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IDAHO PUBLIC
UTILITIES COMMISSION

July 27, 2012

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

RE: PAC-E-10-08 – XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs' MOTION TO AMEND COMPLAINT

Dear Ms. Jewell:

Enclosed please find the prepared XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs' Motion to Amend Complaint. Per the Commission's Rules of Procedure, we have enclosed and original and seven (7) copies.

Sincerely,

Chynna C. Tipton
Richardson & O'Leary PLLC

encl.

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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' MOTION TO AMEND COMPLAINT

Pursuant to pursuant to Rules 56 and 66 of the Idaho Public Utilities Commission's Rules of Procedure ("IPUCRP"), and the Commission's Notice of Scheduling Order No. 32600, XRG-DP-7, XRG-DP-8, XRG-DP-9, XRG-DP-10, LLCs (referred to collectively as "XRG" or "Exergy") hereby files this Motion to Amend its Complaint. XRG respectfully requests that the Commission accept its First Amended Formal Complaint for filing and consideration, consistent with the Commission's directive in its Notice of Scheduling Order No. 32600.

BACKGROUND

XRG filed its initial Complaint on July 29, 2010, alleging that PacifiCorp (dba Rocky Mountain Power) had failed process XRG's request for four power purchase agreements ("PPAs") by insisting that transmission capacity would be unavailable to accept the entire output XRG proposed to deliver to Rocky Mountain Power. During discovery, on September 21, 2010, Rocky Mountain Power admitted that it would be able to accept all of the output from XRG's four projects and finally offered to process XRG's request for four PPAs. XRG then attempted to settle the Complaint.

During settlement negotiations, Rocky Mountain Power, along with Idaho Power and Avista, filed a joint petition in GNR-E-10-04 to lower the eligibility cap for published avoided cost rates, such that the rates in Order No. 31025 available at the time XRG filed its Complaint would become unavailable. Rocky Mountain Power lifted the stay on discovery in place during discovery and filed a Motion for Protective Order and a Motion for Summary Judgment, arguing that XRG was not entitled to the avoided cost rates in effect prior to March 12, 2010.

XRG filed an Answer, opposing summary judgment on its right to the rates in effect prior to March 12, 2010. XRG also specifically noted "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." *XRG's Answer to Rocky Mountain Power's Motion for Summary Judgment* at 18. In a footnote, XRG further stated:

> To the extent the Commission disagrees that XRG's Complaint includes a request for such alterative 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.
>
> *Id.* at 18 n.9.

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, concluding material issues of fact precluded summary judgment yet nonetheless dismissing XRG's initial Complaint. The Order did not address XRG's argument that its Complaint should be construed to include a claim for alternative relief of the rates in effect at the time XRG filed its Complaint.

XRG filed a Petition for Reconsideration, again requesting that the Commission grant 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)." *XRG's Petition for Reconsideration* at 1. The Commission granted XRG's Petition for Reconsideration in Order No. 32588. The Commission then issued its Notice of Scheduling Order No. 32600, wherein the Commission for the first time addressed XRG's argument that it should be entitled to the rates in effect on the date it filed its Complaint on July 29, 2010. Specifically, the Notice of Scheduling Order No. 32600 stated:

> No amended complaint has ever been received by the Commission. Amendments are permissible pursuant to Rule 66 of the Commission's Rules of Procedure. However, a mere mention in a footnote of what is otherwise an answer to Rocky Mountain Power's Motion for Summary Judgment is not sufficient to constitute a motion upon which the Commission can base a ruling. If XRG seeks to amend its complaint it must do so pursuant to the Commission's Rules of Procedure. *See* IPUC Rules *56* and 66.
> Notice of Scheduling Order No. 32600 at 1-2.

MOTION TO AMEND COMPLAINT

XRG respectfully submits that it was unaware the Commission would require it to file a motion and amend its Complaint until the issuance of the Commission's Notice of Scheduling Order No. 32600 on July 26, 2012. Until that time, the Commission had not yet ruled on XRG's assertion in its Answer in opposition to summary judgment that the original Complaint should be construed to include a claim for alternative relief of the rates in effect at the time XRG filed its Complaint.

XRG's position reasonably requested liberal construction of its initial Complaint. *See* IPUCRP 66 ("Pleadings will be liberally construed, and defects that do not affect substantial rights of the parties will be disregarded."); IPUCRP 327 ("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. . . ." (emphasis added)). In *Harper v. Harper*, 122 Idaho 535, 835 P.2d 1346 (Ct. App. 1992), the Court of Appeals addressed the standard for dismissing a complaint – which is how the Commission initially disposed of XRG's initial Complaint prior to reconsideration. The Court stated, "It need not appear that the plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be granted." *Id.*, 122 Idaho at 536, 835 P.2d at 1347; *accord Conley v. Gibson*, 355 U.S. 41, 48 (1957). XRG maintains that the Commission should liberally construe the original Complaint as requested by XRG in its Answer in opposition to summary judgment filed February 22, 2011.

However, because the Commission's Notice of Scheduling Order No. 32600 appears to request that XRG file an amendment to its initial Complaint, XRG respectfully requests leave to amend its Complaint, and respectfully requests that the Commission accept for filing and

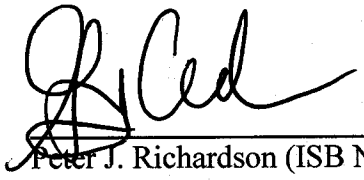
consideration XRG's First Amended Formal Complaint. In this case, such amendment is proper for multiple reasons. First, XRG reasonably expected from existing rules and case law that its initial Complaint would be liberally construed and from the facts set forth therein the Commission could "ascertain that *some* relief may be granted" – namely, the rates in effect at the time the Complaint was filed. *Id.*, 122 Idaho at 536, 835 P.2d at 1347 (emphasis added). Furthermore, the First Amended Complaint is limited to additional facts and relief specifically included in XRG's Answer in opposition to Rocky Mountain Power's Motion for Summary Judgment. Thus, Rocky Mountain Power is not prejudiced because it knew XRG intended to secure the very alternative relief XRG now proposes to set forth expressly in the First Amended Formal Complaint at the request of the Commission. Moreover, Rocky Mountain Power has itself argued in this proceeding that the only way XRG could entitle itself to vintage avoided cost rates is to file a meritorious complaint prior to the date of the rate change. XRG did just that prior to the rate change on December 14, 2010. To deny XRG alternative claim to those rates after XRG attempted in good faith to settle this matter would be patently unjust.

CONCLUSION

For the reasons set forth above, XRG respectfully requests that the Commission accept its First Amended Complaint for filing and consideration, consistent with the Commission's directive in its Notice of Scheduling Order No. 32600.

Respectfully submitted this 27th day of July, 2012.

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 27th day of July, 2012, a true and correct copy of the within and foregoing XRG LLCs' MOTION TO AMEND COMPLAINT 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	X Hand Delivery ___ U.S. Mail, postage pre-paid ___ Facsimile X 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 X U.S. Mail, postage pre-paid ___ Facsimile X Electronic Mail
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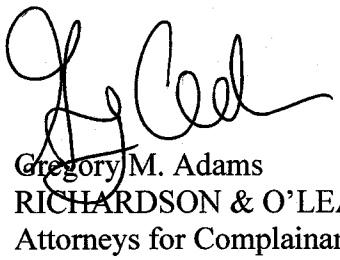
By: 

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