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March 8, 2011

VIA HAND DELIVERY AND ELECTRONIC MAIL

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

Re: Case No. PAC-E-10-08
XRG, Complainant, vs.
PACIFICORP dba ROCKY MOUNTAIN POWER, Defendant

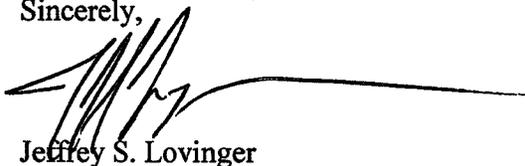
Dear Ms. Jewell:

Enclosed for filing in the above-captioned docket are an original and seven (7) copies of *Rocky Mountain Power's Reply to XRG's Answer in Opposition to Rocky Mountain Power's Motion for Protective Order to Stay Discovery and Motion for Summary Judgment* and an original and seven (7) copies of *Affidavit of Bruce Griswold in Support of Rocky Mountain Power'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,



Jeffrey S. Lovinger

cc: PAC-E-10-08 Service List

Enclosures

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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

Complainant,

v.

PACIFICORP, DBA ROCKY MOUNTAIN
POWER,

Defendant.

Case No. PAC-E-10-08

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

PacifiCorp, dba Rocky Mountain Power ("Company"), respectfully submits this reply to XRG's answer to Rocky Mountain Power's motions for protective order and summary judgment.¹

¹ The Commission's procedural rules do not provide for or prohibit the submission of a reply to an answer filed in opposition to a dispositive motion. I.R.C.P. 7.3(b)(3)(E) provides for both responses and replies to motions. XRG's answer raises a number of points not addressed by the Company's motion for summary

I. INTRODUCTION

More than four months after the Commission modified published avoided cost rates in Order No. 31025, XRG filed a complaint seeking grandfathered rate treatment. The Company has moved for summary judgment on three grounds.

First, contrary to Commission grandfathering criteria and the doctrine of laches, XRG failed to file a complaint before (or even shortly after) rates changed. This alone justifies denial of grandfathered rates.

Second, when rates changed, XRG's proposal was not mature enough to form the basis of a legally enforceable PURPA obligation. Specifically, XRG proposed to deliver off-system output to the Company at the Brady Substation, but XRG did not have interconnection agreements or transmission service agreements with the transmission providers and XRG could not articulate a technically or financially viable strategy for delivering output to the Company at Brady. The Company has no obligation to purchase off-system power before a QF establishes a viable method of delivery to the Company's system. XRG's conceptual proposal is not mature enough to establish a right to grandfathered rates.

Third, the Commission has repeatedly recognized that a QF must actively negotiate before it is entitled to a power purchase agreement (PPA) at published rates. On the undisputed facts of this case, XRG failed to actively negotiate. XRG obtained draft PPAs from the Company in May and October 2009 but never provided any

judgment and includes: (1) a motion to stay resolution of the motion for summary judgment pending completion of discovery (Answer at 16); and (2) a motion to amend the complaint (Answer at 18 n. 9). Rocky Mountain Power submits this reply in the belief that it will aid the Commission in resolving the pending motion for summary judgment. This reply has been filed within fourteen days of XRG's answer and associated motions. In the event the Commission deems it necessary, the Company respectfully requests that this reply be considered alternatively as an answer to XRG's motions.

comment, redline mark-up, or other feedback on the drafts. Because XRG did not even respond to the Company's draft PPAs, the Commission may conclude that XRG failed to actively negotiate as a matter of law.

In response to the Company's motion for summary judgment, XRG raises a number of technical objections, each of which is addressed below. In its principle substantive objection, XRG asserts that the Company's position on transmission constraints at Brady was a bad faith attempt to avoid PURPA obligations. XRG asserts that the Company's refusal to take more than 23 MW of output at Brady prevented XRG from actively negotiating PPAs and from developing solid transmission or interconnection plans. This objection is unpersuasive.

The Company denies that it acted improperly in raising concerns about transmission constraints at Brady or that it sought to avoid its obligations under PURPA. But even if the Commission accepts for the sake of argument that Rocky Mountain Power was wrong about transmission constraints at Brady, such a conclusion does not prevent the Commission from granting summary judgment and denying grandfathered rates.

The Company's position on transmission constraints does not excuse the fatal flaws in XRG's claim. The Company informed XRG in March 2009 that it could not accept more than 23 MW of output at Brady. XRG could have filed a complaint seeking a Commission ruling on that question at any time thereafter. The Company's position certainly did not prevent XRG from filing a timely complaint for grandfathered rates prior to or shortly after the rate change. Nor did the Company's position prevent XRG from responding to the draft PPAs provided by the Company in May and October 2009. Finally, the Company's position on transmission constraints at Brady did not prevent

XRG from obtaining interconnection and transmission service agreements with transmission providers or from otherwise establishing a technically and financially viable proposal for delivering output to the Company at Brady. Whether XRG seeks to compel the Company to purchase 23 MW or 70 MW of off-system power, XRG must establish a viable delivery proposal before the Company has any PURPA obligation.

In sum, the undisputed facts show that XRG failed to file a timely complaint for grandfathered rates, failed to respond to a draft PPA or otherwise actively negotiate, and failed to establish a viable plan to deliver power to the Company's system—under these circumstances the Commission can and should deny grandfathered rates as a matter of law.

II. MATERIAL FACTS²

XRG has failed to show any genuine issue regarding the following material facts:

A. The Company consistently told XRG, from March 2009 through March 15, 2010, that it would only accept 23 MW at Brady.

The Company told XRG it would accept only 23 MW at Brady, on March 23, May 11, October 2, 2009, and April 13, 2010.³ XRG does not dispute this; in its answer, XRG asserts “Rocky Mountain Power consistently and unequivocally relied on the perceived transmission problem to reject XRG’s request for 4 PPAs.”⁴

² With its motion for summary judgment, the Company filed: (i) Exhibit A, a bound catalog of all written communications between XRG and the Company concerning the XRG Projects from the date of XRG’s initial request for power purchase agreements (January 29, 2009) through the date it filed its complaint (July 29, 2010); and (ii) Exhibit B, excerpts from XRG’s responses to the Company’s discovery requests.

³ Exhibit A at 111 (March 23, 2009), 139 (May 11, 2009), 209 (October 2, 2009), 299 (April 13, 2010). All references herein to “Exhibit A” refer to Exhibit A to the Company’s motion for summary judgment.

⁴ Answer at 7.

B. XRG never commented on the draft power purchase agreements provided by the Company, or otherwise provided feedback regarding the terms of a power purchase agreement.

On May 11, 2009, the Company sent XRG a draft PPA attached to an email requesting that XRG “[p]lease provide a redline to this document with your proposed changes for discussion.”⁵ XRG responded the next day that it would review the draft PPA and get back to the Company shortly.⁶ XRG reiterated, on July 6, 2010, that “[w]e shall provide a redline to this contract and the other 3 identical contracts proposed for XRG-DP 7, 3, 9, and 10.”⁷ On October 2, 2009, the Company sent XRG a revised draft PPA, again asking XRG to “[p]lease provide comments on this draft for your XRG-DP-10, LLC project including any updated project information.”⁸ On March 11, 2010—only days before the rate change—XRG again indicated that it would provide a redline mark-up of the draft PPA.⁹ XRG does not dispute that it never provided comments, via redline or otherwise, regarding the substance of either draft PPA.¹⁰

⁵ Exhibit A. at 117.

⁶ *Id.* at 197.

⁷ *Id.* at 201.

⁸ *Id.* at 209.

⁹ *Id.* at 289.

¹⁰ In its answer, XRG asserts, presumably as a rationale for why it never commented on either draft PPA, that the Company “has provided no evidence that any terms were in dispute.” Answer at 20. It is fundamental that non-communication is not a valid basis of formation of a PPA between the Company and XRG. As detailed in the Company’s motion for summary judgment, the Commission requires that the QF developer *actively negotiate* a PPA and provide the utility with an opportunity to conduct due diligence on the proposed terms of any purchase agreement. At minimum, active negotiation requires that a QF developer provide comments and proposed revisions on a draft PPA especially when the developer repeatedly indicates that it intends to provide revisions and comments (suggesting to any reasonable counter-party that the developer has revisions to propose and that the terms of the draft agreement remain unresolved). If, as XRG appears to suggest in its answer, there were no disputed terms, then XRG should have communicated to the Company that it had no comments or revisions on the draft PPA and that it was prepared to execute PPAs for all four proposed projects on the terms contained in the Company’s draft PPA. It is undisputed that XRG never provided the Company with comments, revisions, or unconditional approval of the draft PPAs.

C. When it knew rates were about to change, XRG did not attempt to obligate itself to one or more PPAs.

On March 10, 2010, XRG's counsel received notice that the Commission would soon revise the published avoided cost rates.¹¹ On March 11, 2010, XRG sent an email to the Company stating that XRG intended to take the draft PPA provided by the Company, replicate it for all four proposed projects, and provide a redline mark-up of all four PPAs.¹² On March 12, 2010, XRG's attorney wrote the Company because XRG heard that published avoided cost rates were about to change. The letter asked the Company to "either; (1) confirm our understanding that we are entitled to the current rates and follow up with a contract containing the same; or (2) please tender an execution ready agreement containing the current rates by return mail."¹³ Tellingly, neither of these XRG communications stated that XRG was obligating itself to deliver and sell 70 MW of output to the Company at Brady Substation.

D. At the time the rates changed, XRG had not established the feasibility of transmitting its output to Brady.

In its answer, XRG cites to its responses to the Company's discovery requests 31 and 32 as evidence of its progress in verifying the availability of transmission.¹⁴ Those responses state that XRG first submitted interconnection requests to Bonneville Power Administration (BPA) for all four XRG Projects on November 1, 2006, but that BPA

¹¹ *In The Matter of the Adjustment of Avoided Cost Rates for New PURPA Contracts for Avista Corporation DBA Avista Utilities, Idaho Power Company, and PacifiCorp DBA Rocky Mountain Power*, IPUC Case No. GNR-E-I0-01, Order No. 31092, 11 (2010) (stating that Peter Richardson "conceded[he] received a copy of Staff's [March 9, 2010] letter the next day [March 10, 2010]").

¹² Exhibit A at 289.

¹³ *Id.* at 296.

¹⁴ Answer, Exhibit 1 at 49-50.

deemed those requests withdrawn for nonpayment in March 2009.¹⁵ XRG filed new BPA interconnection requests for XRG-DP7 and XRG-DP8 (but not XRG-DP9 or XRG-DP10) on December 2, 2009, and November 23, 2009, respectively.¹⁶ Those were the only requests for interconnection pending on March 15, 2010.¹⁷ No requests to interconnect XRG-DP9 or XRG-DP10 were pending on the date of the rate change. No requests for transmission service for any of the projects were pending on the date of the rate change. To date, XRG does not have interconnection agreements or transmission service agreements for any of its proposed projects.

XRG does not deny any of the following assertions in PacifiCorp's motion for summary judgment based on documents in the record: (a) that XRG did not request transmission to Brady from BPA until December 9, 2010;¹⁸ (b) that XRG decided, on October 7, 2010, to interconnect XRG DP-7 to Raft River Electric Co-op instead of BPA;¹⁹ (c) that, on December 16, 2010, BPA told XRG that there is no interconnection capacity on BPA's system for XRG DP7 until BPA re-rates the 138 kV transmission path;²⁰ (d) that, until January 5, 2011, XRG was unaware that BPA does not deliver to

¹⁵ *Id.* at 49.

¹⁶ *Id.*

¹⁷ XRG attempted to submit new BPA interconnection requests for XRG-DP9 and XRG-DP10 on March 12, 2010; however BPA rejected the requests. Exhibit B at 2 (all references herein to "Exhibit B" refer to Exhibit B to the Company's motion for summary judgment). On December 6, 2010, BPA deemed XRG's interconnection request for XRG-DP9 complete as of November 24, 2010. As of January 12, 2011, BPA had not acknowledged XRG's interconnection request for XRG-DP10. *Id.*

¹⁸ Exhibit B at 13.

¹⁹ *Id.* at 12. DP-7 is identified as GO388 in communications regarding interconnection between BPA and XRG.

²⁰ *Id.* at 22.

Brady;²¹ and (e) that, on January 6, 2011, XRG received an email in which BPA instructed XRG to expect that completion of generator-requested BPA transmission upgrades to take three to five years.²²

III. DISCUSSION

The Company is entitled to summary judgment for three reasons:

A. XRG failed the bright line rule.

XRG did not file a complaint or execute a PPA with the Company before published avoided cost rates changed March 16, 2010. Under the Commission's holding in *A.W. Brown*, approved by the Idaho Supreme Court, these facts alone justify granting the motion for summary judgment.²³ XRG's arguments to the contrary in its answer are unpersuasive.

XRG's assertion that the bright line rule of *A.W. Brown* should not apply because it had "almost no notice" of the rate change misapprehends Idaho law. XRG does not have a due process right to any advance notice of a change in published avoided cost rates.²⁴ Furthermore, the Commission already has determined, in Order No. 31092, that

²¹ *Id.* at 14 (Email from BPA to XRG stating, "Once the output of your proposed project leaves the BPA 138kV Point to Point loop at Minidoka or Adelaide you will be doing transmission business with Idaho Power. They own and operate the 138 kV line that runs from Adelaide to American Falls near Brady in the Idaho Power Balancing Area Authority. BPA is not a Balancing Area Authority in this region").

²² *Id.* at 16.

²³ See Motion for Summary Judgment at 18.

²⁴ The Idaho Supreme Court has held that a QF developer's due process rights do not attach to a particular avoided cost rate until the developer has established a legally enforceable obligation to sell its output to a utility at the rate in question. *Rosebud Enterprises, Inc. v. Idaho Pub. Utils. Comm'n*, 131 Idaho 1, 12 (1997).

QFs received sufficient notice of the rate change established by Order No. 31025.²⁵ In any event, XRG's attorney received actual notice on March 10, 2010, that rates might change soon. The Commission may conclude that XRG had ample time to file a complaint as a matter of law. The amount of effort for a sophisticated party like XRG to file a complaint with the Commission is comparable to the effort XRG expended in drafting its March 11, 2010 email to the Company and expended in drafting the March 12, 2010 letter to the Company from XRG's legal counsel. XRG's election to complain to the Company rather than the Commission should not preclude application of the bright line rule.

XRG's requests for Commission leniency²⁶ are also undeserving. XRG did not fail the bright line test by a little; it failed by a lot. XRG offers no credible excuse for waiting more than four months after rates changed to file its complaint. Such delay was either cavalier or calculated. XRG may have delayed because it thought the bright line test was irrelevant (just like it claims it didn't need to comment on the Company's draft PPAs) or perhaps it delayed because it wanted to make sure it had a viable project before it filed a complaint. In either case, XRG's circumstances bear no resemblance to other instances where the Commission has excused a failure to comply with its bright line rule.

XRG's delay in asserting its rights is detrimental to the administration of QF contracts in Idaho, generally, and to the Company in particular. XRG waited more than 16 months after learning that the Company would buy only 23 MW at Brady before filing

²⁵ *In the Matter of the Adjustment of Avoided Cost Rates for New PURPA Contracts for Avista Corp. dba Avista Utilities, Idaho Power Co., and PacifiCorp dba Rocky Mountain Power*, IPUC Case No. GNR-E-10-01, Order No. 31092 (2010).

²⁶ Answer at 28 (arguing that the Commission should not apply the bright line rule because it was not compelled to do so and because it has not always done so in the past).

a complaint and now XRG seeks a contract rate that is much greater than the Company's current avoided cost. XRG easily could have avoided this prejudice to PacifiCorp and its customers (who will pay for the power the Company purchases from XRG) if it had filed its complaint before avoided cost rates changed. In addition to failing the Commission's bright line rule, XRG's complaint should fail under the doctrine of laches because XRG sat on its claim and the Company was prejudiced as a result.²⁷

B. XRG failed to negotiate, as a matter of law.

It is undisputed that, after the Company sent XRG one PPA in May 2009, XRG repeatedly said it would send comments, but never did. XRG's failure to either negotiate the single PPA or else file a complaint with the Commission prior to Order No. 31025 constitutes failure to negotiate as a matter of law, as explained in PacifiCorp's motion for summary judgment, at 11-14. None of XRG's arguments, in its answer, excuse its failure to negotiate.

XRG cites *Earth Power Resources, Inc.* for the principle that when a QF attempts to negotiate and does everything in its power to commit itself but is prevented by a utility's knowing or negligent conduct the QF is entitled to the rates in existence at the time it attempted to obligate itself.²⁸ There is no evidence, however, that XRG attempted substantive negotiation of the terms of the PPAs it sought or that it ever attempted to obligate itself to sell power to PacifiCorp. As the Commission stated, in *Island Power Co. v. Utah Power & Light Co.*, "[a]n expressed desire to sell does not equate to a

²⁷ See Motion for Summary Judgment at 20.

²⁸ Answer at 19.

commitment to sell.”²⁹ XRG asserts in its answer that “XRG attempted to obligate itself” to four PPAs.³⁰ However, such a naked assertion does not constitute evidence.³¹

XRG alleges in its answer that it was precluded from negotiating by the Company’s erroneous determination of a transmission constraint.³² As discussed in PacifiCorp’s motion for summary judgment, a QF is not entitled to cease negotiations merely because the parties disagree on a key term. Furthermore, XRG gives no evidence how the Company prevented it from responding to the draft PPAs the Company sent to XRG on May 11, 2009 and on October 2, 2009. Even if the Commission assumed, for the sake of this motion only, that the Company was wrong to conclude that it could only take 23 MW of output at Brady, nothing prevented XRG from actively negotiating by responding to the draft PPAs provided by the Company in May and October 2010. XRG told the Company on multiple occasions that it would take the single PPA provided and send the Company a redline draft for each of the four Projects.³³ The Company assumed that XRG would do so, and waited for XRG comments that never came. In sum, XRG had an obligation to actively negotiate notwithstanding any dispute over the number of PPAs it would receive; at the very least, XRG should have responded to the draft PPA

²⁹ *Island Power Co. v. Utah Power & Light Co.*, IPUC Case No. UPL-E-93-4, Order No. 25647 at 17, 1994 Ida. PUC LEXIS 92.

³⁰ Answer at 20.

³¹ See *Nanney v. Linella, Inc.*, 130 Idaho 477, 480-81 (Idaho Ct. App. 1997) (upholding a grant of summary judgment where appellant’s assertions of factual issues material to the summary judgment were unsupported by the record and were generally inconsistent with the testimony of appellant’s own personnel).

³² Answer at 21. Although PacifiCorp vigorously denies that its determination was erroneous, it need not do so in this motion.

³³ Exhibit A at 201, 289 (July 6, 2009 and March 11, 2010 respectively).

provided by the Company and should have indicated what changes XRG sought or indicated that the draft PPA was acceptable without revision.

C. XRG's Projects were not sufficiently mature to be entitled to a PURPA contract.

On March 15, 2010, XRG had not yet applied to BPA, or any other utility, for transmission services to Brady. In January 2011, XRG sought to interconnect at least one of its four Projects to Raft River Electric Co-op, and learned, for the first time, that Idaho Power Company, not BPA, delivers to Brady. The Commission may hold, as has the Public Utility Commission of Oregon, that an off-system QF must obtain wheeling agreements from its project to the purchasing utility's system before it may create a legally enforceable PURPA obligation.³⁴ The Oregon PUC noted that many utilities (such as Raft River Electric Co-op) are not subject to FERC's mandatory wheeling requirements.³⁵ There are good reasons why a utility that is not required to wheel QF output would choose not to do so.³⁶ If the Commission adopts such a rule, XRG's request for grandfathered rates must be denied.

If the Commission does not embrace the strict rule, above, it may nevertheless grant summary judgment because XRG was not ready, willing and able to obligate itself to deliver power. The Commission has previously stated that an eligible project must be

³⁴ See Motion for Summary Judgment at 15.

³⁵ *Portland General Electric Co. v. Oregon Energy*, OPUC Docket No. UC315, Order No. 98-055, 1998 Ore. PUC LEXIS 131, *20, recons denied, Order No. 98-238, 1998 Ore. PUC LEXIS 204 (noting that FERC lacks authority to require nonpublic utilities to file open access tariffs).

³⁶ By electing to interconnect with a QF and wheel power a utility becomes a "transmitting utility" under the Federal Power Act (FPA). 16 U.S.C. §§ 791-828e. A transmitting utility is subject to significant additional regulation including reliability regulations and potentially compulsory wheeling under Sections 211, 211A, 215, 220, and 221 of the FPA. 16 U.S.C. §§ 824j, 824j-1, 824o, 824t, 824u.

more than conceptual.³⁷ As of March 15, 2010, the XRG Projects' transmission plans were merely conceptual. XRG defaulted on its original BPA interconnection requests in February 2009, and only two of the four Projects had interconnection queue positions with BPA on March 15, 2010. If the Commission draws all inferences in favor of XRG, it can conclude that XRG only knew the feasibility of *interconnecting* two of its four projects as of March 15, 2010, and that XRG did not know the feasibility of *transmitting* the output of any of its proposed projects to Brady. When XRG contacted the Company on March 11 and March 12, 2010, it made no attempt to bind itself to an obligation to deliver to the Company—probably because XRG did not know the feasibility, cost, or timeline of delivering its output to Brady. As of January 2011, XRG still has not demonstrated the technical, legal, or economic feasibility of transmitting its output to Brady. This demonstrates a lack of adequate maturity of the XRG Projects as a matter of law.³⁸

XRG's arguments to the contrary are unpersuasive. The fact that XRG must pay several large deposits to study interconnection and transmission to confirm its conceptual transmission plans³⁹ results from XRG's decision to disaggregate a large project into four small projects and wheel them across three systems to Brady. XRG's attorney's

³⁷ *Forest Fuel Power, Inc. v. Washington Water Power Company*, IPUC Case No. U-1008-246, Order No. 20486, 11 (1986) (“The Commission views the project as being only conceptual at this time. Serious negotiations have not taken place. The filing of a complaint was premature.”).

³⁸ See also *In the matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement with Yellowstone Power Inc.*, IPUC Case No. IPC-E-10-22, Order No. 32104 (2010) (Factors the Commission considers when determining whether a QF merits grandfathered rate treatment include: (i) whether a QF developer is materially down the path of facility interconnection with the utility; (ii) whether the developer obtained QF status from FERC; (iii) whether the parties had exchanged contract drafts and project specific information; and (iv) whether the parties reached a meeting of the minds as to the material contract terms and conditions).

³⁹ Answer at 25.

statement, that XRG is “comfortable with [the feasibility of wheeling to Brady] from a technical and cost perspective” is not evidence;⁴⁰ the evidence in Exhibit B can only demonstrate that XRG still has no definite plan for delivering its output to Brady. XRG’s statement that it has “committed to a \$45/kW delay default liquidated damages provision”⁴¹ is misleading at best. Neither of the PPAs tendered to XRG for comment contained such a provision and there is no evidence that XRG ever proposed or agreed to post any delay security prior to March 15, 2010 (a further indication of XRG’s failure to actively negotiate a PPA).

Off-system QFs are different from on-system QFs and therefore merit distinct legal treatment. For example, the Company should not have a duty to provide a PPA to a QF located in Hawaii just because the QF requests one. There must be some obligation on the part of the QF to demonstrate that delivery to the Company’s system is legally and financially feasible in a predictable time; XRG has made no such demonstration. XRG’s problems securing transmission to Brady show that the feasibility of wheeling QF output to a utility cannot be assumed.

XRG alleges that the Company has entered into PPAs with off-system QFs without inquiring into their interconnection status.⁴² The Company does not believe this statement is true, but even assuming it were true, such a fact would not prevent the Company’s review of XRG’s transmission plans when the Company reasonably believes such plans may be inadequate. XRG insists that BPA’s system interconnects to the

⁴⁰ See *Nanney*, 130 Idaho at 480-81 (see n. 33, *supra*).

⁴¹ Answer at 26.

⁴² *Id.* at 24.

Company at Brady⁴³; however, BPA and the Company's transmission maps say otherwise. It would be imprudent for the Company to ignore such evidence. The Company should not be required to purchase XRG output until XRG demonstrates the technical and financial feasibility of transmitting its output to Brady.

D. The Company's motion for summary judgment is procedurally proper.

XRG's claim that summary judgment is not the appropriate procedure for resolving this case is unfounded. The Company's motion is neither improper⁴⁴ nor unprecedented.⁴⁵ There is no need to stay the motion until after Rocky Mountain Power responds to XRG's discovery request because the facts XRG seeks to discover are not related to the issues raised in the Company's motion for summary judgment.⁴⁶

XRG further claims that it was prejudiced because it was required to answer a "381-page dispositive filing" in 14 days.⁴⁷ This claim is also unfounded. First, the motion for summary judgment is 24 pages. The balance of the 381-page filing was comprised of Exhibit A, a catalog of emails between XRG and the Company that the Company first served on XRG on September 10, 2010; and Exhibit B, excerpts from XRG's responses to the Company's discovery requests. XRG has seen the contents of Exhibit A and Exhibit B before; indeed, XRG was the author or supplier of much of that

⁴³ *Id.* at 25, n. 15.

⁴⁴ The Commission may consider and decide substantive prehearing motions such as a motion for summary judgment. IDAPA 31.01.01.056; IDAPA 31.01.01.256.

⁴⁵ See *Forest Fuel Power, Inc. v. Washington Water Power Company*, IPUC Case No. U-1008-246, Order No. 20486 (1986) (Commission granted a motion for summary judgment against a QF that sought to lock in avoided cost rates under a PPA because the QF failed to produce material facts demonstrating the QF properly negotiated with the utility and was sufficiently mature).

⁴⁶ See generally Rocky Mountain Power's Motion for Protective Order (February 7, 2011). See also XRG's Third Production Request Nos. 24-63.

⁴⁷ Answer at 17.

content. Second, XRG raised no objection to the timeline when PacifiCorp consulted XRG prior to filing its motion. XRG, which has had more than six months since it filed its complaint to develop its case, has not made a credible showing of prejudice.

E. Staying the motion would contribute to judicial inefficiency.

In its answer, XRG requests that the Commission “at least stay the motion until after Rocky Mountain Power responds to XRG’s discovery requests and XRG supplements [its answer] with the additional discovery.”⁴⁸ In its motion for protective order to stay discovery, the Company has explained why the additional discovery sought by XRG is irrelevant to the resolution of the pending motion for summary judgment. Continuing discovery while putting the motion for summary judgment on hold would unnecessarily burden the Company and the Commission with further discovery that is immaterial to the expedient resolution of the motion and, potentially, this docket.

F. The evidence submitted with Rocky Mountain Power’s motion for summary judgment is admissible.

XRG argues, citing I.R.C.P. 56(c) and 56(e), that the Company’s motion for summary judgment fails to include any admissible evidence because its exhibits are not accompanied by sworn affidavit.⁴⁹ At the outset, the Company fails to see the substantive significance of an affidavit where the exhibits to the motion for summary judgment consist entirely of admissions made by XRG and documents filed by XRG with the

⁴⁸ *Id.* at 16.

⁴⁹ *Id.* at 17.

Commission during discovery in this proceeding.⁵⁰ XRG's argument also lacks technical merit.

The Idaho Rules of Civil Procedure do not apply where, as here, the Commission has its own, on-point, rule.⁵¹ While the Commission generally follows rules on admissibility of evidence used by the district courts of Idaho in non-jury civil cases, Commission Rule 261 provides “[n]o informality in any proceeding or in the manner of taking testimony invalidates any order made ... by the Commission.” Rule 261 further provides that “[a]ll other evidence may be admitted if it is a type generally relied upon by prudent persons in the conduct of their affairs.” XRG does not dispute that it had prior access to the evidence. Nor does it dispute that the exhibits are what they purport to be.⁵² Exhibit A and Exhibit B are therefore reliable and the Commission may weigh the exhibits in ruling on the motion for summary judgment.⁵³

⁵⁰ To be precise, Exhibit A to the Company's motion for summary judgment consists in part of a compilation of correspondence that the Company, not XRG, filed with the Commission as part of discovery, but the accuracy of which XRG has admitted, which admission XRG filed with the Commission as part of discovery. See Exhibit A at 3.

⁵¹ Idaho Code § 61-601 (“All hearings and investigations before the commission or any commissioner shall be governed by this act and by rules of practice and procedure to be adopted by the commission, and in the conduct thereof neither the commission nor any commissioner shall be bound by the technical rules of evidence”); see also *McNeal v. Idaho PUC*, 142 Idaho 685, 690 (2006); *In the Matter of the Application of Idaho Power Company for Authority to Modify its Rule H Line Extension Tariff Related to New Service Attachments and Distribution Line Installations*, IPUC Order No. 30955 (2009) (“the law governing the Commission contemplates a rule of liberality in the reception of evidence” quoting *Application of Lewiston Grain Growers*, 69 Idaho 374, 380, 207 P.2d 1028, 1032 (1949)).

⁵² Under rules applicable to Idaho trial courts, “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” I.R.E. Rule 901. XRG does not deny that Exhibit A and Exhibit B are authentic excerpts of the discovery record.

⁵³ Even if Idaho trial court rules applied, Exhibit A and Exhibit B would be admissible. I.R.C.P. Rule 56(c) provides that judgment shall be rendered on “pleadings, depositions, and admissions on file, together with the affidavits, if any.” See e.g. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (holding that, under the analogous Federal Civil Rules of Procedure, even in the absence of an affidavit, summary judgment may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file). Because Exhibit A and Exhibit B were filed with the Commission during discovery

Notwithstanding the Company's belief that an affidavit is not essential to the admissibility of the exhibits, the Company now provides the attached affidavit of Bruce Griswold certifying the accuracy of the exhibits to the motion for summary judgment.

G. Evidence of settlement discussions is improper and non-probative.

In its answer, XRG discusses at length settlement negotiations with the Company.⁵⁴ XRG's disclosure violates the Commission's longstanding practice of protecting the confidentiality of settlement negotiations.⁵⁵ In the Commission's words, "[c]omments made and information, ideas, and opinions shared during the course of settlement discussions must remain confidential to strengthen the policy of promoting settlements."⁵⁶ Furthermore, the purpose for which XRG discusses the settlement negotiations has no bearing on the Company's motion for summary judgment or on XRG's complaint. Settlement negotiations taking place in the fall of 2010 do not shed light on XRG's entitlement to rates in March 2010.⁵⁷

(and again with the Company's motion), and because Exhibit A consists of an admission by XRG and Exhibit B consists of documents produced by XRG, an affidavit swearing to their authenticity is unnecessary.

⁵⁴ Answer at 2, 11, 12, 21 n. 11, 32-33, and portions of exhibits.

⁵⁵ Commission Rule 292 ("Settlement negotiations are confidential, unless all participants to the negotiation agree to the contrary"); *In the Matter of the Petitions Requesting Extended Area Service (EAS) between Arbon and American Falls, Arbon and Pocatello, and between Rockland and American Falls*, IPUC Case No. GNR-T-96-5, Order No. 27450, 1998 Ida. PUC LEXIS 97, *7 ("Arbon") (adopting a stipulation withdrawing an attorney's affidavit and certain references in a supporting memorandum to settlement negotiations; affirming a long standing practice that the disclosure of settlement negotiations is prohibited by the Commission's Rules).

⁵⁶ *Arbon*, 1998 Ida. PUC LEXIS 97, *7.

⁵⁷ Finding no exception to confidentiality in the Commission's rules, XRG attempts to justify its disclosure under an exception from the Idaho Rules of Evidence. Answer at 21 n. 11. As discussed in Section III.F, *supra*, the Commission is not bound by the Idaho Rules of Evidence. Even if the Commission adopts exceptions from the Idaho Rules of Evidence, settlement negotiations would not fit any exception due to their complete lack of relevance.

H. XRG's complaint does not include a prayer for Order No. 31025 rates and XRG should not be granted leave to amend its complaint.

In the prayer for relief found in its complaint, XRG asks the Commission to: (1) declare PacifiCorp in violation of PURPA, FERC regulations, and Commission orders; (2) require PacifiCorp to execute standard PPAs at the rates on file prior to March 12, 2010; and (3) grant any other relief the Commission deems necessary. In its answer, XRG asserts for the first time that its request for "any other relief the Commission deems necessary" should be read to include a request for four PPAs at the published avoided cost rates established by Order No. 31025.⁵⁸ In the alternative (and in a footnote), XRG seeks leave to amend its complaint.⁵⁹ The Company opposes both XRG's radical re-interpretation of the complaint and XRG's apparent attempt to bootstrap a new complaint into its original July 29, 2010 filing date.⁶⁰

Formal complaints filed before the Commission must "[f]ully state the facts constituting the acts or omissions of the utility ... and the dates when the acts or omissions occurred" and must "[s]tate what action or outcome should be taken to resolve the complaint."⁶¹ The Idaho Supreme Court recently found that a complaint failed to apprise the defendant of a particular claim where the claim was not explicitly mentioned

⁵⁸ Answer at 18.

⁵⁹ *Id.* 18 n. 9.

⁶⁰ XRG does not make clear that, if the Commission grants leave to amend, it seeks to have such amended complaint relate back to the date of the original complaint. The Company opposes any such attempt to relate back. In Idaho courts, an amended complaint does not relate back to the date of the original complaint if it alleges wrongful conduct arising at a different time and with regard to a different set of facts. *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 347 (Idaho 2001); *see also* I.R.C.P. 15(c) (an amended complaint relates back only where it shares the same "conduct, transaction, or occurrence" as the original complaint). Here, any claim by XRG for rates in Order No. 31025 would necessarily be dependent on events occurring after March 16, 2010 and therefore would be beyond the scope of the original complaint.

⁶¹ IDAPA 31.01.01.054.

in the complaint and an essential element of the claim was not plead.⁶² The court held that the unplead claim could not be considered on its merits.⁶³ XRG's complaint does not request rates in effect after March 16, 2010 or even mention events occurring after March 16, 2010. Under the standards for pleading, XRG's complaint cannot be construed to request Order No. 31025 rates.

This is a complaint about whether XRG is entitled to grandfathered treatment regarding rates in effect prior to March 16, 2010. The Company had no notice that XRG's complaint sought grandfathered treatment for Order No. 31025 rates, the Company has not sought discovery related to this new claim, and would be prejudiced if XRG's complaint were construed in such a fashion.⁶⁴ If XRG wishes to seek grandfathered treatment regarding rates in effect just prior to December 14, 2010, it must file a new complaint.

IV. CONCLUSION

For the reasons discussed above, the Company's motion for summary judgment should be granted and XRG's motions to stay summary judgment and to amend the complaint should be denied. If the motion for summary judgment is granted, the Company's motion for a protective order staying discovery is moot.

⁶² *Mortensen v. Stewart Title Guar. Co.*, 235 P.3d 387, 393-95 (Idaho 2010).

⁶³ *Id.* ("Pleading is necessary to put the opposing party on notice of the claims it is facing and thereby insure that a just result is accomplished." (internal quotations omitted)).

⁶⁴ Due to the lack of relevance to the complaint, PacifiCorp did not seek to admit evidence that Company sent XRG a written offer to negotiate four PPAs at the Order No. 31025 prices on September 21, 2010; that the offer asked XRG to contact Company "as soon as possible" if XRG wanted to negotiate, and that XRG did not respond until December 13, 2010. XRG filed Company's September 21, 2010 letter with its answer (*See Answer, Exhibit 3 at 2-10*), however Company did not use this information in its motion for summary judgment, nor did it investigate through discovery why XRG failed to respond sooner.

Dated this 8th day of March 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark C. Moench', is written over a horizontal line.

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