on the pleadings pursuant to I.R.C.P. 12(c) or a motion to dismiss pursuant to I.R.C.P 12(b)(6). The Order cannot rely on those rules because the Order relied on evidence submitted by Rocky Mountain Power. "If on a

motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” I.R.C.P. 12(b)(6), *accord* I.R.C.P. 12(c); *see also Taylor v. McNichols*, 149 Idaho 826, 833, 243 P.3d 642, 649 (2010).

The only rule cited in the Commission’s Order (other than the summary judgment rule) was IPUCRP 327. Order No. 32553 at 7. That rule provides:

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

IPUCRP 327.

This rule does not contain any legal standard the Commission could apply. It merely stands for the unremarkable proposition that the Commission may rely upon a legal basis not advocated by any party, or grant relief not specifically requested by a party. For example, if the Commission were to determine in this case that summary judgment was inappropriate, IPUCRP 327 allows the Commission to apply an alternative legal standard such as that for judgment on the pleadings set forth in I.R.C.P. 12(c). IPUCRP 327 merely puts parties on notice that the Commission may rely on an alternative basis, or grant some form of relief not specifically requested. However, the rule cannot supplant all other applicable legal standards and allow the Commission to apply a completely arbitrary and unspecified legal standard. To do so reads new words into the plain terms of IPUCRP 327.

The error is particularly acute in this case where the Commission itself asked the parties

to specifically address the summary judgment standard. *See* Order No. 32246 at 2. The Commission asked the parties to address the summary judgment standard in response to Rocky Mountain Power's Motion for Summary Judgment. XRG did just that. And the Commission agreed with XRG that Rocky Mountain Power had not satisfied the legal standard Rocky Mountain Power advocated for and the Commission asked the parties to argue. Nevertheless, after nearly a year of inaction by the Commission, the Commission deemed the summary judgment record sufficient to dismiss XRG's complaint. The Commission erred by applying an arbitrary and unreasonable legal standard.

2. The Commission Should Grant Reconsideration Because Order No. 32553 Failed to Rule on XRG's Motion to Complete Discovery Pursuant to I.R.C.P 56(f).

The Commission's Order No. 32553 failed to address XRG's Motion to Complete Discovery pursuant to I.R.C.P. 56(f). The revised discovery requests still outstanding 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 (finding error in denial of Rule 56(f) motion seeking an opportunity to conduct discovery on relevant points before disposition of a summary judgment motion).

Rocky Mountain Power's unreasonable conclusion that it lacked available transmission capacity until months after XRG filed its complaint is the critical issue in this case. Rocky Mountain Power refused to negotiate four PPAs with XRG on that basis alone. *See RMP's SJ Motion* at 5; *RMP SJ Exhibit A* at 209; *see also* Tr. 38-41. The Commission cannot dismiss XRG's complaint without allowing XRG to fully explore that issue in discovery, *unless* Rocky

Mountain Power's conduct is completely irrelevant to the legal conclusions reached in Order No. 32553.

But Rocky Mountain Power's conduct is obviously not irrelevant. Indeed, Order No. 32553 itself made extensive findings on the issue.

The Order stated:

We further find that, prior to the time the published rates changed in March 2010, **Rocky Mountain Power reasonably held its position that transmission in the area of XRG's requested interconnection was constrained.** In early 2009, when XRG initially proposed its projects, Rocky Mountain Power reviewed the publicly available information regarding its available transmission (OASIS). The report showed that there was then between 20 and 25 MW of unsubscribed capacity available at the location requested by XRG. Tr. at 49. This information was relayed to XRG. Rocky Mountain Power suggested proceeding with a single PPA and investigating alternatives for the remainder of the projects. XRG was provided a draft PPA but did not follow up. **Based on these facts, we cannot find that Rocky Mountain Power was attempting to impede negotiations with XRG by failing to acknowledge the Populus to Terminal transmission upgrades.** The parties had not yet begun active negotiations on the projects.

Order No. 32553 at 9-10 (emphasis added).

This passage highlights the flaw in Order No. 32553. The Commission analyzed all of Rocky Mountain Power's evidence, and reached a conclusion that Rocky Mountain Power acted reasonably to restrict XRG to 20 to 25 MW total for all of its requested PPAs. Yet the Commission allowed only one party to develop and present evidence on that issue, and the Commission's Order therefore violates I.R.C.P. 56(f). XRG provided extensive argument regarding why the outstanding discovery requests are highly likely to uncover evidence that undercuts the conclusion that Rocky Mountain Power acted reasonably in its transmission investigation. See Tr. at 57-60.

XRG was developing more than one project and Rocky Mountain Power's unreasonable network transmission conclusion precluded XRG's ability to proceed through Rocky Mountain Power's QF due diligence evaluation on any of the projects or even so much as obtain a draft

contract for any more than one of the projects. That Rocky Mountain Power suggests it proposed negotiating only one PPA is unavailing to Rocky Mountain Power's Motion because XRG intended to exercise its right to develop four projects. Rocky Mountain Power's erroneous network transmission investigation precluded Rocky Mountain Power from even providing its standard due diligence inquiry on even one project until September 11, 2010. *See XRG SJ Exhibit No. 3* at pp. 1-10. The erroneous network transmission investigation completely stalled negotiations starting February 25, 2009, until September 11, 2010. XRG is entitled to further discovery on the matter prior to the Commission reaching factual conclusions on the issue and dismissing XRG's complaint.

3. The Commission Should Grant Reconsideration Because Order No. 32553 Failed to Rule on XRG's Entitlement to the Rates Contained in Order No. 31025, or Alternatively to Rule on XRG's Request to Amend Its Complaint to Expressly Request Such Relief.²

As noted above, the avoided cost rates available when XRG filed its complaint were the rates contained in Order No. 31025. 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 pre-existing rates in Order No. 30744, or any other relief the Commission deems necessary. XRG argued that its 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. *XRG SJ Answer* at 18 & n.9. XRG also requested leave to amend its complaint, to the extent the Commission might disagree that XRG's Complaint includes a request for such alternative relief. *Id.* Under I.R.C.P. 15(a), "in the interest of justice, district

² XRG makes this argument in the alternative to its claim to the rates in Order No. 30744, and maintains it is entitled to the rates in Order No. 30744.

courts should favor liberal grants of leave to amend a complaint.” *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997).

The Commission’s Order No. 32553 did not address or even mention this issue. Because the availability of published rates changed after filing the complaint 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.

Even under Rocky Mountain Power’s formulation of the legally enforceable obligation rule, XRG clearly entitled itself to the rates in effect at the time it filed its highly meritorious complaint regarding Rocky Mountain Power’s erroneous network transmission determination. *See Rocky Mountain Power’s SJ Motion* at 18 (“In considering QF requests for grandfather rate treatment, the Commission requires that a QF either: (a) enter into a power purchase contract with a utility prior to a rate change, or (b) file a meritorious complaint for grandfather rates before a rate change.”). To the extent Rocky Mountain Power may argue XRG did not make adequate efforts to secure contracts prior to the drop in the eligibility cap on December 14, 2010, the Commission could investigate settlement negotiations initiated by XRG after Rocky Mountain Power first agreed to negotiate four PPAs in September 2010. *See XRG’s SJ Answer* at 21 & n.11.

4. The Commission Should Grant Reconsideration Because Order No. 32553 Fails to Implement 18 C.F.R. § 292.304(d)(2)(ii) and the Commission's Own Prior Precedent Applying that Federal Regulation.

XRG's claim to entitlement of the rates contained in Order No. 30744, or alternatively the rates contained in Order No. 31025, arises from the Federal Energy Regulatory Commission's ("FERC") rules which the Commission must implement. *See Complaint* at ¶¶ 16-18 (citing 18 C.F.R. 292.304(d)(ii) and *Blind Canyon Aquaranch v. Idaho Power Company*, Case No. IPC-E-94-1, Order No. 25802 (1994)). FERC's rules allow a QF to create a "legally enforceable obligation" even if a utility is resistant to entering into executed contracts. *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, ¶ 36 (2011) (explaining "that the phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and that the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract, *or as here, from delaying the signing of a contract, so that a later and lower avoided cost is applicable.*" (emphasis added)). Pursuant to the Commission's precedent implementing this rule, 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).

XRG's claim to entitlement to the rates in Order No. 30744 in effect prior to March 16, 2010 relies upon XRG's allegation that Rocky Mountain Power unreasonably refused to process its request for four PPAs. The critical issue is the reasonableness of Rocky Mountain Power's conclusion, from February 25, 2009 through the date of the rate change in March 2010, that Rocky Mountain Power lacked network transmission capacity for more than one project to

deliver at Brady substation. By depriving XRG of the right to even complete discovery on that matter, Order No. 32553 improperly implements 18 C.F.R. § 292.304(d)(2)(ii) and the Commission's precedent.

Under the reasoning of the Order, the possibility of utility bad faith or delay is irrelevant. That is incorrect reasoning. *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at ¶ 36. XRG's theory of the case is that Rocky Mountain Power abused its dual role as network transmission operator and PURPA negotiator in order to delay negotiations of PPAs for XRG's *four* projects. "In order to grant their motion, you need to assume that they committed a violation of their standards of conduct and their [OATT] and discriminated against this PURPA developer by sticking their heads in the sand and ignoring they were upgrading this line and that the path was going to be available." *See* Tr. at 60. To not even permit further discovery and simply dismiss the complaint is a failure to implement 18 C.F.R. § 292.304(d)(2)(ii) and a failure to apply the Commission's own prior precedent in a consistent manner.

Further, XRG's right to entitlement to the rates contained in Order No. 31025 is undeniable under the FERC rules and the Commission's precedent. Rocky Mountain Power itself argued that QFs must file a complaint prior to the date of a rate change in order to lock in a right to the pre-existing rates. *See RMP's SJ Motion* at 18; *see also A.W. Brown Co., Inc. v. Idaho Power Co.*, 121 Idaho 812, 814, 816, 828 P.2d 841, 843, 845 (1992). That is the most onerous grandfather test applied by the Commission that has been affirmed by the Idaho Supreme Court or FERC.³ XRG meets that test for the rates contained in Order No. 31025. Those were the rates in effect at the time XRG filed its complaint regarding Rocky Mountain

³ Although the test applied in *Cedar Creek Wind LLC* required a fully executed contract and was therefore more onerous than filing a complaint, FERC determined that test to be inconsistent with 18 C.F.R. § 292.304(d)(2)(ii). 137 FERC ¶ 61,006.

Power's unreasonable conclusions regarding network transmission. XRG presented argument regarding its entitlement to these rates. *See XRG's SJ Motion* at 18 & n.9, 28-29; Tr. 24-25. The Commission's Order failed to even address this issue or to grant XRG's request to amend its complaint to the extent the Commission views that as necessary. This is a failure to implement 18 C.F.R. § 292.304(d)(2)(ii) and a failure to apply the Commission's own prior precedent in a consistent manner.

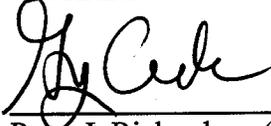
The Commission should grant reconsideration because Order No. 32553 establishes a rule whereby no matter how bad faith the conduct of the utility during negotiations, the QF cannot create a legally enforceable obligation by any means – even the filing of a meritorious complaint regarding that bad faith and unreasonable delay.

CONCLUSION

For the reasons set forth above, XRG respectfully requests that the Commission reconsider its Order No. 32553, and issue an order which: Denies Rocky Mountain Power's Motion for Summary Judgment; Reinstates XRG's original claim in its complaint for rates in Order No. 30744; Grants XRG's request for leave to amend its complaint to alternatively claim right to the rates in Order No. 31025 (should the Commission construe the existing complaint not to include such relief); Grants XRG Motion to Complete Discovery by ordering Rocky Mountain Power to respond to XRG's revised discovery requests; and Provides XRG an opportunity to file its own Motion for Summary Judgment at the close of discovery.

Respectfully submitted this 8th day of June, 2012.

RICHARDSON AND O'LEARY, PLLC

A handwritten signature in black ink, appearing to read "P. Richardson", written over a horizontal line.

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 8th day of June, 2012, a true and correct copy of the within and foregoing XRG LLCs' PETITION FOR RECONSIDERATION was served in the manner shown to:

Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
472 W. Washington
Boise, ID 83702
jean.jewell@puc.idaho.gov

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Mark C. Moench
Rocky Mountain Power
201 South Main Street, Suite 2300
Salt Lake City, UT 84111
Mark.moench@pacificorp.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Daniel E. Solander
Rocky Mountain Power
201 South Main Street, Suite 2300
Salt Lake City, UT 84111
Daniel.solander@pacificorp.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

Jeffrey S. Lovinger
Kenneth E. Kaufmann
Lovinger Kaufmann LLP
825 NE Multnomah, Suite 925
Portland, OR 97232
lovinger@LKLAW.com
Kaufmann@LKLAW.com

Hand Delivery
 U.S. Mail, postage pre-paid
 Facsimile
 Electronic Mail

By: 
Gregory M. Adams
RICHARDSON & O'LEARY PLLC
Attorneys for Complainant