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January 11, 2021

VIA ELECTRONIC MAIL

Jan Noriyuki Secretary
Idaho Public Utilities Commission
11331 West Chinden Blvd., Building 8
Suite 201-A
Boise, Idaho 83714

Re: Case No. IPC-E-20-17
Black Mesa, LLC vs. Idaho Power Company

Dear Ms. Noriyuki:

Attached for electronic filing is Idaho Power Company's Answer to Motion for Summary Judgment in the above entitled matter. If you have any questions about the attached documents, please do not hesitate to contact me.

Very truly yours,

Donovan E. Walker

Donovan E. Walker

DEW:cld
Enclosures

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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

BLACK MESA, LLC Complainant, v. IDAHO POWER COMPANY, Respondent.	CASE NO. IPC-E-20-17 IDAHO POWER COMPANY'S ANSWER TO MOTION FOR SUMMARY JUDGMENT

COMES NOW, Idaho Power Company ("Idaho Power" or "Company") pursuant to the Idaho Public Utilities Commission's ("IPUC" or "Commission") RP 56, 57, and 256 as well as the procedural schedule from Order No. 34898, by and through its attorney of record, and hereby submits its Answer to the Motion for Summary Judgment filed by Black Mesa, LLC ("Black Mesa") on December 14, 2020, as follows:

I. INTRODUCTION

On March 17, 2020, Black Mesa filed a Complaint against Idaho Power requesting the Commission find that it has established a legally enforceable obligation ("LEO") committing Idaho Power and its customers to a purchase from its proposed battery storage qualifying facilities ("QF") for a 20-year term and utilizing published

avoided cost rates applicable to "other" QFs. On April 20, 2020, Idaho Power filed an Answer and Motion to Dismiss with the Commission in response to Black Mesa's complaint stating that the Commission had previously determined that Black Mesa was not entitled to published rates and a 20-year contract term as an "other" QF, and that the Federal Court in its final decision[1] had *specifically declined* to order the Commission to grant 20-year contracts and published rates as "other" QFs to battery storage QFs. In addition, Idaho Power's Answer referenced the then pending proceeding initiated to determine the proper avoided cost rate and contracting terms and conditions for battery storage QFs initiated in response to, and consistent with, the Federal Court's decision.[2]

The Commission denied Idaho Power's Motion to Dismiss stating that "the record would benefit from further development." Order No. 34715, p 5. In denying the Motion to Dismiss the Commission stated, "Doing so gives the parties full opportunity to highlight pertinent facts and make arguments about how the facts apply to the legal standard for creating a LEO." *Id.* The briefing schedule directed by the Commission in Order No. 34715 was suspended at Black Mesa's request and with Idaho Power's agreement to allow the parties to engage in negotiations and attempt resolution of the dispute. On November 13, 2020, Black Mesa filed a Motion to reinstate the briefing schedule stating that Black Mesa and Idaho Power were engaged in settlement discussions that had concluded with no definitive resolution, and that the parties jointly request reinstatement of the briefing schedule.

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[1] United States District Court for the District of Idaho, Memorandum Decision and Order, p 36-37, Case No. 1:18-cv-00236-REB, Document 62, Jan. 17, 2020.

[2] IPC-E-20-02. The Commission subsequently issued final Order No. 34794 on October 2, 2020, determining that battery storage QFs are entitled to published rates and 20-year contracts up to 100 kW in size, and that battery storage QFs larger than 100 kW are entitled to IRP Method pricing and 2-year contract terms.

Rather than filing a brief as contemplated by the Commission's Order, Black Mesa filed a Motion for Summary Judgment on December 14, 2020, in which it again claims that it is "entitled" to a 20-year contract and published rates available to "other" QFs. Black Mesa claims Idaho Power failed to properly respond to its request for pricing and a contract under Schedule 73.

Black Mesa is not entitled to published rates and 20-year contracts as an "other" QF. Black Mesa has not established a LEO to published rates and 20-year contracts as an "other" QF. Black Mesa is not entitled to judgment as a matter of law, its Motion for Summary Judgment should be denied, and its Complaint should be dismissed.

II. BACKGROUND AND FACTS

Black Mesa initially submitted a Schedule 73 application requesting a PURPA Energy Sales Agreement ("ESA") for a single, 20 MW proposed battery storage facility on February 13, 2017. *See*, Attachment 5 to Idaho Power's Petition, Case No. IPC-E-17-01. In its request, Black Mesa demanded a 20-year contract at published avoided cost rates. *Id.* Idaho Power responded to this initial request, within the 10-day response time required by Schedule 73, by informing the project that the Company did not agree that it was entitled to a 20-year contract or published avoided cost rates. Attachment 1 to Idaho Power's Answer and Motion to Dismiss, February 27, 2017, letter from Idaho Power.[3] On February 27, 2017, Idaho Power initiated a proceeding at the Commission, asking the Commission to issue a Declaratory Order regarding the proper contract terms, conditions, and avoided cost pricing for five battery storage facilities requesting contracts under PURPA, including Black Mesa's proposed project as well as

[3] Idaho Power's February 27, 2017, letter was also provided in Attachment 6 to Idaho Power's Petition in Case No. IPC-E-17-01.

four additional proposed battery storage projects from Franklin Battery Storage.[4] Case No. IPC-E-17-01.

On July 13, 2017, the Commission issued Order No. 33785 granting Idaho Power's Petition for declaratory relief stating, "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 No. 33785, p 12-13. Subsequently, the Franklin Energy Storage projects ("Franklin") petitioned the IPUC for reconsideration alleging that the Commission had improperly considered Franklin's QF status in its determination.[5] On August 29, 2017, the Commission denied Franklin's Petition for Reconsideration. Order No. 33858.

Franklin then filed a Petition for Declaratory Order and Petition for Enforcement action against the IPUC at the Federal Energy Regulatory Commission ("FERC") to which FERC declined to act. FERC Docket EL-18-50-000. On May 30, 2018, Franklin filed a Complaint for Violation of the Federal Power Act, PURPA, and FERC Regulations with the United States District Court for the District of Idaho ("Federal Court").[6] The Federal Court heard argument on the IPUC's and Idaho Power's Motions to Dismiss, as well as cross-motions for summary judgment on February 7, 2019. On January 17, 2020, the Federal Court issued its Memorandum Decision and Order,

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[4] 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 to the Petition for Declaratory Order, Case No IPC-E-17-01. 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 to the Petition for Declaratory Order, Case No IPC-E-17-01.

[5] Franklin Energy Storage Projects' Petition for Reconsideration, Aug. 3, 2017, Case No. IPC-E-17-01.
[6] Case No. 1:18-cv-00236-REB.

denying the IPUC's and Idaho Power's motions to dismiss and for summary judgment, and granting in part Franklin's motion for summary judgment[7] stating as follows:

> 3. Plaintiffs' [Franklin's] Motion for Summary Judgment (Dkt. 24) is GRANTED IN PART:
>
> a. The Court finds that the Defendant IPUC Commissioners violated the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601 et seq., when they issued final order numbers 33785 on July 13, 2017 and 33858 on August 29, 2017. Such orders established an implementation plan that impermissibly classified the QF status of Plaintiffs' energy storage facilities that are certified under such Act as energy storage facilities. Classifying such facilities as "solar QFs" is outside the Commissioners' authority as state regulators and therefore in violation of federal law.
>
> b. Defendants are permanently enjoined from enforcing or applying either of such IPUC final orders to Plaintiffs' facilities as if such facilities are classified as something other than energy storage QFs, to include but not be limited to classifying Plaintiffs' facilities as if they are "solar QFs" under the IPUC's prior implementation plan. Defendants are further permanently enjoined from considering the energy source input into Plaintiffs' energy storage QFs for the purpose of classifying the QFs in any way other than as energy storage QFs.

Memorandum Decision and Order, p 36-37, Case No. 1:18-cv-00236-REB, Document 62, Jan. 17, 2020.

However, the Federal Court also stated that it will not order the IPUC to place any specific terms upon any power supply contract Idaho Power must enter with energy storage QFs[8] stating:

> 4. Plaintiffs' Motion for Summary Judgment (Dkt. 24) is otherwise DENIED. The Court specifically declines to order Defendants [IPUC] to require utilities under their jurisdiction to afford energy storage QFs all rights and privileges

[7] Case No. 1:18-cv-00236-REB, Document 62.
[8] Case No. 1:18-cv-00236-REB, Document 62, at p 35.

> afforded to "other QFs" under the IPUC's PURPA implementation plan.

Id., at p 37.

Following the District Court's Friday, January 17, 2020, Order, on Tuesday, January 21, 2020, Idaho Power received two Schedule 73 applications that were e-mailed over the holiday weekend for two, 20 MW each, battery storage QFs from Black Mesa Energy 1 and Black Mesa Energy 2. Attachment 2 to Idaho Power's Answer and Motion to Dismiss. These applications state, "Black Mesa Energy LLC, reiterates its previous request for an Energy Sales Agreement pursuant to Schedule 73 as requested on 2/10/2017 ... The project is an energy storage QF and qualifies for the "Other projects" avoided costs as found in 1:18-cv-00236-REB (Franklin Energy Storage v. Idaho PUC & Idaho Power)." *Id.*

Immediately following the Federal District Court's Friday, January 17, 2020, Order, Idaho Power filed a Petition with the Commission on the next business day, Tuesday, January 21, 2020. Case No. IPC-E-20-02. In light of the Federal Court's Order as well as Black Mesa's ensuing request for PURPA contracts, Idaho Power requested that the IPUC initiate a proceeding to determine the proper avoided cost rates as well as contract terms and conditions applicable to, and to be included in, the PURPA contracts requested by energy storage QFs, as contemplated in the Federal Court's decision. Idaho Power's Petition, Case No. IPC-E-20-02.

Idaho Power responded to Black Mesa on February 3, 2020, within the required 10 business days of Schedule 73, informing Black Mesa that Idaho Power did not agree that Black Mesa's projects were entitled to published rates and 20-year contracts as well as informing Black Mesa of Idaho Power's January 21, 2020, Petition requesting

that the IPUC initiate a proceeding to determine the proper avoided cost rates as well as contract terms and conditions applicable to, and to be included in the PURPA contracts requested by energy storage QFs. Attachment 1 to Idaho Power's Answer and Motion to Dismiss, February 3, 2020, letter from Idaho Power.

The Commission subsequently issued Order No. 34552 providing Notice of Idaho Power's Petition and establishing a February 28, 2020, deadline for interested persons to intervene as parties to the proceeding. There were no Petitions to Intervene filed. Black Mesa did not intervene nor participate despite being served with the initial Petition, continuing to seek published rate, 20-year contracts, and filing its Complaint in the interim. Comments were filed by Commission Staff, the Idaho Conservation League, Renewable Northwest, and Clenera. The Commission issued its final Order No. 34794, Case No. IPC-E-20-02, on October 2, 2020, determining that battery storage QFs are entitled to published rates and 20-year contracts up to 100 kW in size, and that battery storage QFs larger than 100 kW are entitled to IRP Method pricing and 2-year contract terms.

III. SUMMARY JUDGMENT

The Commission's Rules of Procedure do not specifically address motions for summary judgment. Order No. 32580, p 6. However, in the past the Commission has adopted the standards for summary judgment as set out in the Idaho Rules of Civil Procedure (IRCP). *Id.* (citing Order No. 28888; 28832; 32246; 29687). Summary judgment may be granted only if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (quoting

IRCP 56(c)). "Where the evidentiary facts are undisputed and the [Commission] will be the trier of fact, 'summary judgment is appropriate, despite the possibility of conflicting inferences because the [Commission] alone will be responsible for resolving the conflict between those inferences.'" *Id.*, p 6-7 (citing *McKoon v. Hathaway*, 146 Idaho 106, 109, 190 P.3d 925, 928 (2008) *quoting Drew v. Sorensen*, 133 Idaho 534, 537, 989 P.2d 276, 279 (1999); *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982)).

IV. ARGUMENT

Black Mesa's Motion for Summary Judgment should be denied in its entirety, and its Complaint dismissed. Black Mesa is not entitled to published rates and 20-year contracts, has not established a legally enforceable obligation to published rates and 20-year contracts, and is not entitled to judgment as a matter of law. In fact, the Commission has now on two occasions determined that proposed battery storage QFs are not entitled to published rates and 20-year contracts as "other" QFs. Additionally, the Commission has found in a case that Black Mesa participated in, that the proposed Franklin battery storage QFs had not established a legally enforceable obligation to published rates and 20-year contracts as "other" QFs under facts identical to Black Mesa's. Furthermore, the Federal District Court specifically declined to order the IPUC to grant the proposed Franklin battery storage QFs published rates and 20-year contracts as "other" QFs, instead referencing the "jurisdictional divide" between state and federal authorities and deferring to the Commission's determination as to proper avoided cost rates and purchasing terms and conditions for proposed battery storage QFs.

Idaho Power did not refuse to contract with Black Mesa. On both occasions alleged by Black Mesa (2017 and 2020) Idaho Power followed the procedure set forth in Schedule 73. Idaho Power in good faith disputed Black Mesa's demands of entitlement to published rates and 20-year contracts as an "other" QF, communicated this to Black Mesa within the required 10-day response time, and additionally on both occasions filed a proceeding with the Commission to determine the proper avoided cost rate and contract terms and conditions for proposed battery storage QFs - also within the initial 10-day response time of Schedule 73. On both occasions the Commission ruled that proposed battery storage QFs are not entitled to published rates and 20-year contracts as "other" QFs. Black Mesa is not entitled to judgment as a matter of law, and its Motion for Summary Judgment should be denied and its Complaint should be dismissed.

A. *There is No Legally Enforceable Obligation Granting Black Mesa Eligibility to Published Rates and 20-Year Contracts as an "Other" QF*

The Idaho Supreme Court has affirmed that the "IPUC has authority, under state and federal law, to require that *before a developer can lock in a certain rate, there must be either a signed contract to sell at that rate or a meritorious complaint alleging that the project is mature and that the developer has attempted and failed to negotiate a contract with the utility; that is, there would be a contract but for the conduct of the utility*." *Idaho Power Co., v. Idaho Public Utilities Comm'n*, 155 Idaho 780, 787, 316 P.3d 1278, 1285 (2013)("*Grouse Creek*")(*quoting Rosebud Enterprises, Inc. v. Idaho Public Utilities Comm'n.*, 131 Idaho 1, 6, 951 P.2d 521, 526 (1997)(emphasis added)). "States must provide for legally enforceable obligations as distinct from contractual obligations, but '[i]t is up to the States, not [FERC], to determine the specific parameters

of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred under State law.'" *Id.* at 786, 316 P.3d at 1284 (*quoting Power Resource Group, Inc. v. Public Utility Comm'n of Texas*, 422 F.3d 231, 238 (5thCir.2005).

The Idaho Supreme Court, in the most recent case regarding the principle of legally enforceable obligations in the State of Idaho, discusses the evolution of this principle, citing favorably to *A.W. Brown Co., Inc. v. Idaho Power Co.,* 121 Idaho 812, 828 P.2, 841 (1992) and *Rosebud, supra*.

> In its order issued in the proceeding involving *A.W. Brown Co.,* IPUC correctly noted: "The Concept of 'legally enforceable obligation' does not appear in PURPA. Rather, it arises from the implementing regulations promulgated by the Federal Energy Regulatory Commission." IPUC then quoted FERC's explanation for adopting that concept in its regulations. "Use of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility."

Grouse Creek, 155 Idaho at 787, 316 P.3d at 1285. "FERC has given to each state the authority to decide when a LEO [legally enforceable obligation] arises in that state." *Id.* (*quoting Power Resource Group,* 422 F.3d at 239).

Idaho Power did not refuse to contract with Black Mesa. Idaho Power is, and has been, keenly aware of its legal obligation to purchase generation from a QF under PURPA, and never refused to do so with Black Mesa. However, Idaho Power has no obligation to blindly accept and acquiesce to any demand for rates and purchase terms that a potential QF brings to Idaho Power. The rates and purchase terms are the exclusive province of the IPUC to establish. Despite the many inflammatory allegations

to the contrary from Black Mesa, Idaho Power followed its Schedule 73 process. Idaho Power, after receiving Black Mesa's Schedule 73 applications and requests for published rates and 20-year contracts as an "other" QF, responded in writing within the 10-day timeframe as required by Schedule 73, informing Black Mesa that it did not believe that its proposed battery storage QFs were eligible for published rates and 20-year contracts as an "other" QFs.

Additionally, Idaho Power, both in 2017 and in 2020 after the federal court decision regarding Franklin storage, initiated proceedings with the IPUC seeking a determination as to the proper price and contract term that the proposed battery storage QFs were eligible for. Idaho Power initiated these proceedings also within the initial 10-day response time set forth in Schedule 73. These proceedings were necessary so that the IPUC could determine and establish the proper avoided cost rate and purchase terms for battery storage within its existing PURPA implementation framework. Idaho Power did not seek, and the Commission did not impose, a "new PURPA implementation plan." Idaho Power sought and the Commission determined where the new resource type, battery storage, fits and what it is eligible for within Idaho's existing PURPA implementation. Such proceedings were necessary for the IPUC to exercise its exclusive authority to determine and establish a just, fair, and lawful avoided cost rate for battery storage QFs that not only complies with the mandatory purchase provisions of PURPA, but also protects the retail customers of Idaho Power by assuring they only pay the proper utility avoided cost for purchases from battery storage QFs.

Bringing a good-faith dispute to the Commission, as the decision maker that possesses the exclusive authority to resolve such disputes, is by no means a refusal to

contract, and does not require the utility to proceed with a contracting process that meets the demands of the QF. It is not an unreasonable delay. It is not intransigence on the part of the utility. And it does not entitle the QF to lock in a rate and contract term that the IPUC determines is not a proper avoided cost rate and contract term for that QF. When a QF brings a demand to the utility under Schedule 73 that it is not entitled to, the utility is not obligated to move forward by offering incorrect rates and contracts to that QF. The Commission expects and demands that the utility not take actions that would be harmful to its customers and expects the utility to bring questions regarding the lawful rates and purchase terms of PURPA purchases to it for resolution. This is exactly what Idaho Power did in response to Black Mesa's demands. As soon a practically feasible, and within Schedule 73's initial 10-day response time, Idaho Power responded to Black Mesa in writing that it did not agree that Black Mesa was eligible for the rates and terms its had requested - *and* - that Idaho Power had additionally initiated proceedings at the IPUC seeking its determination as to the proper rates and terms for the QF's proposed purchase.

Determination of a legally enforceable obligation is not some game of "gotcha" where the QF can unilaterally bind utility customers to rates and terms that the QF is not entitled to and that could be harmful to utility customers. The IPUC is the exclusive authority that determines the proper rate and purchase terms for the QF. The binding precedent for the determination of a legally enforceable obligation in the State of Idaho in the absence of signed contract requires a Commission determination that the QF has a meritorious complaint that the utility refused to contract, refused to negotiate, and that establishment of legally enforceable obligation is required to prevent the utility from

circumventing the requirement to contract with a QF. *Grouse Creek, supra.* A good-faith dispute regarding the proper rates and purchase terms does not meet this standard.

The Commission has previously ruled under *nearly identical facts* that the proposed Franklin battery storage QFs did not establish a legally enforceable obligation to published rates and 20-year contracts as an "other" QF in 2017. Order No. 33785, p 12, Case No. IPC-E-17-01. Although Black Mesa was a party to that case, just like the Franklin projects, it now states that it did not make a claim to a legally enforceable obligation as part of the 2017 case. However, Black Mesa *is* making such a claim now, and there are no material differences in the facts considered by the Commission in its determination that the proposed Franklin battery storage projects did not establish a legally enforceable obligation, and the facts that exist for Black Mesa's proposed battery storage projects. Just like the Commission's determination rejecting Franklin's claim of LEO entitlement to published rates and 20-year contracts as "other" QFs, Black Mesa has no valid claim to a LEO, nor entitlement to published rates and 20-year contracts available to "other" QFs.

Further, there are no material differences in the facts from the 2017 claims compared to the present LEO claims, or Black Mesa's second round of contract requests in 2020 following the federal court's decision in the Franklin battery case. In both instances the proposed battery storage QF filed initial contract requests with the utility demanding published rates and 20-year contracts as "other" QFs. In both instances Idaho Power responded to the proposed battery storage QF that it did not believe it to be eligible for published rates and a 20-year contract as an "other" QF and

initiated proceedings, within the required ten-day response time required by Schedule 73, with the Commission to determine the proper avoided cost rates and purchase terms and conditions for battery storage QFs. The Commission has ruled that a reasonable dispute between the parties regarding contract terms and conditions in this same context where the utility files the dispute with the Commission for resolution, does not constitute intransigence or a failure to negotiate on the part of the utility, and *DOES NOT* trigger the creation of a LEO. Order No. 33785, p 12, Case No. IPC-E-17-01.

Additionally, the Federal Court ruled that the Franklin battery storage QFs, which are nearly exactly situated, factually, as Black Mesa's proposed projects, were not entitled to rates and terms as "other" QFs in Idaho. The Federal Court instead references the "jurisdictional divide" between the state and federal authorities and deferred to the IPUC to make its determination as to the proper rates and purchase terms for battery storage QFs consistent with its decision. Immediately after the Federal Court's decision, Idaho Power initiated an action consistent with that order, IPC-E-20-02, for the Commission to determine the proper avoided cost rates and contract terms and conditions for battery storage QFs. Black Mesa was notified in writing and served with the Petition for that matter. The Commission issued its final Order No. 34794, Case No. IPC-E-20-02, on October 2, 2020, determining that battery storage QFs are entitled to published rates and 20-year contracts up to 100 kW in size, and that battery storage QFs larger than 100 kW are entitled to IRP Method pricing and 2-year contract terms.

Idaho Power did not refuse to contract with Black Mesa. Idaho Power complied with the requirements of Schedule 73 and responded to Black Mesa within Schedule

73's required 10-day response time that Black Mesa was not eligible for the rates and terms it requested, and filed proceedings with the Commission within the same required 10-day response time in good faith seeking resolution of the dispute. On both occasions the Commission found that battery storage QFs are *not* eligible for published rates and 20-year contracts as "other" QFs. There is no refusal to contract, no utility delay, no utility intransigence, and no meritorious complaint that Black Mesa was entitled to what it was demanding. There is no legally enforceable obligation granting Black Mesa eligibility to published rates and 20-Year contracts as an "other" QF.

B. *Black Mesa is not Entitled, nor Eligible for, Standard Rates Published for "Other" QFs and 20-Year Contract Terms*

Almost the entirety of Black Mesa's claims rely upon a gross mischaracterization of the IPUC's PURPA implementation in the State of Idaho. Black Mesa uses this mischaracterization in an attempt to bolster a strained argument that they are "entitled" to avoided cost rates and contract terms other than those determined appropriate for a proposed battery storage QF by the IPUC. Black Mesa attempts to perpetuate a myth which it calls a "dichotomy" of PURPA implementation in Idaho that consists of (1) wind and solar QFs and (2) all other QFs. Black Mesa Motion for Summary Judgment, p 10, and pp 8-15, for example. This is not the "dichotomy" of PURPA implementation in Idaho. If anything approaches a "dichotomy" it would be the distinction the IPUC makes between two different pricing methodologies: (1) the surrogate avoided resource methodology ("SAR") reserved for smaller, unsophisticated QF projects and utilized for off-the-shelf, published rates - and (2) the much more accurate incremental cost integrated resource plan ("ICIRP" or "IRP") methodology reserved for larger and more sophisticated QF projects. The SAR methodology is based upon the avoided cost of a

fictional, combined-cycle, natural gas, combustion turbine. The ICIRP methodology is based upon the specific hourly generation profile of the proposed QF generator, and assigns an avoided cost based upon the highest cost, displaceable utility resource that is also generating during any hour that the proposed QF delivers its generation. A QF's eligibility for SAR-based, or ICIRP-based avoided cost rates is determined by the QF's size. In the past all QFs 10 aMW and under were eligible for SAR rates, while all QFs over 10 aMW were only eligible for ICIRP rates. Because of the manipulative practice of large wind and solar QF projects disaggregating themselves into smaller units in an attempt to gain access to higher SAR-based rates, the Commission lowered the published rate eligibility cap for wind an solar to 100 kW, which is the federally required minimum size under which standard rates must be offered. Later, and in separate proceedings, the Commission determined that all QF contracts - for all resource types - that exceeded the published rate eligibility cap were limited to a maximum contract term of 2 years - not just for wind and solar. Additionally, within these methodologies avoided cost rates are tailored to individual generation types; for instance, all ICIRP-based prices are priced for that resource type's specific peak hour capacity factor. For published rates, the Commission publishes (publicly available on the Commission's webpage and updated annually) avoided cost rate tables for wind, solar, non-seasonal hydro, seasonal hydro, and other projects. There is not a PURPA implementation dichotomy consisting of wind/solar and other. There are two different rate methodologies differentiated by size and generation type.

Black Mesa, as a proposed battery storage QF, is not "entitled" to off-the-shelf, published rates and 20-year contracts simply because it is a newly developed QF

technology that the Commission had not previously specifically addressed. Black Mesa is entitled to the avoided cost rates and contract terms and conditions that the IPUC approves for use for battery storage QFs. As stated several times in Idaho Power's Answer to Black Mesa's Complaint: Idaho Power did not refuse to contract with Black Mesa at an avoided cost rate and a contract term approved by the Commission, and has asked the Commission to set and approve the same. Black Mesa dedicates a section of its Motion for Summary Judgment to misconstruing this statement into what it inflames as a "fatally inconsistent argument" and "attempt to thwart QFs' rights." Black Mesa Motion for Summary Judgment, p 27-29. There is nothing inconsistent in that statement, and no malfeasance on the part of Idaho Power to thwart anyone's "rights." Black Mesa itself admits and makes a point about how the Commission had not yet established a proper rate or contract term for a battery storage QF. Black Mesa Motion for Summary Judgment, p 10-11. This in and of itself does not mean there is any "entitlement" for a battery storage QF, or some other new and unaddressed QF technology, to automatically be included and eligible for a pre-existing published rate classification for "other" QFs that was specifically designed for biomass, small hydro, cogeneration, geothermal, and waste-to-energy QFs, all of which have different generation output characteristics than battery storage. Additionally, to this day there has never been a battery storage QF contract in Idaho Power's Idaho or Oregon jurisdiction, which is not surprising as it is a new and emerging technology that has only cursorily been addressed by FERC and not addressed at all by many states under PURPA.

Black Mesa could have had no expectation that it was "entitled" to rates as an "other" QF. There had, and has, never before been a proposed QF contract in the state of Idaho for a battery storage QF. The Commission did not address or consider battery storage QFs when establishing avoided cost rates and contracting terms and conditions for "other" QFs. In the two instances in which the Commission has considered and determined battery storage QF eligibility for the existing avoided cost rates in the state of Idaho, the first of which was initiated with Black Mesa and Franklin's 2017 initial requests, the Commission has determined published rate eligibility, as well as 20-year contracts to be capped at 100 kW, the federally required minimum. And lastly, Black Mesa could have no expectation of "entitlement" to rates and contract terms as an "other" QF in its 2020 contract requests, as such requests were made immediately following the Federal Court's decision in Franklin, where the court specifically refused to require the IPUC to give battery storage QFs avoided cost rates and purchase terms as "other" QFs.[9]

It is the IPUC's exclusive jurisdiction, authority, and province to set a proper and lawful avoided cost rate and terms of purchase for eligible QFs in the mandatory purchase obligation of PURPA. Black Mesa spends a lot of time and effort arguing about what it believes it is "entitled" to under PURPA, but it always leaves out an important part of the equation under PURPA - the protection of the utility's retail customers who ultimately pay the bill for development and acquisition of QF generation. To be lawful, the acquisition of QF generation at avoided cost rates must not harm the utility's retail customers, who pay the cost of PURPA generation. Customers are

[9] Black Mesa was aware of the Federal Court's decision as, surprisingly, it cites to that decision in its demands for prices and terms as an "other" QF, even though the Federal Court decision states that it is specifically *not* directing or requiring the IPUC to grant such status to battery storage QFs.

entitled to not have their power rates increased unnecessarily for generation that is not needed to serve load on the utility's system and increases the cost at which the utility could otherwise provide customers' service. The IPUC in its exclusive authority must determine the proper avoided cost rate that is not harmful to utility customers and represents what the utility would pay to otherwise generate or purchase that energy but for the proposed QF generation. The Federal Court in Franklin recognized this "jurisdictional divide" in its refusal to direct the IPUC to grant battery storage the same avoided cost rates and contract terms and conditions as "other" QFs.

Black Mesa is not "entitled" to avoided cost rates as an "other" QF. This is true for several reasons, but one need look no further than the Federal Court ruling in Franklin where the federal court agreed and recognized that such determination was within the exclusive jurisdiction and authority of the IPUC to decide.

VI. CONCLUSION

Black Mesa is not entitled to published rates and 20-year contracts as an "other" QF. Black Mesa has not established a legally enforceable obligation to published rates and 20-year contracts as an "other" QF. Black Mesa is not entitled to judgment as a matter of law. Black Mesa's Motion for Summary Judgment should be denied in its entirety, and its Complaint dismissed.

Respectfully submitted this 11th day of January 2021.

Donovan E. Walker

DONOVAN E. WALKER
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January 2021, I served a true and correct copy of IDAHO POWER COMPANY'S ANSWER AND MOTION TO DISMISS upon the following named parties by the method indicated below, and addressed to the following:

Black Mesa Energy, LLC
Peter J. Richardson
Gregory M. Adams
RICHARDSON ADAMS, PLLC
515 n. 27th Street
Boise, Idaho 83702

____Hand Delivered
____ U.S. Mail
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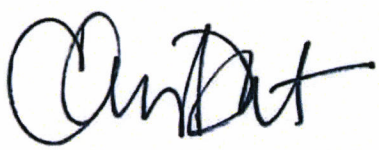

Christy Davenport, Legal Secretary