Office of the Secretary
Service Date
July 13, 2017

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE PETITION OF IDAHO POWER COMPANY FOR A DECLARATORY ORDER REGARDING PROPER CONTRACT TERMS, CONDITIONS, AND AVOIDED COST PRICING FOR BATTERY STORAGE FACILITIES	)))))))	**CASE NO. IPC-E-17-01** **ORDER NO. 33785**

On February 27, 2017, Idaho Power Company filed a Petition asking the Commission to issue a Declaratory Order regarding proper contract terms, conditions, and avoided cost pricing for five battery storage facilities requesting contracts under the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission issued a Notice of Petition and Notice of Modified Procedure setting deadlines for comments from the battery storage facilities, affected utilities, Staff, and any interested persons. Order No. 33729. The Commission also granted a joint Petition to Intervene by Sierra Club and Idaho Conservation League (ICL). Order No. 33743.

The Commission received comments from the battery storage facilities – Franklin Energy, LLC and Black Mesa, LLC – followed by comments from Commission Staff, Avista Corporation, Sierra Club/Idaho Conservation League (ICL), and Idaho Power. Each of the parties, except Black Mesa, also filed reply comments. *See* Order No. 33765 (granting Franklin Energy's unopposed Motion to extend deadline for reply comments). With this Order, the Commission grants IPC's request for a Declaratory Order.

BACKGROUND: PUBLIC UTILITY REGULATORY POLICIES ACT

PURPA was passed as part of the National Energy Act of 1978. The Act's goals include the encouragement of electric energy conservation, efficient use of resources by electric utilities, and equitable retail rates for electric consumers, as well as the improvement of electric service reliability. 16 U.S.C. § 2601 (Findings). Under the Act, the Federal Energy Regulatory Commission (FERC) prescribes "broad, generally applicable rules" for PURPA's implementation. *Portland General Electric Co. v. FERC*, 854 F.3d 692, (D.C. Cir. 2017); 16 U.S.C. § 824a-3(a), (b). The Act also "requires state public-utility commissions to implement FERC's rules at the local level." *Portland General Electric*, 854 F.3d 692; 16 U.S.C. § 824a-3(f). State commissions "may comply with the statutory requirements by issuing regulations, by

resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules." *FERC v. Mississippi*, 456 U.S. 742, 751 (1982). State commissions have "discretion in determining the manner in which the rules will be implemented." *Idaho Power Company v. Idaho Pub. Util. Comm.*, 155 Idaho 780, 782, 316 P.3d 1278, 1280 (2013).

PURPA requires electric utilities, unless otherwise exempted, to purchase electric energy from QFs. 16 U.S.C. § 824a-3; *see also* 18 C.F.R. § 292.101 (defining QFs), 292.303(a). In Idaho, the purchase rate for a utility's contract to purchase QF energy under PURPA must be approved by this Commission. *Idaho Power*, 155 Idaho at 789, 316 P.3d at 1287.

Under PURPA, the purchase rate for PURPA contracts shall not exceed the "incremental" or "avoided cost" to the utility, defined as the cost of energy which, but for the purchase from [the QF], such utility would generate or purchase from another source. 16 U.S.C. § 824a-3(d); 18 C.F.R. § 292.101(6) (defining avoided costs). However, FERC rules require establishment of "standard rates for purchases from [QFs] with a design capacity of 100 kilowatts or less," and allow "standard rates for purchases from [QFs] with a design capacity of more than 100 kilowatts." 18 C.F.R. § 292.304(c)(1), (2). FERC rules provide that standard rates "[m]ay differentiate among [QFs] using various technologies on the basis of the supply characteristics of the different technologies." 18 C.F.R. § 292.304(c)(3)(ii).

This Commission has established two methods of calculating avoided cost, depending on the size of the QF project: (1) the surrogate avoided resource (SAR) methodology, and (2) the integrated resource plan (IRP) methodology. *See* Order No. 32697 at 7-8. The Commission uses the SAR methodology to establish standard or "published" avoided cost rates. *Id.* Currently, the eligibility cap for wind and solar QFs to access published avoided cost rates is set at 100 kilowatts (kW). QF projects other than wind and solar are subject to a published rate eligibility cap of 10 average megawatts (aMW). Order Nos. 32262 at 1, 32697 at 7-8.

PURPA and FERC's implementing regulations do not dictate a requisite term length for contracts under PURPA. *See Afton Energy, Inc. v. Idaho Power*, 107 Idaho 781, 785-86, 693 P.2d 427, 431-32 (1984); *Idaho Power*, 155 Idaho at 782, 316 P.3d at 1280. Consequently, state jurisdictions have identified varying minimum contract terms. Since PURPA was first implemented in Idaho, this Commission has periodically modified the maximum length for PURPA contracts. *See* Order No. 29029. In 2015, this Commission reduced the term for

individually-negotiated PURPA contracts (those not subject to published rates) in Idaho from 20 years to 2 years. Order Nos. 33357, 33419. The contract term for published rate contracts remains at 20 years. *See* Order No. 33253 (clarifying that the proceedings concerned the contract term for QFs exceeding the published rate eligibility cap).

IDAHO POWER'S PETITION

Idaho Power stated it received requests for PURPA contracts from five battery storage facilities (self-certified as QFs)[1] asserting they are entitled to published avoided cost rates and 20-year terms. Petition at 2. The five facilities are Franklin Energy Storage One, Two, Three, and Four, LLCs and Black Mesa, LLC,[2] and the contracts request 148 MW of total combined energy storage. *Id.* at 4, 7. Idaho Power informed Franklin and Black Mesa that it did not believe any of the storage facilities are eligible for published rates and 20-year contracts. *Id.*

Idaho Power acknowledged that "QF status is within the exclusive jurisdiction [of] and properly before FERC"; thus for purposes of its Petition, the Company did not challenge the QF status of Franklin and Black Mesa. *Id.* at 6. Idaho Power asserted the Commission has jurisdiction to issue a Declaratory Order. *Id.* at 5. Thus, the Company requested a Declaratory Order that the Franklin and Black Mesa QFs and other battery storage facilities "are subject to the same 100 kW published avoided cost rate eligibility cap applicable to wind and solar facilities." *Id.* at 13. The Company also requested a ruling that "the proper authorized avoided cost rate for battery storage facilities . . . that exceed 100 kW nameplate capacity, is [a rate based on] the incremental cost IRP methodology with a maximum contract term of two years." *Id.* at 13-14.

Idaho Power noted that "the generation source that energizes all of the Proposed Battery Storage Facilities is solar generation," and "the output profile submitted for each of the . . . Facilities matches the shape and timing of the generation profile of a solar generator." *Id.* at 7 (citing Attachments 1-5). According to the Company, the potential benefits of an economically

[1] Petition at 4. Franklin and Black Mesa submitted a FERC Form 556 for each of the proposed projects, self-certifying that the projects are QFs under 18 C.F.R. § 292.207(a). *See* Attachments 1-5 to Petition.

[2] The Black Mesa QF is owned by Redwood Energy, LLC, which submitted comments on behalf of Black Mesa as its corporate owner. However, "Black Mesa Energy, LLC" submitted its Schedule 73 PURPA contract request form to Idaho Power on its own behalf. Attachment 5 to Petition, at 4.

viable utility-scale energy storage facility[3] cannot be recognized if QFs "are configured in such a manner as to come under published rates," or structured to "pass[ ] through as many kW hours as possible…to maximize revenue," as proposed by Franklin and Black Mesa. *Id.* at 8.

The Company believes that Franklin and Black Mesa are using their QFs to "circumvent the Commission's rules and requirements in its implementation of PURPA for the state of Idaho." *Id.* The Company asserted the Franklin and Black Mesa QFs are "nothing more than a pass through of the solar generation [that will energize their batteries], in what appears to be a blatant attempt to manipulate the 100 kW published rate eligibility cap and two-year contract limitation for solar generators." *Id.* at 9. The Company argued it is appropriate and necessary for the Commission to grant its requested declaratory relief "extend[ing] the 100 kW published rate eligibility cap to battery storage projects . . . to protect customers from this manipulation of the rules." *Id.* at 13.

COMMENTS

A. Franklin Energy

Franklin opposed Idaho Power's Petition. Franklin asserted there is no "legal controversy" because the Commission's Orders and policy rulings are "clear [and] unequivocal" in supporting Franklin's entitlement to published avoided cost rates for up to 20 years. Franklin Comments at 1-2, 11-12. Franklin quoted Commission Order No. 32697, which provides, "We find that a 10 aMW eligibility cap for access to published avoided cost rates for resources other than wind and solar is appropriate to continue to encourage renewable development while maintaining ratepayer indifference." *Id.* at 7 (quoting Order No. 32697 at 14 (emphasis by Franklin)). Also, Franklin quoted the Commission's decision to "maintain the eligibility cap at 10 aMW for QF projects other than wind and solar (including but not limited to biomass, small hydro, cogeneration, geothermal, and waste-to-energy)." *Id.* at 10 (quoting Order No. 32697 at 9 (emphasis by Franklin)).

Franklin argued that, because Commission Order No. 32697 is clear, there "are no adverse legal interests," and Idaho Power's request must be construed as a request to reconsider or revise Order No. 32697. *Id.* at 2, 4. For such relief, Franklin contended, it and any potentially affected parties must receive notice and the opportunity to present evidence and cross-examine

[3] The Company states that the potential benefits of economically viable, utility-scale energy storage facilities include "provid[ing] ancillary grid services such as reserve capacity, surge capacity, load-balancing, or voltage support; firming [ ] variable generation; or time-shifting generation to match load." Petition at 8.

witnesses. *Id.* at 3-4. Franklin also argued that the Commission's decision in such a proceeding must be prospective only, and thus not apply to its legally enforceable contracts with Idaho Power for the four proposed battery storage QFs. *Id.* at 4-5.

In addition, Franklin challenged – and asked the Commission to disregard – a number of factual assertions in Idaho Power's Petition. Franklin contended that, contrary to the Company's claims, the Franklin QFs (1) "contemplated" energy sources in addition to solar; (2) have offered to be dispatchable; and (3) will have the ability – "to varying degrees" – to provide ancillary grid services, firming of variable generation, and time-shifting generation to match load. *Id.* at 14. Further, Franklin disputed that its QFs will merely "pass through" solar power, arguing that they would instead "utilize renewable energy as input into the battery storage system . . . [that would then be] used to provide a non-intermittent, dispatchable product." *Id.* at 15.

Finally, Franklin asserted that it has complied with all the requirements of the Company's Tariff Schedule 73, which outlines PURPA contracting procedures, and that as such it has established LEOs and is entitled to published rates and 20-year contracts. *Id.* at 17.

B. Redwood Energy for Black Mesa

Redwood Energy, LLC, which owns the Black Mesa QF, submitted brief comments on Black Mesa's behalf, asserting that it qualifies for published rates "because it is a QF [with] output of less than 10 [aMW] but is not a wind or solar QF that would be restricted to 100 kW." Redwood Comments. Redwood contended that the Black Mesa QF "has fundamentally different characteristics than a wind or solar project without energy storage." *Id.* According to Redwood, battery storage "makes output both more predictable and more coincident with system load, thus [resulting in] a higher Net Qualifying Capacity." *Id.* Redwood asserted that "[e]nergy storage will reduce Idaho Power's requirements for Resource Flexibility, thus avoiding a cost that would be borne but for" the Black Mesa QF project. *Id.* Redwood further asserted, "This is a dispatchable system that will offer ancillary grid services such as voltage support, load shifting, reserve capacity, load-balancing, [and] firming of variable generation or time-shifting to match load." *Id.*

C. Staff

Staff believes there is a legal dispute that can be properly addressed by a Declaratory Order, namely the terms of PURPA contracts between Idaho Power and the battery storage QFs.

Staff maintained that Franklin's and Black Mesa's position that they are clearly entitled to published avoided cost rates under the language of Order Nos. 32262 and 32176 is an "overly simplistic analysis." Staff Comments at 7. Staff asserted that "the energy source of a battery system is not an electro-chemical reaction." *Id.* at 8. Rather, "a battery storage facility can be a QF only if its energy source complies with PURPA and PURPA regulations," consistent with FERC's analysis in *Luz Development and Finance Corporation*, 51 FERC P 61,078 (1990), a FERC order cited in Franklin's comments. *Id.*

Staff thus reasoned "it is appropriate to look to the Franklin and Black Mesa QFs' energy sources in determining their eligibility for published rates." *Id.* Staff highlighted that Franklin's and Black Mesa's requests for PURPA contracts identified solar as the energy source, although they have "contemplated" other sources. *Id.* at 8-9 (citing Franklin Comments at 14 and arguing that "mere contemplation of an alternate source is insufficient to obligate a utility to purchase power from a battery storage QF with rates and contract terms based on that hypothetical source"). Staff thus argued that Franklin and Black Mesa are subject to the 100 kW published avoided cost rate eligibility cap. *Id.* at 9. Staff asserted that Franklin and Black Mesa – as currently configured – exceed that cap, and are thus eligible for two-year terms and negotiated avoided cost rates under the IRP methodology. *Id.*

Staff argued that Franklin and Black Mesa were interpreting isolated parts of Commission orders, but ignoring the intent of the orders gleaned by reading them in their entirety and in context. Staff Comments at 9-10, *quoting Hayes v. City of Plummer*, 159 Idaho 168, 170, 357 P.3d 1276, 1278 (2015) (other citation omitted) (statutory "provisions should not be read in isolation, but must be interpreted in the context of the entire document").

Staff asserted, "A battery storage QF that would not exist except for its energy source should not be able to evade an eligibility cap that would otherwise be applied to its energy source." Staff Comments at 11. "Here, Franklin and Black Mesa – battery storage QFs currently intending to use solar as their energy source – should not be exempt from this Commission's eligibility cap which was intended to prevent disaggregation of large solar projects." *Id.* Staff argued Franklin's and Black Mesa's interpretation that they are eligible for published rates under Order No. 32262 is contrary to the Commission's intent – ignored by Franklin and Black Mesa, but expressed throughout Order No. 32262 – to prevent disaggregation. *Id.* at 9-11.

Finally, Staff disputed Franklin's contention that it established a LEO. *Id.* at 9. The Idaho Supreme Court affirmed this Commission's determination that a LEO "requires a showing that there would have been a contract but for the actions of the utility." *Idaho Power*, 155 Idaho at 787. Given the undisputed facts that Franklin and Black Mesa proposed to configure their QFs with solar energy sources, Staff determined there was no indication that Idaho Power impeded formation of PURPA contracts. Staff Comments at 9.

Given the broader implications of issues raised in the case, Staff recommended that the Commission initiate a general investigation into the appropriate contract terms for battery storage QFs. Staff Comments at 11.

D. Avista

Avista Corporation supported Idaho Power's Petition. Avista asserted that battery storage facilities "should be classified, and treated, in the same manner as the facilities that provide the primary energy source for such battery storage facilities." Avista Comments at 5, 3-4 (discussing *Luz*, 51 FERC P 61,078). In other words, battery storage facilities using wind or solar facilities as their primary energy source should be treated as wind or solar QFs. *Id.* Avista proposed that if the Commission rejects the proposal to treat battery storage facilities in the same manner as their primary energy source, then the Commission should "initiate a generic proceeding to determine the appropriate treatment of such facilities." *Id.* at 5. Finally, Avista recommended that the Commission put a "moratorium on energy storage QFs with nameplate capacities above 100 kW to protect utility customers during [a generic] proceeding." Avista Comments at 5-6.

E. Sierra Club and ICL

Sierra Club and ICL opposed Idaho Power's Petition, arguing that the Company is asking to modify prior Commission Order Nos. 32262 and 33357, and that a petition for declaratory order is therefore not the appropriate process. Sierra Club/ICL Comments at 1-2. Sierra Club and ICL asserted that the Commission's "inherent, derivative" authority under the Idaho Uniform Judgments Act "must yield to" the statutory process for "rescinding, altering or amending prior orders" under *Idaho Code* § 61-624, because otherwise the procedures set forth in *Idaho Code* § 61-624 "become superfluous." Sierra Club/ICL Comments at 3.

The bulk of Sierra Club and ICL's comments challenged the validity of Order No. 33357, the final Order from consolidated proceedings on petitions by Idaho electric utilities to

shorten PURPA contract lengths for projects with IRP-based avoided cost rates. Sierra Club/ICL Comments at 4-19. Sierra Club and ICL raised several arguments why Order No. 33357 is invalid, and concluded that "the Commission cannot extend [an Order that] exceeded the Commission's jurisdiction." *Id.* at 19. Sierra Club and ICL recommended that the Commission "revisit Order No. 33357 for wind and solar projects." *Id.*

Sierra Club and ICL asserted, to the extent the Commission considers whether to limit the length of contracts for battery storage facilities, "it must hold a hearing and make findings that the contract term allows reasonable opportunity for QFs to attract financing for viable projects." *Id.* at 2.

REPLY COMMENTS

A. Idaho Power

On reply, Idaho Power stated that the proposed battery storage facilities have not established a LEO. Idaho Power Reply at 7-9. The Company detailed communications between Idaho Power and the battery storage QFs demonstrating the Company's efforts and actions prior to filing its Petition here, and attached supporting records. *Id.* (Attachments 1-2).

Idaho Power further asserted a generic case was not needed. Idaho Power Reply at 5-6. However, the Company indicated it "is not necessarily opposed to such proceedings." *Id.*

B. Franklin and Black Mesa

In its reply, Franklin asserted that Staff is simply ignoring the "clear and unequivocal ruling by this Commission that all QFs other than solar and wind are entitled to twenty-year contracts." Franklin Reply at 8. Franklin noted that, "in *Luz*, FERC was *not* 'evaluating battery storage facilities' for the purpose of determining their eligibility for published rates and twenty-year contract terms." Franklin's Reply at 2 (emphasis by Franklin). Franklin highlighted that FERC's conclusion in *Luz* was that "energy storage facilities such as the proposed Luz battery system are a renewable source for purposes of QF certification." *Id.* (quoting *Luz* at 10). Franklin argued that Idaho Power, Staff and Avista "conveniently ignore the distinct legal status FERC has declared as to energy storage QFs." *Id.* at 3-4.

Franklin took no position on Staff's recommendation to open a generic case, except to assert that "such new generic dockets will only have prospective effect." Franklin Reply at 11.

C. Staff

Staff disagreed with Sierra Club and ICL's argument that the petition be construed as a request to modify the Commission's Orders. Staff Reply at 3. Staff noted that the Company's request is *consistent* with Order No. 32262, and consistent with *Luz*. *Id.* "Thus there is no reason – as Sierra Club and ICL contend – for Idaho Power to seek modification of Order No. 32262." *Id.* Staff further noted that the Company's Petition seeks to apply Order No. 33357 without modification. *Id.* at 4.

Staff disputed the argument by Sierra Club and ICL challenging the validity of Order No. 33357. Staff argued that their challenges exceed the scope of Idaho Power's Petition, and are barred by *Idaho Code* § 61-625, which precludes collateral attack on a final order of the Commission. Staff Reply at 4-5.

As to Avista's recommended moratorium on energy storage QFs larger than 100 kW, Staff recommended instead that the Commission allow such QFs to enter PURPA contracts, but that the Commission temporarily set a 100 kW threshold for battery storage facilities to be eligible for published avoided cost rates, pending the outcome of a generic proceeding. Staff Reply at 2. Staff stated this "would ensure that Idaho Power complies with its obligation to purchase under PURPA while also protecting ratepayers by ensuring accurate avoided cost rates." *Id.* at 2-3.

D. Sierra Club and ICL

In their reply, Sierra Club and ICL argued that Staff erred in asserting that the issue of contract length is in the discretion of state commissions based on FERC's silence about contract length in its implementing regulations. Sierra Club/ICL Reply at 2-4. Sierra Club and ICL also again addressed, as they did in their opening comments, the issue of contract length as it relates to QFs' financial viability. *Id.* at 4-6.

COMMISSION FINDINGS AND DECISION

This Commission has jurisdiction over Idaho Power, an electric utility, pursuant to the authority and power granted it under Title 61 of the Idaho Code and PURPA. *Idaho Code* §§ 61-129, 61-501; 16 U.S.C. § 824a-3(f). The Commission has authority under PURPA and FERC's implementing regulations to set avoided costs, order electric utilities to enter into fixed-term obligations for the purchase of energy from QFs, and implement FERC rules. *See supra* Background.

Also, the Commission has jurisdiction to issue declaratory orders under Title 61 of the Idaho Code and the Idaho Uniform Declaratory Judgments Act of 1933, *Idaho Code* §§ 10-1201 *et seq.* *See Utah Power & Light v. Idaho Pub. Util. Comm'n*, 112 Idaho 10, 12, 730 P.2d 930, 932 (1986) (PUC had jurisdiction to determine which regulated electrical utility had the right to be the sole supplier of electricity to electric customer under the Uniform Declaratory Judgments Act). A declaratory judgment "must clarify and settle the legal relations at issue, and afford leave from uncertainty and controversy which gave rise to the proceeding." *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988 (1984) (citing *Sweeney v. Am. Nat'l Bk.*, 62 Idaho 544, 115 P.2d 109 (1941)). For a declaratory judgment to be rendered, there must be "an actual or justiciable controversy" that is "real and substantial," and "definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 516 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

Under the applicable statutes and case precedent, and in light of the circumstances here, we have jurisdiction to issue a declaratory order. Idaho Power disagrees with Franklin and Black Mesa as to which avoided cost rate and eligibility cap should apply to the two battery storage developers for purposes of forming PURPA contracts. Both sides contend their respective interpretations of applicable law should govern their contracts. We thus find the Company, Franklin and Black Mesa have adverse legal interests about which there is "an actual or justiciable controversy" that is "real and substantial," and "definite and concrete," that we have jurisdiction to clarify and resolve. *See Harris*, 106 Idaho at 516 (quoting *Aetna Life Ins.*, 300 U.S. at 240-41). We reject Sierra Club's and ICL's argument that the Company is actually seeking modification of the Commission's prior Orders. Sierra Club/ICL Comments at 1-2. We further find Sierra Club/ICL's challenge to the validity of Order No. 33357 to be an impermissible collateral attack, pursuant to *Idaho Code* § 61-625.

We are unaware of any reference in PURPA or FERC's implementing regulations that identifies battery storage as a renewable resource eligible for QF status and the benefits provided by the Act. Indeed, FERC acknowledged that "[n]either the statute nor the final rule refers specifically to energy storage systems." *Luz* at 61,171. Consequently, our ruling on the narrow declaratory issue before us should not be read to presume that this Commission deems battery storage to be a legitimate qualifying facility eligible for the benefits of PURPA and

subject to the Act's implementing regulations under FERC. The battery storage facilities' QF status is a matter within FERC's jurisdiction and is not at issue in this case.

Although FERC goes on in *Luz* to summarily include battery storage as a renewable resource for purposes of QF certification, it does so with specific parameters. FERC distinguishes battery storage from energy sources that generate electric energy and provide the battery with its resource. FERC states that ". . . in order for a storage facility to be a QF the primary energy source for generation of this energy must be one of those contemplated by the statute for conventional small power production facilities. . . ." *Id.* "Section 3(17)(A) of the FPA defines a small power production facility as one which 'produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources or any combination thereof.'" *Id.*, *citing* 16 U.S.C. § 796(17)(A)(i) (1988). "Primary energy source is defined as the fuel or fuels used for the generation of electric energy. . . ." *Id.*, *citing* 16 U.S.C. § 796(17)(B)(i) (1988).

Luz attempted to convince FERC that a battery storage facility independently meets the definition of a primary energy source because it generates energy when an electro-chemical reaction discharges the stored power from the battery. *Id.* at 61,169. Luz further argued that the time shifting capability of energy storage "can only make sense and be implemented if energy storage facilities like the proposed battery system are allowed to operate as QFs and to use electric energy without an inquiry as to the source of energy used to generate that electricity." *Id.* at 61,170. FERC rejected this position. "Contrary to Luz's assertion, the primary energy source of the battery system is not the electro-chemical reaction. Rather, it is the electric energy which is utilized to initiate that reaction, for without that energy, the storage facility could not store or produce the electric energy which is to be delivered at some later time. Since this energy is the primary energy source of the facility, it is necessary to look to the source of this energy as the ultimate primary energy source of the facility." *Id.* at 61,171.

FERC confirmed that energy storage facilities are not renewable resources/small power production facilities *per se*. *Id.* Electric input is required to produce electric output from a storage facility. *Id.* at 61,172. For this reason, in order to qualify as a PURPA resource, the primary energy source behind the battery storage must be considered. We must, then, look to Franklin's and Black Mesa's primary energy sources in order to determine their eligibility under PURPA. The primary energy source for Franklin and Black Mesa is solar generation.

Moreover, the energy generation output profiles for the battery storage facilities are a direct reflection of the solar generation that operates as the primary energy source for the battery storage facilities. Petition at 7, Attachments 1-5.

Accordingly, we find it appropriate to base Franklin's and Black Mesa's eligibility under PURPA on its primary energy source – solar. Solar resources larger than 100 kW are entitled to negotiate two-year PURPA contracts through the use of Idaho's IRP methodology. Franklin's argument that this Commission's prior decisions clearly and unequivocally allow it entitlement to published rates ignores FERC's pronouncement that energy storage facilities are not *per se* renewable resources/small power production facilities under PURPA.

Franklin further maintains that it has established a legally enforceable obligation (LEO) requiring Idaho Power to purchase its energy. Franklin Comments at 17. However, Franklin has failed to prove that Idaho Power impeded Franklin's ability to enter into PURPA contracts. *See Idaho Power*, 155 Idaho at 787. To the contrary, Idaho Power notified the battery storage facilities that the utility did not believe the projects were entitled to 20-year, published rate contracts and requested the projects "supplement your Applications with additional information that verifies eligibility for the requested rates and terms, or modify your Applications to request rates and terms that your proposed projects may qualify for." Petition, Attachment 6.

"FERC has given each state the authority to decide when a LEO arises in that state." *Idaho Power*, 155 Idaho at 787, *quoting Power Resource Group, Inc. v. Public Utility Comm'n of Texas*, 422 F.3d 231, 239 (5th Cir. 2005). The facts and evidence in this case reveal that the parties were in active negotiations which resulted in Idaho Power's Petition for a declaratory ruling. We decline to interpret a reasonable dispute between the parties regarding contract terms and conditions as intransigence or a failure to negotiate on the part of the utility. Therefore, we find that no action (or inaction) of the utility has triggered the creation of a legally enforceable obligation.

Finally, based on the above findings regarding the characteristics of battery storage and the compulsory consideration of its underlying primary energy source, we find a generic investigation unnecessary. We grant Idaho Power's Petition for a declaratory ruling to address and resolve the legal dispute between Idaho Power and Franklin Energy/Black Mesa arising out of contract negotiations between the two parties. We find that, as storage facilities with design

capacities that will exceed 100 kW each and with solar as their primary energy source, the projects are eligible for two-year, negotiated (IRP methodology) contracts.

ORDER

IT IS HEREBY ORDERED that Idaho Power's Petition for declaratory relief is granted as set forth above.

THIS IS A FINAL ORDER. Any person interested in this Order may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code* § 61-626.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 13th day of July 2017.

PAUL KJELLANDER, PRESIDENT

KRISTINE RAPER, COMMISSIONER

ERIC ANDERSON, COMMISSIONER

ATTEST:

Diane M. Hanian
Commission Secretary

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