EXHIBIT 5

Rogerson, Idaho

Franklin Energy Storage One LLC

Franklin Energy Storage Two LLC

Franklin Energy Storage Three LLC

Franklin Energy Storage Four LLC

Jackpot Solar Substation

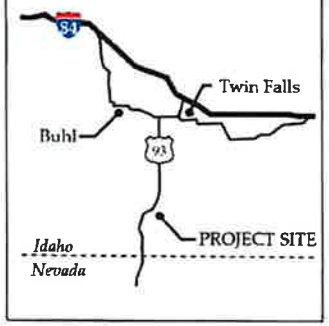
DIRECTIONS TO PROJECT SITE FROM TWIN FALLS
From Highway 30, head South on Highway 93 for 25 miles
Project Site is located off of Highway 93 just South of the town of Rogerson, Idaho

PROJECT SUMMARY
Total Acreage: Jackpot Solar 2: ±1,450 acres
Existing Zoning: Agricultural Preservation (Ag Pres)

DEVELOPER INFORMATION
Mr. Robert Paul
Alternative Power Development, Northwest, LLC
515 N. 27th St., Boise, ID 83702
(760) 861-1104
robertapaul08@gmail.com

LEGAL DESCRIPTION
That portion of land south of Idaho State Highway 93 located in Township 14 South, Range 16 East, Sections 17, 19, 20, and 29

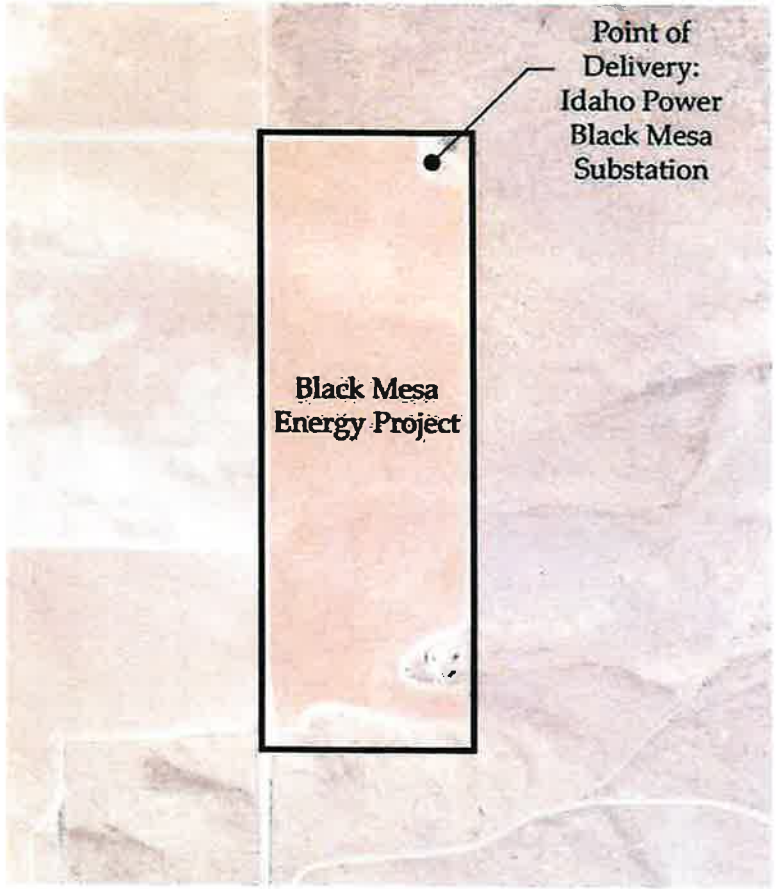
LOCATION

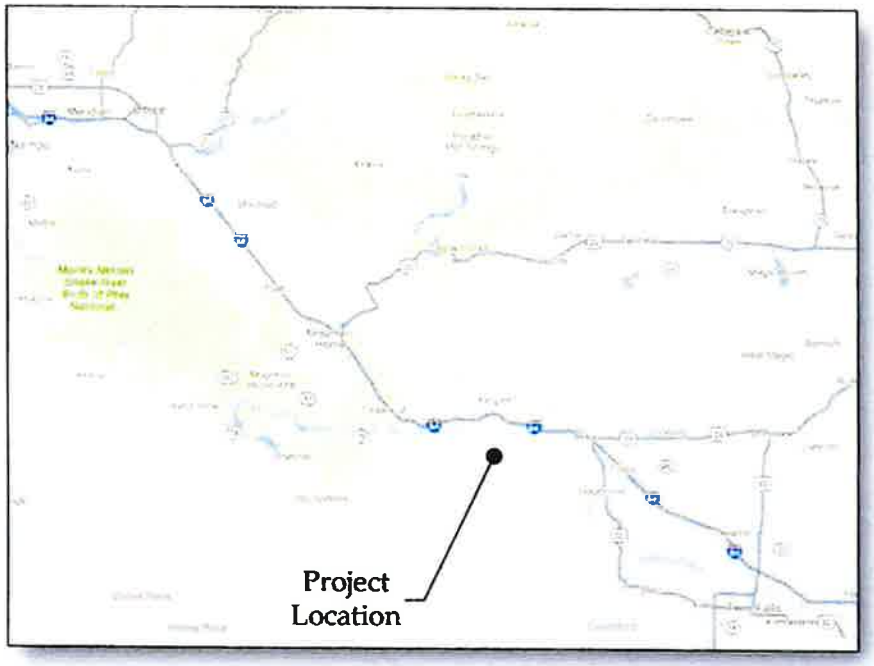


ALTERNATIVE POWER DEVELOPMENT

FRANKLIN ENERGY STORAGE

DATE	SITE PLAN SCALE	REV
01/09/2017	NTS	0





Black Mesa Energy Project	20 MW Energy Storage + Renewable Energy	Lat/Long: 42.904, -115.183 Location: Elmore County, Idaho

EXHIBIT 6

IDAHO POWER
An IDACORP Company

February 9, 2017

Franklin Energy Storage
Peter Richardson
Richardson Adams, PLLC
515 N. 27th Street
Boise, ID 83702

VIA: Email Only – peter@richardsonadams.com

RE: Franklin Energy Storage One, Two, Three, and Four Schedule 73 Energy Sales Agreement Applications

Mr. Richardson,

Idaho Power is in receipt your Schedule 73 Energy Sales Agreement Applications ("Applications") dated January 26, 2017, for the proposed Franklin Energy Storage One, Franklin Energy Storage Two, Franklin Energy Storage Three, and Franklin Energy Storage Four projects. As of the date of this letter, the Applications are not complete due to the following:

Your Applications state that the projects are seeking published avoided cost rates, Rate Option 4 – Non-Levelized Non-Fueled Rates, and a (20) twenty-year contract term. Based on the data provided with your Applications, it appears that these proposed projects may exceed 10 average-MW measured on a monthly basis. In addition, the map provided with your Applications indicates that all the projects appear to be within 1 mile of each other as they are all located adjacent to each other within the same square-mile.

Although you state in your Applications that Facility interconnection status is "pending", it is my understanding that no Generator Interconnection Applications have been submitted to Idaho Power for these proposed projects, nor have you identified any Point of Interconnection or Point of Delivery. However, your provided map identifies the Jackpot Solar Substation near the proposed projects.

It appears that you are intending to add battery storage to the solar generation projects that you had previously submitted Schedule 73 Energy Sales Agreement applications for: Jackpot Solar North, South, East, and West. Further, the only evidence provided of the proposed Franklin energy storage projects being Qualifying Facilities ("QFs") are the self-certification Form 556s purporting to certify non-generator storage units as PURPA QFs.

Given the deficiencies identified above, it does not appear that your proposed projects qualify for Rate Option 4 – Non-Levelized Non-Fueled Rates and a twenty (20) year contract term. If you wish to proceed with these Applications, please supplement your Applications with additional information that verifies

1221 W Idaho St. (83702)
P.O Box 70
Boise, ID 83707

eligibility for the requested rates and terms, or modify your Applications to request rates and terms that your proposed projects may qualify for.

Idaho Power is unable to begin any preparation of indicative pricing proposals for your proposed projects until the Application information identified above is received and the Applications have been deemed complete.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Michael Darrington
Energy Contracts Leader
Phone: (208)388-5946
Email: mdarrington@idahopower.com

Cc: Donovan Walker (IPC)
Mike Polito (IPC)
Robert Paul (Franklin)

EXHIBIT 7

Peter Richardson
Franklin Energy Storage One, LLC
515 N. 27th Street
Boise, Idaho 83702
peter@richardsonadams.com

February 10, 2017

Michael Darrington
Senior Energy Contract Coordinator
Idaho Power Company
1221 West Idaho Street
Boise, Idaho 83702
HAND DELIVERY

Re: Revised Qualifying Facility Energy Sales Agreement Application Franklin Energy Storage One, LLC; Franklin Energy Storage Two, LLC; Franklin Energy Storage Three, LLC and Franklin Energy Storage Four, LLC

Dear Mr. Darrington:

Thank you for your response yesterday to the above referenced Qualifying Facility Energy Sales Agreement Applications ("Applications"). Your letter provided that "given the deficiencies" you identified in the Applications that these four projects are not entitled to Option 4 rates and contract terms. Schedule 73 required that your response notify the projects of "any deficiencies." Based on that requirement, I assume the deficiencies identified in your letter are the only deficiencies you have identified. Hence once they are resolved, the projects will be able to move forward to the next step in the in the Application process which is the provision of indicative pricing proposals. Each deficiency you identify is addressed below:

Ten Average-MW Measured on a Monthly Basis:

You note that it "appears that these proposed projects may exceed 10 average-MW measured on a monthly basis. Based on further review of the 24X7 spreadsheet that accompanied the Applications you appear to be correct. We have consulted with our engineering team and they confirm the spreadsheets incorrectly represented the anticipated output from the projects. Attached is a revised "Schedule of estimated Qualifying Facility electric output in an 8,760-hour electronic spreadsheet format" for the projects. As you can see, the estimate production values are below the 10 average-MW measured on a monthly basis threshold. In addition, I would note that the projects will be electrically and mechanically designed such that they will not be physically capable of delivering more that the threshold limit.

All the Projects Appear to be Within 1 Mile of Each Other:

This is true. However, there is no prohibition preventing QF projects from being located adjacent to each other. These projects are separately owned. Please reference and compare Section 5a of the previously provided FERC Form 556 for each project. It is not clear from your letter if this is an identified "deficiency," however in the event you have questions regarding ownership you may also refer to the Idaho Secretary of State's official web site to reference corporate formation documentation.

No Generator Interconnection Applications have Been Submitted

It is not clear if this is an identified "deficiency." Schedule 73 requires only that the project provide you with a statement of the "interconnection agreement status." The statement that such status is pending is accurate and complete. The projects are completing the internal work necessary to prepare and submit interconnection agreement requests to Idaho Power which will be submitted shortly.

Identified Point of Interconnection or Point of Delivery

I believe the map that accompanied the Applications indicated the points of Interconnection and Delivery. To clarify any ambiguity, the points of Interconnection and Delivery will be the Idaho Power 345 kV system on the Midpoint-Humbolt (MPSN-HMBT) transmission line that is adjacent to the projects. The exact configuration of the interconnection will have to be studied as part of the Company's Feasibility Study, System Impact Study and Facilities Study that have yet to be completed.

Other QF Projects in the Area:

You state that we are "intending to add battery storage to the solar generation projects you had previously submitted … applications for: Jackpot Solar North, South, East and West." This is incorrect. These projects are distinct from, and independent of, the referenced Jackpot projects. The Franklin projects are battery storage QFs that will utilize renewable sources of power to energize the battery systems for subsequent delivery of power and energy to Idaho Power pursuant to a pre-determined schedule. It is my understanding that the Jackpot projects are simple stand-alone solar projects.

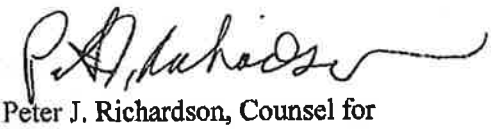
Evidence of Qualifying Facility Status:

Schedule 73 requires, as a condition to receipt of an indicative pricing proposal only that the project demonstrate "an ability to obtain Qualifying Facility status." You state, apparently as an item of deficiency, that "Further, the only evidence provided of the Franklin energy storage projects being Qualifying Facilities ("QFs") are the self-certification Form 556s purporting to certify non-generator storage units as PURPA QFs." While it is not required for compliance with Schedule 73, these projects have submitted Form 556 at FERC certifying their QF status. Your use of the word

"purporting" to describe the Form 556 certification process Franklin has completed suggests that the certification is merely theoretical or meaningless. I hope that is not the case, as the Form 556s have been duly certified and accepted for filing by FERC – its execution by the attorney for Franklin is neither meaningless nor theoretical. As you know, battery storage facilities are a class of QF recognized by FERC under PURPA. Nevertheless, as noted above, it is not even an Idaho PUC requirement that the Form 556 be filed in order to comply with Schedule 73. We have done so in advance of our commercial on line date as a courtesy to Idaho Power and believe that is more than sufficient for purposes of going to the next step in the Schedule 73 process, which is receipt of your indicative pricing proposal for each of the Franklin projects.

I believe I have addressed all of the concerns you raised in yesterday's letter. Please give me a call if you have any questions. In the meantime, we anticipate within the next ten business days and pursuant to Section 1(c) of Schedule 73, receipt of Idaho Power's indicative pricing proposal.

Very truly yours,



Peter J. Richardson, Counsel for
Franklin Energy Storage One, Two, Three and Four, LLCs;

Cc: Donovan Walker
Idaho Power Company
1221 West Idaho Street
Boise, Idaho 83702

ENC: 24X7 Production Spreadsheets

EXHIBIT 8

IDAHO POWER®
An IDACORP Company

February 27, 2017

Franklin Energy Storage
Peter Richardson
Richardson Adams, PLLC
515 N. 27th Street
Boise, ID 83702

VIA: Email Only – peter@richardsonadams.com

RE: RE: Franklin Energy Storage One, Two, Three and Four Energy Sales Agreement Applications

Mr. Richardson,

Idaho Power received your February 10, 2017, letter regarding the Schedule 73 Qualifying Facility Energy Sales Agreement Applications ("Applications") for the proposed projects noted above. In your Applications, you request a proposed contracting term of 20 years and published avoided cost Rate Option 4, Non-Levelized Non-Fueled Rates, and your letter contained attachments with generation profiles for projects less than 10 aMW.

Idaho Power does not agree that your proposed projects are eligible for published avoided cost Rate Option 4, Non-Levelized Non-Fueled Rates, with a 20-year contract term. On February 27, 2017, Idaho Power filed an application to the Idaho Public Utilities Commission requesting a declaratory order that determines the contract term and avoided cost pricing methodology for which your proposed projects may be eligible. See IPUC Case No. IPC-E-17-01.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Michael Darrington

Michael Darrington
Energy Contracts
Phone: (208)388-5946
Email: mdarrington@idahopower.com

Cc: Donovan Walker

1221 W. Idaho St. (83702)
P.O. Box 70
Boise, ID 83707

EXHIBIT 9

DONOVAN E. WALKER (ISB No. 5921)
Idaho Power Company
1221 West Idaho Street (83702)
P.O. Box 70
Boise, Idaho 83707
Telephone: (208) 388-5317
Facsimile: (208) 388-6936
dwalker@idahopower.com

Attorney for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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

Idaho Power Company ("Idaho Power" or "Company"), pursuant to RP 101, hereby petitions the Idaho Public Utilities Commission ("IPUC" or "Commission") to issue an order determining the proper contract terms, conditions, and avoided cost pricing to be included in the Public Utility Regulatory Policies Act of 1978 ("PURPA") contracts requested by several battery storage facilities.[1]

[1] On January 26, 2017, Idaho Power received four separate Schedule 73 applications from proposed battery storage projects requesting published avoided cost rate indicative pricing and 20-year contracts from: Franklin Energy Storage One, LLC (32 MW); Franklin Energy Storage Two, LLC (32 MW); Franklin Energy Storage Three, LLC (32 MW); and Franklin Energy Storage Four, LLC (32 MW). *See* Attachments 1-4. All proposed Franklin Energy Storage projects were submitted by the same developer. On February 13, 2017, Idaho Power received another Schedule 73 application from a separate proposed battery storage project from another developer: Black Mesa Energy, LLC (20 MW). See Attachment 5. These five proposed projects are hereafter referred to collectively as "Proposed Battery Storage Facilities."

Idaho Power, a vertically integrated public utility electric service provider regulated in the state of Idaho by the IPUC, is the petitioner in this matter. PURPA requires Idaho Power, as a public utility, to purchase generation from cogeneration and small power production facilities that are certified as PURPA qualifying facilities ("QFs" or "QF") at avoided cost rates determined by the IPUC. The Proposed Battery Storage Facilities claim they are entitled to published avoided cost rates with a 20-year contract term. Attachments 1-5, 6. Idaho Power asserts that the Proposed Battery Storage Facilities be subject to the same 100 kilowatt ("kW") published rate eligibility cap applicable to wind and solar generation.

Idaho Power seeks a declaratory ruling from the Commission that proposed battery storage facilities over 100 kW are eligible for negotiated avoided cost rates determined by the incremental cost Integrated Resource Plan ("IRP") methodology and a maximum contract term of two years—and that battery storage facilities up to a maximum nameplate capacity of 100 kW are entitled to published avoided cost rates and a 20-year maximum contract term.

In support of this Petition, Idaho Power states as follows:

I. BACKGROUND AND FACTS

After separate lengthy and contested proceedings, the Commission determined as part of its implementation of PURPA for the state of Idaho: (1) the published, or standard, avoided cost rate eligibility cap for wind and solar QFs is set at 100 kW, consistent with 18 C.F.R. 292.304(c), Order No. 32262; and (2) the maximum contract term for proposed QF projects that are larger than the published rate eligibility cap is two years. Order No. 33357. The published rate eligibility cap for all other generation

types remains at the previously established 10 average megawatts ("aMW") on a monthly basis and all proposed projects that are eligible for published rates have the previously established maximum contract term of 20 years available to them. The Commission also previously directed that published avoided cost rates be distinguished by resource type. Order No. 32697, p. 15; Order No. 32802, pp. 5-8. Negotiated avoided cost rates, for projects that exceed the published rate eligibility cap, are based upon the incremental cost IRP methodology, which compares the specific generation profile of the proposed project to the displaceable resources used to serve load in the Company's resource stack to arrive at an avoided cost.

Over an approximate two week period in late January/early February 2017, Idaho Power received five applications seeking PURPA energy sales agreements for a total of 148 megawatts ("MW") of proposed battery storage QFs. *See* Attachments 1-5. Idaho Power has attached hereto, and incorporates herein by this reference, as Attachments 1 through 5, the Proposed Battery Storage Facilities' five separate Schedule 73 applications requesting published avoided cost pricing and 20-year contracts, the Federal Energy Regulatory Commission ("FERC") Form 556 QF self-certifications, and the projects' generation/output profiles submitted by each project to Idaho Power. Also attached hereto, and incorporated herein by this reference are: Attachment 6, Idaho Power's February 9 and 27, 2017, responses to the Proposed Battery Storage Facilities; Attachment 7, February 10, 2017, response from Franklin Energy Storage One through Four; as well as Attachment 8, maps depicting the location and layout of the Proposed Battery Storage Facilities.

Each Proposed Battery Storage Facility submitted a FERC Form 556 self-certification of QF status to Idaho Power, purporting to be a QF independent of its generation source. Attachments 1-5. As part of the required Schedule 73 applications, each Proposed Battery Facility also submitted a generation output profile, on an hourly basis, for all 8,760 hours in a year. *Id.* Each generation profile is nearly identical, and generally matches the shape, timing, and output of a solar generation profile. *Id.* The four proposed Franklin Energy Storage projects are located at the same site and were submitted from a single developer—the same developer that had previously submitted Schedule 73 applications and requests for energy sales agreements for the four proposed 20 MW Jackpot Solar facilities which were the subject of the Commission's final Order No. 33667 in Case No. IPC-E-16-21. Attachments 1-4, 8. The fifth proposed battery storage facility, Black Mesa LLC, was submitted by a different developer at a different location, but with nearly identical information provided in both the Schedule 73 application and Form 556 self-certification. Attachments 5, 8. Each Proposed Battery Storage Facility in its individual Schedule 73 application requests published avoided cost rates, Rate Option 4, Non-Levelized Non-Fueled Rates, and a 20-year contract. Attachments 1-5.

Idaho Power responded to the four proposed Franklin Energy Storage facilities within Schedule 73's required 10-business day response time with a letter dated February 9, 2017. Attachment 6. Idaho Power notified legal counsel for the four proposed Franklin Energy Storage facilities that the applications were not complete, identified several deficiencies in the Schedule 73 applications, and stated that "it does not appear that your proposed projects qualify for Rate Option 4 - Non-Levelized Non-

Fueled Rates and a twenty (20) year contract term." *Id.* The proposed Franklin Energy Storage facilities responded by letter dated February 10, 2017, purporting to address deficiencies in its applications and demanding that Idaho Power proffer 20-year, published avoided cost rates for its proposed battery storage projects. Attachment 7, attached hereto and incorporated herein by this reference. By letters dated February 27, 2017, Idaho Power responded to all five Proposed Battery Storage Facilities that it does not agree that they are eligible for published rates and 20-year contracts, and notified them of this case filing. Attachment 6.

II. DISCUSSION

A. The Commission has Jurisdiction to Issue a Declaratory Order in the Case.

The Commission has jurisdiction to issue declaratory orders under Title 61 of *Idaho Code* and the Idaho Uniform Declaratory Judgments Act of 1933. *See* Order No. 33667, pp. 5-6, Case No. IPC-E-16-21.

> 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. 277, 240-41 (1937)).

Id. The Commission has further recognized its role when considering a petition for declaratory ruling as follows:

> Declaratory rulings are appropriate regarding the applicability of any statutory provision or of any rule or order of this Commission. *See* IDAPA 31.01.01.101; Uniform Declaratory Judgment Act, *Idaho Code* 10-1201 *et seq.* A declaratory ruling contemplates the resolution of prospective

> problems. The rights sought to be protected by a declaratory judgment may invoke either remedial or preventive relief; it may relate to a right that is only yet in dispute or a status undisturbed but threatened or endangered; but in either event it must involve actual and existing facts. *Idaho Supreme Court in Harris v. Cassia County*, 106 Idaho 513, 516-517, 618 P.2d 988 (1984).

Order No. 29480, p. 16. Additionally, the Commission may clarify any order on its own motion. RP 325.

Idaho Power does not agree with the Proposed Battery Storage Facilities' claims as to their QF status independent of a cognizable associated generation resource, and this Petition is without prejudice to Idaho Power's position before FERC on the validity of the self-certifications. However, QF status is within the exclusive jurisdiction and properly before FERC, not this Commission, for determination. Idaho Power does not seek from this Commission a determination as to QF status with regard to the Proposed Battery Storage Facilities. Idaho Power seeks a determination from the Commission as to the proper avoided cost rates, as well as the proper contractual terms and conditions applicable to the Proposed Battery Storage Facilities Schedule 73 requests for PURPA pricing and contracts. Although not conceding any argument and advocacy to the contrary at FERC, for purposes of the determination as to the rate eligibility and contract term length for the Proposed Battery Storage Facilities as requested in this Petition, Idaho Power does not dispute that the facilities are self-certified QFs without respect to the validity of those self-certifications. The legal controversy or question for the Commission is, under the facts presented by the requests of the Proposed Battery Storage Facilities, whether they are entitled to published avoided cost rates and 20-year contract terms—or are instead entitled to the negotiated rate and contracting

procedures and two-year contract terms. This is a determination that is within the exclusive jurisdiction of this Commission. The status of and applicability of the Commission's implementation of PURPA with regard to proposed battery storage facilities was not considered and/or addressed in the Commission's determinations as to published rate eligibility cap, differentiation of applicable avoided cost rates to different generation technologies, or its determinations regarding other contractual terms and conditions, such as contract term.

Idaho Power has now received, in a little over two weeks' time, multiple requests for a total of 148 MW from proposed battery storage facilities and disagrees with the Proposed Battery Storage Facilities as to the proper application of the Commission's implementation of PURPA with regard to published avoided cost rate eligibility and the maximum contract term applicable to such projects. There is a real and substantial controversy as to the proper application of this Commission's implementation of PURPA with regard to specific requests and actual and existing facts, applicable to the Proposed Battery Storage Facilities. It is appropriate for the Commission to issue a declaratory order in this case.

B. Battery Storage Facilities should be Subject to the 100 kW Published Rate Eligibility Cap.

With regard to the five applications seeking PURPA energy sales agreements, the generation source that energizes all of the Proposed Battery Storage Facilities is solar generation. Attachments 1-5. The output profile submitted for each of the Proposed Battery Storage Facilities matches the shape and timing of the generation profile of a solar generator. *Id.* None of the Proposed Battery Storage Facilities propose to operate in a manner that would realize the potential benefits of energy

storage facilities—they simply propose to operate with substantially the same generation profile as a solar generator. The potential benefits and possible promise of economically viable, utility-scale energy storage facilities is in the unique operational characteristics to, for example: provide ancillary grid services such as reserve capacity, surge capacity, load-balancing, or voltage support; firming of variable generation; or time-shifting generation to match load. However, to realize these benefits, it would be necessary for operational control and dispatchability of the facility to be with the utility charged with serving load. When operated as proposed by the Proposed Battery Storage Facilities, it appears to be structured in a way that passes through as many kW hours as possible in order to maximize revenue under the must-purchase provision of PURPA. Furthermore, any of the potential benefits of utility-scale battery storage facilities cannot be recognized when the Proposed Battery Storage Facilities are configured in such a manner as to come under published rates, priced at the avoided cost of a natural gas combustion turbine, and standard contract terms and conditions. It would only be through the project-specific avoided cost determinations of the incremental cost IRP methodology and the negotiated rate and contract process required of proposed projects that exceed the published rate eligibility cap where it may be possible to determine the value of the Proposed Battery Storage Facilities.

Furthermore, from Idaho Power's perspective, the Proposed Battery Storage Facilities' Schedule 73 applications appear to be vehicles used to circumvent the Commission's rules and requirements in its implementation of PURPA for the state of Idaho. The four proposed Franklin Energy Storage facilities are all located adjacent to, and in the same vicinity as the previously proposed four, 20 MW each, Jackpot Solar

facilities. *See* Case No. IPC-E-16-21. The four proposed Jackpot Solar facilities have the same developer, Robert Paul, and the same legal counsel, Peter Richardson, as the four proposed Franklin Energy Storage facilities. The proposed Black Mesa storage facility submitted almost identical documents as the four proposed Franklin Energy Storage facilities, and the developers of all five proposed projects had some level of involvement with the Grand View Solar project, an 80 MW PURPA solar QF under contract with Idaho Power. As was made clear by the Commission in the previously referred to Jackpot Solar case, Case No. IPC-E-16-21, solar QFs are subject to a 100 kW published rate eligibility cap, and for any projects that exceed the published rate eligibility cap, the maximum contract term is limited to two years. Pricing for such facilities is determined at the start of each two-year contract term. Order No. 33667.

The non-generator Proposed Battery Storage Facilities have proposed to classify themselves without regard to the solar generation that will energize their batteries, and further proposed to disaggregate into 10 aMW increments, which would avoid application of the 100 kW published rate cap and associated two-year contract term limitation for projects over the cap. First, the Commission should recognize that the Proposed Battery Storage Facilities are acting as nothing more than a pass through of the solar generation, 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. Secondly, the four proposed Franklin Energy Storage facilities are all immediately adjacent to each other within the same one-mile section of land. Attachment 8. The projects purport to be in compliance with disaggregation rules by claiming separate ownership, but this appears to be an attempt to get 128 MW of capacity split up into four

separate 10 aMW increments, with the goal of qualifying for published rates and 20-year contracts.

This was the practice that the Commission determined to prevent when it first implemented a temporary reduction to a 100 kW published rate eligibility cap for wind and solar projects, Order No. 32176, and then made that 100 kW published rate cap permanent for wind and solar QFs. Order No. 32262. *See* Case Nos. GNR-E-10-04, GNR-E-11-01.

> Based upon the record, the Commission finds that a convincing case has been made to temporarily reduce the eligibility cap for published avoided cost rates from 10 aMW to 100 kW for wind and solar only while the Commission further investigates the implications of disaggregated QF projects. . . .
>
> Wind and solar resources present unique characteristics that differentiate them from other PURPA QFs. Wind and solar generation, integration, capacity and ability to disaggregate provide a basis for distinguishing the eligibility cap for wind and solar from other resources. . . .
>
> At a minimum, FERC regulations require that standard or published rates be set for purchases from QFs with a design capacity of 100 kW or less. These regulations also grant the Commission the discretion to set the published rate eligibility cap at a higher level. 18 C.F.R. § 292.304(c). Whether it is a published rate or a rate for a larger QF, FERC requires that the avoided cost rates for all QF purchases be just and reasonable to utility customers and in the public interest; and not discriminate against qualifying cogeneration and small power production facilities. 18 C.F.R. § 292.304(a)(1). In establishing a published rate, the Commission may differentiate among QFs using various technologies on the basis of supply characteristics of the different technologies; the availability of capacity and energy during daily and seasonal peaks; dispatchability; reliability; and other factors. 18 C.F.R. § 292.304 (c)(3). . . .
>
> This Commission established a clear and reasoned distinction between small and large QFs in 1995 when it

> adopted the use of the IRP methodology for larger QFs. Order Nos. 25882, 25883, 25884. The Commission explained that requiring larger QF projects "to prove their viability by market standards ensures that utilities will not be required to acquire resources priced higher than would result from a least cost planning [RFP] process. Ratepayers will not be disadvantaged and QFs will be treated fairly and consistently with the requirements and goals of PURPA." *Id.* at 6. The purpose, then and now, of distinguishing between small and large QFs with the application of the IRP methodology for large QF projects is to more precisely value the energy being delivered – not encourage or discourage QF resources.

Order No. 32176, pp. 9-10 (citations omitted, emphasis in original). In extending the 100 kW published rate eligibility cap from temporary to permanent for wind and solar QFs, the Commission stated:

> Based upon the record in this case and after careful consideration of the positions presented, the Commission finds it appropriate to maintain the 100 kW eligibility cap for published avoided costs rate for wind and solar QFs. We find that any attempt to implement criteria in an effort to prevent disaggregation would be met by attempts to circumvent such criteria. The economic incentive for the projects is obvious. QF developers are working within the current structure provided by this Commission. However, we emphasize that PURPA and our published rate structure were never intended to promote large scale wind and solar development to the detriment of utility customers. Avoided cost rates are to be just and reasonable to the utility's ratepayers. 18 C.F.R. § 292.304(a)(1). PURPA entitles QFs to a rate equivalent to the utility's avoided cost, a rate that holds utility customers harmless – not a rate at which a project may be viable. 18 C.F.R. § 292.304(a)(2). If we allow the current trend to continue, customers may be forced to pay for resources at an inflated rate and, potentially, before the energy is actually needed by the utility to serve its customers. This is clearly not in the public interest.
>
> PURPA and the implementing regulations require only that the published/standard avoided cost rates be established and made available to QFs with a design capacity of 100 kW or less. 18 C.F.R. § 292.304(c). . . . Wind and solar projects

> larger than 100 kW continue to be entitled to PURPA contracts at avoided cost rates calculated using the IRP Methodology. Furthermore, a 100 kW threshold for wind and solar QFs provides a certainty to the parties in negotiations that disaggregation criteria would not. While we recognize the impact that this decision will have on small wind and solar projects, it would be erroneous, and illegal pursuant to PURPA, for this Commission to allow large projects to obtain a rate that is not an accurate reflection of the utility's avoided cost for the purchase of the QF generation.

Order No. 32262, p. 8 (citations omitted).

Once again, the Commission is faced with a rush of proposed PURPA projects that appear to be configuring themselves in such a manner as to circumvent the Commission's rules implementing PURPA to the direct detriment of Idaho Power customers, which is contrary to PURPA. The Proposed Battery Storage Facilities share the modular, and easily disaggregated, nature of wind and solar generation referenced by the Commission in its orders limiting those resource types to 100 kW for published rate eligibility. The 148 MW of Proposed Battery Storage Facilities' requests for energy sales agreements also came in a large amount of proposed MWs in a very short time, again similar to the previous wind and solar development. In its order reducing the maximum contract term for proposed projects that exceed the published rate eligibility cap, the Commission stated:

> Based upon our record, we find that 20-year contracts exacerbate overestimations to a point that avoided cost rates over the long-term period are unreasonable and inconsistent with the public interest. We find shorter contracts reasonable and consistent with federal and state law for multiple reasons. First, shorter contracts have the potential to benefit both the QF and the ratepayer. By adjusting avoided cost rates more frequently, avoided costs become a truer reflection of the actual costs avoided by the utility and allow QFs and ratepayer to benefit from normal fluctuations in the market.

> Second, shorter contract lengths do not ultimately prevent a QF from selling energy to a utility over the course of 20 years – or longer. PUPRA's "must purchase" provision requires the utility to continue to purchase the QF's power. . . . A shorter contract length merely functions as a reset for calculation of the avoided costs in order to maintain a more accurate reflection of the actual costs avoided by the utility over the long term. . . .
>
> This Order shortens the length of IRP-based PURPA contract in order to maintain a more accurate avoided cost. . . . This Order strikes a balance between just and reasonable rates for ratepayers, the public interest and interests of QFs, as is mandated by PURPA and FERC regulations.

Order No. 33357, p. 23, 32 (emphasis in original). It is appropriate and within the exclusive authority of the Commission to act in the public interest to protect customers from this manipulation of the rules and extend the 100 kW published rate eligibility cap to battery storage projects.

III. CONCLUSION

Idaho Power respectfully requests that the Commission issue a declaratory order, without prejudice to Idaho Power's position on the validity of the underlying self-certifications, finding that, under the facts presented, the Proposed Battery Storage Facilities are subject to the same 100 kW published avoided cost rate eligibility cap applicable to wind and solar facilities. More specifically, Idaho Power seeks a declaratory ruling from the Commission that the proper authorized avoided cost rate for battery storage facilities, such as those proposed by Franklin Energy Storage One through Four and Black Mesa Energy, as projects that exceed 100 kW nameplate capacity, is the incremental cost IRP methodology with a maximum contract term of two

years—and that battery storage facilities, up to a maximum nameplate capacity of 100 kW, are eligible for published avoided cost rates and a 20-year maximum contract term.

Respectfully submitted this 27th day of February 2017.

DONOVAN E. WALKER
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of February 2017 I served a true and correct copy of the within and foregoing PETITION FOR DECLARATORY ORDER upon the following named parties by the method indicated below, and addressed to the following:

Franklin Energy Storage One through Four, LLC
Peter J. Richardson
RICHARDSON ADAMS, PLLC
515 North 27th Street (83702)
P.O. Box 7218
Boise, Idaho 83707

____Hand Delivered
__X__ U.S. Mail
____Overnight Mail
____FAX
__X__ Email peter@richardsonadams.com

Black Mesa Energy, LLC
Brian Lynch
Black Mesa Energy, LLC
P.O. Box 2731
Palos Verdes, California 90274

____Hand Delivered
__X__ U.S. Mail
____Overnight Mail
____FAX
__X__ Email brian@mezzdev.com

Christa Bearry, Legal Assistant

EXHIBIT 10

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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