WILLIAMS · BRADBURY

ATTORNEYS AT LAW

July 12, 2011

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

Re: PAC-E-11-01 through PAC-E-11-05

Dear Ms. Jewell:

Enclosed please find an original and seventeen copies of the Reply Comments of Cedar Creek Wind, LLC for filing in the above referenced dockets.

Please call should you have any questions.

Sincerely,

Ronald L. Williams

Ronald L. Williams

RLW/jr
Enclosures
cc: Service List

1015 W. Hays Street - Boise, ID 83702
Phone: 208-344-6633 - Fax: 208-344-0077 - www.williamsbradbury.com

Ronald L. Williams ISB No. 3034
Williams Bradbury, Attorneys at Law
1015 W. Hays Street
Boise, ID 83702
Phone: (208) 344-6633
Fax: (208) 344-0077
ron@williamsbradbury.com

Larry F. Eisenstat
Michael R. Engleman
Dickstein Shapiro LLP
1825 Eye Street, NW
Washington, DC 20006-5403
Tel: (202) 420-2200
Fax: (202) 420-2201
eisenstatl@dicksteinshapiro.com
englemanm@dicksteinshapiro.com

Counsel for Petitioner Cedar Creek Wind, LLC

RECEIVED
2011 JUL 12 PM 4:31
IDAHO PUBLIC
UTILITIES COMMISSION

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (RATTLESNAKE CANYON PROJECT)	**CASE NO. PAC-E-11 -01**
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (COYOTE HILL PROJECT)	**CASE NO. PAC-E-11-02**
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (NORTH POINT PROJECT)	**CASE NO. PAC-E-11-03**

IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (STEEP RIDGE PROJECT)	)	**CASE NO PAC-E-11-04**
IN THE MATTER OF THE APPLICATION OF PACIFICORP DBA ROCKY MOUNTAIN POWER FOR A DETERMINATION REGARDING A FIRM ENERGY SALES AGREEMENT BETWEEN ROCKY MOUNTAIN POWER AND CEDAR CREEK WIND, LLC (FIVE PINE PROJECT)	)	**CASE NO. PAC-E-11-05**

REPLY COMMENTS OF CEDAR CREEK WIND, LLC

Cedar Creek Wind, LLC ("Cedar Creek") hereby submits these Reply Comments ("Reply") to the Answer of Rocky Mountain Power to Cedar Creek Wind, LLC's Petition for Reconsideration[1] (the "Answer") filed by PacifiCorp d/b/a Rocky Mountain Power ("Rocky Mountain Power") in the above-captioned dockets.[2] Although not permitted as a matter of right, Cedar Creek respectfully submits that because Cedar Creek is, in effect, the applicant for contract approval in this case, and in order to ensure that the Commission has the benefit of a full and fair record as to the issues presented in the Petition, Cedar Creek should be permitted to respond to Rocky Mountain Power's inappropriate effort to provide a *post hoc* rationalization for

1 Case No. PAC-E-11-01 *et al.* (July 6, 2011).

2 On June 29, 2011, Cedar Creek petitioned the Commission to reconsider its Order No. 32260, issued June 8, 2011 (the "*June 8 Order*"), in which it disapproved five Firm Energy Sales Agreements (the "Agreements") between Rocky Mountain Power and Cedar Creek (collectively, the "Parties") with respect to Cedar Creek's Rattlesnake Canyon, Coyote Hill, North Point, Steep Ridge, and Five Pine projects (collectively, the "Projects"). Cedar Creek Wind, LLC's Petition for Reconsideration of Order No. 32260 and Request for Expedited Treatment, Case No. PAC-E-11-01 *et al.* (June 29, 2011) ("Petition").

the Commission's rejection of the Agreements, as well as Rocky Mountain Power's mischaracterization of pertinent Commission precedent, state and federal law, and Cedar Creek's arguments supporting reconsideration of the *June 8 Order*.[3]

I. REPLY COMMENTS

A. The Commission Should Disregard Rocky Mountain Power's Attempt to Exclude the Proper Application of Grandfathering Criteria to Determine the Date on Which a Legally Enforceable Obligation Arose

In an effort to separate the Commission's *June 8 Order* from the requirements of PURPA, Rocky Mountain Power asserts that the "concept of grandfathering is distinct from the concept of the establishment of a legally enforceable obligation."[4] Both PURPA[5] and Idaho law directly refute this very argument.[6] Determination of the standards governing the date on which a legally enforceable obligation is incurred is largely left to state implementation. Grandfathering criteria are the mechanism through which the effective date of the legally enforceable obligation (and by extension, the "lock-in" date for avoided cost rates under PURPA) is determined.

---

[3] Cedar Creek further submits that this timely-filed reply will not delay the Commission's consideration of the Petition within the prescribed 28-day review period.

[4] Answer at 6.

[5] Section 292.304(d)(2) of the Federal Energy Regulatory Commission's ("FERC") regulations establish as a matter of binding federal law that a QF is entitled to rates effective *at the time the obligation is incurred.* 18 C.F.R. § 292.304(d)(2). Grandfathering criteria are used to determine that date.

[6] *Rosebud Enterprises, Inc. V. Idaho Pub. Util. Comm'n*, 128 Idaho 609, 624, 917 P.2d 766, 781 (1996) ("*Rosebud I*") (concluding that "[c]onferment of grandfathered status on [a] qualifying facility is essentially an IPUC finding that a legally enforceable obligation to sell power existed by a given date"); *see also In the Matter of the Petition of Idaho Power Company for an Order Temporarily Suspending Idaho Power's PURPA Obligation to Enter into Contracts to Purchase Energy Generated by Wind-Powered Small Power Production Facilities*, Case No. IPC-E-05-22, Order No. 29872, at 9 (2005) ("Order No. 29872") (affirming that the Commission's adoption of a "legally enforceable obligation" standard to determine published rate entitlement in complaint and grandfathering cases was reasonable).

By viewing the grandfathering criteria through the prism of a *contract*, rather than a *legally enforceable obligation*, Rocky Mountain Power confuses the effective date of the Agreements with the date on which a legally enforceable obligation arose.[7] The need to determine the latter date as distinct from the former is precisely why the Commission has adopted grandfathering criteria over the course of more than two decades: because under PURPA, the two dates are not necessarily synonymous. To conclude otherwise is simply another way of holding that *only* a fully-executed contract can establish a legally enforceable obligation, a requirement expressly prohibited by PURPA.[8] The Commission's grandfathering criteria recognize this fact, by providing that a legally enforceable obligation (and an accompanying right to grandfathered rates effective as of the date of the legally enforceable obligation) can exist prior to both the *execution* of a contract, and the Commission's approval of the contract, even where a contract specifies that it will not be effective until approved by the Commission.[9] Thus, even if a "lock-in of rates does not occur until the Commission approves a contract to provide power,"[10] PURPA mandates that the locked-in rates in the contract be set as of the date

---

[7] Answer at 5.

[8] Rocky Mountain Power's assertion that a legally enforceable obligation does not arise until a commission *approves* a contract actually takes this argument one step further, by subjecting a QF not only to the whims of its counterparty utility, but to the review period of a commission as well. Answer at 4. As a result, it potentially eliminates *any* certainty available to the QF regarding its avoided cost rates, until the contract is actually approved.

[9] *E.g.*, *In the Matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement with Yellowstone Power, Inc. for the Sale and Purchase of Electric Energy*, Case No. IPC-E-10-22, Order No. 32104, at 12 (2010) ("*Yellowstone Order*") (approving on November 1, 2010 a contract executed on July 28, 2010, and grandfathering rates in effect prior to March 16, 2010).

[10] Answer at 4, n.6 (citing *Earth Power Resources, Inc. v. The Washington Water Power Co.*, Case No. WWP-E-96-6, Order No. 27231 (1997) ("*Earth Power*")). Cedar Creek also is not arguing that the Commission is prohibited from requiring that any legally enforceable obligation ultimately be reflected in a signed contract; quite the contrary, as a project developer, Cedar Creek believes that the certainty provided by a signed contract is beneficial to all parties, and Cedar Creek took every step possible to obtain a fully executed contract before December 14, 2010. However, Cedar Creek *is* contesting the Commission's erroneous conclusion that a legally enforceable obligation cannot be established until a contract is fully-executed.

the legally enforceable obligation was incurred, a determination that requires application of grandfathering criteria.[11]

B. Rocky Mountain Power's Misleading Recitation of the Commission's Grandfathering "Requirements" is Incorrect and Ignores Commission Precedent

Rocky Mountain Power wrongly asserts that "long-standing Idaho law" creates only "two paths by which a QF may establish a legally enforceable obligation under PURPA," *i.e.*, a fully executed power purchase agreement approved by the Commission, or a timely-filed complaint alleging that the QF would have obtained such an agreement but for the utility's refusal to negotiate one (referred to herein as the "'contract or complaint' standard"). This argument is telling. As Rocky Mountain Power would have it, either the utility alone has total control over a QF's PURPA rights by virtue of the power of its signature (or lack thereof), or the QF has to sue (by virtue of the "meritorious complaint process") to protect its PURPA rights. Accordingly, Rocky Mountain Power asserts that because Cedar Creek did not complete either path prior to December 14, 2010, it failed to establish a "legally enforceable obligation" entitling it to published avoided cost rates.[12] Notwithstanding the frightening policy implications of this position, Rocky Mountain Power's argument is fundamentally legally flawed. It ignores, or sloughs off as mere "exceptions,"[13] years of recent Commission precedent in which the Commission's grandfathering criteria required neither a fully-executed contract nor the filing of

---

[11] 18 C.F.R. § 292.304(d)(2). Rocky Mountain Power's citation to *Public Service Company of New Hampshire*, 131 FERC ¶ 61,027 (2010) for the proposition that FERC has recognized the "distinction between grandfathering and the establishment of a legally enforceable obligation" is misleading. That order addressed whether, and, if so, the circumstances under which, a QF's PURPA rights would survive following the termination of its local utility's PURPA purchase obligation, not a situation, as here, where a QF is simply seeking a determination by a state commission that it had established a legally enforceable obligation to specific avoided cost rates pursuant to 18 C.F.R. § 292.304(d)(2).

[12] Answer at 4, 7.

[13] Answer at 16.

a complaint prior to the announced effective date of a rate change, to establish a legally enforceable obligation.

As an initial matter, much of the precedent cited by Rocky Mountain Power does little more than recognize that the Commission has authority to establish standards for determining when a "legally enforceable obligation" is incurred.[14] This is a red herring, for Cedar Creek has not challenged this general authority; indeed, Cedar Creek's Petition supports it. Cedar Creek is directly challenging, however, the legally flawed manner in which the Commission chose to exercise its authority in this case by adopting a bright-line "fully executed contract" requirement for purposes of determining whether to grandfather the Agreements here.

In fact, nothing in the orders cited by Rocky Mountain Power codifies or mandates the "contract or complaint" standard in the manner suggested by Rocky Mountain Power. And rightly so, as Rocky Mountain Power cited not a single case from even the last decade in which the Commission applied that "long-standing precedent," let alone denied a QF's grandfathering request because a QF failed to establish a legally enforceable obligation solely by one of those two mechanisms. The authority cited by Rocky Mountain Power itself demonstrates that the "fully-executed contract or timely-filed complaint" options are not the only routes available to QFs seeking to establish a legally enforceable obligation and entitlement to grandfathered rates.[15] Indeed, the PUC has for many years, routinely approved grandfathered rates where (1) a

---

14 *E.g., Rosebud I*, 128 Idaho 609, 624, 917 P.2d 766, 781 (1996).

15 *See supra* n.16.

QF filed its complaint *after* the effective date of the proposed rate change,[16] or (2) no complaint was filed at all.[17]

Even if it were true that the only mechanism by which a QF could seek to protect its PURPA rights was to execute a contract or file a complaint, Cedar Creek has, consistent with Commission precedent, satisfied the "complaint" criterion by virtue of its conduct in these proceedings. The Commission's 2010 orders allowing grandfathered rates are particularly instructive, as in each case, while acknowledging the Commission's "contract or complaint" precedent, Idaho Power Company ("Idaho Power") argued that simply by the utility "signing the Agreement and voluntarily presenting it to the Commission," the QF had satisfied the purported requirement to "file a complaint" with the Commission.[18] And in each order, *both the Commission and Staff agreed with that conclusion*, with the Commission expressly affirming that it found the utility's "approach ... regarding contract rates to be consistent [or in concert] with the spirit of [the Commission's] prior grandfathering cases."[19] The Commission rightly

---

16 *E.g.*, *Earth Power* at 6-7 (granting a complaint requesting grandfathered rates filed on July 3, 1996, in response to a rate change effective on July 1, 1996); *Blind Canyon Aquaranch, Inc. v. Idaho Power Co.*, Case No. IPC-E-94-1, Order No. 25802, at 5 (1994) (granting a complaint requesting grandfathered rates filed on February 11, 1994, in response to a rate change effective on January 14, 1994).

17 *E.g.*, *In the Matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement for the Sale and Purchase of Electric Energy Between Idaho Power Company and New Energy Three, LLC (Double B)*, Case No. IPC-E-10-18, Order No. 32027, at 2, 4 (2010) ("*Double B Order*") (approving contract based on grandfathered rates in effect prior to March 16, 2010, despite contract being signed on May 24, 2010 and no complaint being filed, because grandfathering was "in concert with the spirit" of the Commission's prior grandfathering cases); *In the Matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement for the Sale and Purchase of Electric Energy Between Idaho Power Company and Salmon Falls Wind Park LLC*, Case No. IPC-E-05-33, Order No. 29951 (2006) (approving, with rates grandfathered as of August 4, 2005, a power purchase agreement executed on October 14, 2005).

18 *E.g.*, *In the Matter of the Application of Idaho Power Company for Approval of a Firm Energy Sales Agreement with Grand View Solar PV 1, LLC for the Sale and Purchase of Electric Energy*, Case No. IPC-E-10-19, Order No. 32068, at 2, 5 (2010) ("*Grand View Solar PV I Order*"); *Idaho Power Double B Order* at 2, 4.

19 *E.g.*, *Yellowstone Order* at 12; *Double B Order* at 4.

recognized that it could conduct the same thorough review of a project's maturity (and accompanying right to grandfathered rates) through these proceedings as through a complaint proceeding.

Accordingly, the Commission did not characterize these orders, as Rocky Mountain Power now does, as "exceptions" to the Commission's precedent, but rather as *fully consistent with that precedent*. In fact, in these orders the Commission cites not only to *A.W. Brown*, a case relied upon by Rocky Mountain Power to establish its claimed "long-standing" "contract or complaint" standard, but to *Order No. 29872*, the 2005 order affirming the very rate eligibility grandfathering criteria that Cedar Creek maintains should be applied here as well.[20] The Commission's citation to this precedent amply demonstrates that the Commission deemed both the 2005 criteria, and its 2010 orders, as establishing the standard for demonstrating a legally enforceable obligation entitled to grandfathered rates.[21]

What occurred in this case is, in all relevant respects,[22] no different from what occurred in numerous 2005 and 2010 grandfathering cases when Idaho Power presented to the

---

20 *E.g.*, *Yellowstone Order* at 12; *Grand View Solar PV I Order* at 5.

21 That the Commission deemed the 2010 cases as relevant precedent is particularly noteworthy because, as in the December 3, 2010 order announcing the effective date of a potential change in the rate eligibility cap, the Commission specified no grandfathering criteria in its March 16, 2010 order changing the published avoided cost rates. *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*, Case No. GNR-E-10-01, Order No. 31025 (2010); *In the Matter of the Joint petition of Idaho Power Company, Avista Corporation, and PacifiCorp dba Rocky Mountain Power to Address Avoided Cost Issues and to Adjust the Published Avoided Cost Rate Eligibility Cap*, Case No. GNR-E-10-04, Order No. 32131 (2010). Yet, the Commission nevertheless granted numerous requests for grandfathered rates by evaluating whether a legally enforceable obligation existed, based on whether (1) contract negotiations between the QF and utility were substantially complete prior to March 16, 2010, and (2) but for pending completion of the utility's internal contract reviews, a contract would have been signed prior to that date. *E.g.*, *Grand View Solar PV I* at 5; *Double B Order* at 4.

22 One immaterial difference is that Idaho Power supported the grandfathering requests in those cases, while Rocky Mountain Power opposes grandfathering in this instance. However, it is certainly inconsistent with the spirit, if not the letter, of PURPA to allow a utility's support or opposition to sway the determination of when a legally enforceable obligation existed.

Commission contracts containing published avoided cost rates, and requested a Commission determination as to the appropriateness of those rates. No complaints had been filed and the contracts had not been fully executed before the effective date of the rate change. And what Cedar Creek did in the instant matter is consistent with those cases: it promptly intervened and advocated in support of its right to grandfathered rates. Thus, it is not asking for any deviation from Commission precedent, but rather only its fair implementation.

What Rocky Mountain Power's reading of Commission precedent would ultimately require is that a QF pursuing grandfathered rates file a complaint alleging bad faith negotiations by the utility once it becomes clear that its contract would not be fully-executed *and approved by the Commission* prior to an announced effective date for a rate or eligibility cap change. This is both wildly impractical, in that it would sabotage the prospect of productive negotiations once the complaint was filed, and directly contrary to Rocky Mountain Power's purported interest in "administratively efficient" resolution of grandfathering claims,[23] as the Commission would be deluged with complaints requiring the same case-by-case determinations that Rocky Mountain Power so abhors. And, in this case, the Commission avoided this deluge only by withholding notice of its possible rejection of established grandfathering criteria in favor of a bright line "signed contract" standard, thereby depriving affected QFs of any indication whatsoever that a complaint might be needed to protect their rights.[24]

---

[23] Answer at 10.

[24] Rocky Mountain Power even asserts that Cedar Creek has not alleged that it "wrongly delayed signing the Agreements." Answer at 7, n.12. This is misleading at best, as Cedar Creek received and relied upon verbal and written assurances from Rocky Mountain Power prior to December 14, 2010 that Rocky Mountain Power anticipated being able to execute the Agreements before that date. Only in the days immediately preceding December 14, 2010 did it become clear that Rocky Mountain Power would not execute the Agreements before then. Had Cedar Creek been given notice that the Commission was backtracking from established precedent and that a signed contract or complaint was necessary, Cedar Creek would have filed what it believes would have been a "meritorious" complaint. As recounted at great length in the affidavit submitted by Dana Zentz in this proceeding, Cedar Creek was subjected to

Furthermore, Rocky Mountain Power's assertion that the "Commission has not established a regular practice of granting grandfathering for changes to the eligibility cap" is belied by the facts.[25] In each of the last two changes in the rate eligibility cap – first, in 2005, and again in 2010 – the Commission has in fact established grandfathering criteria to determine the date on which affected QFs established a legally enforceable obligation. Of course, the key difference between 2005 and 2010 is that in 2005, the Commission established criteria *which a QF could actually satisfy*, and did not inform QFs of those criteria six months late. In 2010, by comparison, the Commission created a "bright line" rule, months after the announced change in the eligibility cap, by which time it *knew* that none of the affected QFs could satisfy its new standard.

Finally, Rocky Mountain Power's reliance on *Power Resource Group, Inc. v. Public Utilities Commission of Texas*[26] is wholly irrelevant to Cedar Creek's Petition. Cedar Creek petitions this Commission to adhere to its own precedent, Idaho law, and PURPA and reverse its determination in the *June 8 Order* that a fully-executed contract is the sole basis to establish the date when a legally enforceable obligation is incurred. Thus, the fact that a court upheld a different standard – one that the court recognized was not expressly addressed by PURPA[27] – does not bear on whether the bright line test adopted by the Commission – which *is* expressly addressed and prohibited by PURPA – is consistent with federal and state law. Nor does it

---

repeated delays over nearly a year in its efforts to negotiate contracts with Rocky Mountain Power. Had Rocky Mountain Power acted with comparable diligence earlier in the negotiations, it is likely that this entire proceeding would have been moot, and the Agreements executed well in advance of the December 14, 2010 cutoff.

25 Answer at 15.

26 422 F.3d 231 (5th Cir. 2005) ("*Power Resource Group*").

27 *Id.* at 239.

address the notice issues raised even if *Power Resource Group* did provide support for the newly adopted bright line test.

C. The Commission Should Reject Rocky Mountain Power's Argument that the Notice Provided to Cedar Creek Was Sufficient Under Idaho Law

Rocky Mountain argues that the Commission had no obligation to provide *any* notice to Cedar Creek and other QFs of its adoption of the new "bright line" rule because the changed eligibility cap did not constitute a "rate" change subject to the 30-day notice requirement in Idaho Code § 61-307.[28] Yet, on the very next page it asserts that the notice requirements of Idaho's Administrative Procedure Act similarly did not apply because the Commission was engaged in its "legislative function" of rate-making.[29] By classifying the Commission's action as neither "heads nor tails," Rocky Mountain Power has conveniently created a regulatory black hole in which the Commission can freely act without providing *any* notice of its actions to affected parties. Regardless, *even if the revised eligibility cap does not constitute a rate change*, Idaho Code § 61-307 requires 30 days notice for any change to a *classification*, as well as in any rules relating to a *classification*.[30] Here, there can be no doubt that revising the eligibility cap, and re-classifying wind and solar QFs between 100 kW and 10 aMW as ineligible for published costs, constitutes such a change in classification subject, at minimum, to the 30-day notice requirement.

---

28 Answer at 12.

29 Answer at 13, n.28.

30 IDAHO CODE ANN. § 61-307 (providing that "no change shall be made by any public utility in any rate, fare, toll, rental, charge *or classification*, or in any rule, regulation, or contract relating to or affecting any rate, fare, toll, rental, charge, *classification* or service … except after thirty (30) days' notice to the commission and to the public as herein provided" (emphasis added)).

As if the justification for violating the Notice requirement makes a difference under the law,[31] Rocky Mountain Power explains that, in this instance, lack of notice was justified because had the Commission provided adequate notice affected QFs might have been able to actually execute their PURPA contracts prior to the date change.[32] This is a shocking and troubling admission by the utility, because it makes clear that only by depriving affected QFs of notice, could the Commission and the utilities achieve the desired result, restriction of PURPA rights. While Rocky Mountain Power presents the Commission with a rationalization for the lack of notice, nothing in the Commission's *June 8 Order* in any way indicates that it was the intent of the Commission to sandbag the affected QFs in the manner Rocky Mountain Power now posits.[33] And this outcome is at odds with the Commission's holding when it last lowered the eligibility cap in 2005, at which time it held:

> The Commission is obliged, however, to enforce PURPA and FERC rules and regulations that require utility purchases of QF capacity and energy. 18 C.F.R. § 292.303(a). Mandatory PURPA resources offered under the Commission approved avoided cost methodology cannot be declined by Idaho Power because the Company would prefer to acquire similar resources through a competitive non-PURPA IRP related RFP process.[34]

---

31 Even Rocky Mountain Power recognizes that the Commission has failed to adequately explain its reasoning, and effectively attempts to "coach" the Commission on how to remedy that failure. *E.g.*, Answer at 7, n.12 (arguing that, notwithstanding the fact that the Commission made no reference in the *June 8 Order* to the second "complaint" path discussed in RMP's Answer, "the Commission might note that Cedar Creek has not filed a complaint" in its order on reconsideration); Answer at 18 (arguing that, notwithstanding Rocky Mountain Power's allegation that the Commission had no obligation to provide notice of its change of the eligibility cap, "the Commission had good cause to act as it did, and may wish to further document such for the record").

32 Answer at 12-13.

33 Furthermore, even if it wanted to, the Commission may not create *post hoc* rationalizations for its findings in the *June 8 Order*. *See, e.g., Nw. Envtl. Def. Ctr. v. BPA*, 477 F.3d 668, 686 (9th Cir. 2007) (explaining that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained" (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007) (concluding that review is limited to the reasoning the agency relied upon in making its decision).

34 Order No. 29872 at 9.

The Commission understood then that it had an obligation to enforce PURPA even over the objection of the utilities. That obligation has not changed. The Commission also recognized in 2005 that it was appropriate for it to "consider the reasonable expectations of wind QFs in the negotiating queue for published rate contracts and to establish grandfathering criteria for those eligible projects actively engaged in contract negotiation with a utility and able to demonstrate project maturity and entitlement."[35] Cedar Creek asks only for application of that same standard.[36]

Rocky Mountain Power also wrongly dismisses Cedar Creek's due process rights to appropriate notice of the Commission's adoption of a "bright line" rule, by claiming that a QF has no due process rights 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."[37] But, Rocky Mountain Power is putting the proverbial cart before the horse, as the Petition's central question is whether, in fact, Cedar Creek *did* have a legally enforceable obligation prior to December 14, 2010, which *would* establish its due process right to the published avoided cost rates. This determination has no bearing on whether, as a separate matter of due process, Cedar Creek was

---

[35] Order No. 29872 at 10. Cedar Creek also notes that the Commission ultimately revised the effective date of its rate eligibility change from July 1, 2005, the date on which it provided notice of Idaho Power's request to change that cap, to August 4, 2005, the date on which it lowered the cap on an interim basis. Order No. 29872 at 11. The Commission emphasized that the utility "had a continuing obligation [through August 4, 2005] under PURPA, FERC rules, and the Orders of this Commission to offer to purchase QF power at the published rate and to engage in contract negotiations with eligible QFs." Order No. 29872 at 11.

[36] Applying the criteria adopted in 2005 would allow the Commission to determine, on a project-by-project basis, whether individual QF projects were sufficiently mature to qualify for grandfathered rates, and would not, therefore, necessarily result in approval of *all* of the rejected QF contracts.

[37] Answer at 13, n.29 (citing *Rosebud Enterprises, Inc. v. Idaho Pub. Util. Comm'n*, 131 Idaho 1, 12 (1997)).

properly entitled to notice of the Commission's adoption and imposition of its "bright line" rule.[38]

Finally, Rocky Mountain Power also claims that QFs should have assumed that, because Order No. 32131 failed to provide any grandfathering criteria, no such criteria would be forthcoming.[39] Rocky Mountain Power's argument is misplaced. The Commission's clear precedent in 2005 and 2010, including Commission orders issued as recently as *four days* prior to the utilities' November 5, 2010 petition to revise the eligibility cap,[40] provide established grandfathering criteria so there was, in fact, no reason to assume that the Commission would announce, six months later, criteria which conveniently not a single QF could retroactively satisfy. Rocky Mountain Power cites not a single prior instance of the Commission issuing patently-unattainable standards for determining the date by which a QF had established a legally enforceable obligation, so there is simply no precedent for what the Commission has done here, and certainly no precedent, *i.e.*, notice, that would have suggested to Cedar Creek that the Commission would deviate wildly from its past criteria as it has here.

---

38 Although, the Commission's failure to provide notice *despite having not yet determined* whether Cedar Creek had a legally enforceable obligation demonstrates what a results-driven process this and other related proceedings was, and raises its own due process concerns.

39 Answer at 15. Of course, criteria *were* forthcoming, just too late for Cedar Creek or any other QF to act quickly enough to enforce their PURPA rights.

40 *Yellowstone Order* (issued on November 1, 2010).

II. CONCLUSION

For the reasons described herein, Cedar Creek respectfully requests that the Commission consider this Reply, expeditiously grant its Petition, and provide the relief requested therein.

DATED this 12th day of July, 2011.

By: Ronald L. Williams

Ronald L. Williams
Williams Bradbury, Attorneys at Law
1015 W. Hays Street
Boise, ID 83702
Telephone: (208) 344-6633

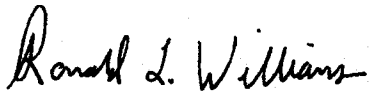
Larry F. Eisenstat
Michael R. Engleman
Dickstein Shapiro LLP
1825 Eye Street, NW
Washington, DC 20006-5403
Telephone: (202) 420-2200

Counsel for Petitioner Cedar Creek Wind, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of July, 2011, I caused to be served a true and correct copy of the foregoing document upon the following individuals in the manner indicated below:

Ted Weston **Rocky Mountain Power** 201 South Main, Suite 2300 Salt Lake City, UT 84111 E-Mail: ted.weston@pacificorp.com	☐ Hand Delivery ☐ US Mail (postage prepaid) ☐ Facsimile Transmission ☐ Federal Express ☒ Electronic Transmission
Daniel E. Solander **Rocky Mountain Power** 201 South Main, Suite 2300 Salt Lake City, UT 84111 E-Mail: daniel.solander@pacificorp.com	☐ Hand Delivery ☐ US Mail (postage prepaid) ☐ Facsimile Transmission ☐ Federal Express ☒ Electronic Transmission
Data Request Response Center PacifiCorp 825 NE Multnomah, Suite 2000 Portland, OR 97232 E-Mail: datarequest@pacificorp.com	☐ Hand Delivery ☐ US Mail (postage prepaid) ☐ Facsimile Transmission ☐ Federal Express ☒ Electronic Transmission
Kristine Sasser **Idaho Public Utilities Commission** 472 W. Washington (zip: 83702) PO Box 83720 Boise, ID 83720-0074 E-Mail: kris.sasser@puc.idaho.gov	☐ Hand Delivery ☐ US Mail (postage prepaid) ☐ Facsimile Transmission ☐ Federal Express ☒ Electronic Transmission
Kenneth E. Kaufmann Lovinger Kaufman LLP 825 NE Multnomah, Suite 925 Portland, OR 97232-2150 E-Mail: kaufmann@lklaw.com	☐ Hand Delivery ☐ US Mail (postage prepaid) ☐ Facsimile Transmission ☐ Federal Express ☒ Electronic Transmission



Ronald L. Williams