Peter Richardson (ISB # 3195)
515 N. 27th Street
Boise, Idaho 83702
Tel. (208) 938-7901
peter@richardsonadams.com

Attorney for Franklin Energy Storage Projects[1]

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 FRANKLIN ENERGY STORAGE PROJECTS' REPLY COMMENTS

COMES NOW, the Franklin Energy Storage Projects, collectively herein, and pursuant to Idaho Public Utilities Commission ("Commission") order No. 33765 issued in the above captioned docket and hereby provides its Reply Comments to those comments filed by the Idaho Power Company ("Idaho Power" or "Company") Avista Corporation ("Avista") and the Staff of the Idaho Public Utilities Commission ("Staff") this docket.[2]

I.

COMMENTERS MISSTATE FERC'S FINDING AS TO THE STATUS OF STORAGE FACILITIES

//

//

[1] Franklin Energy Storage One, LLC; Franklin Energy Storage Two, LLC; Franklin Energy Storage Three, LLC and Franklin Energy Storage Four, LLC (Herein collectively "Franklin Energy Storage Projects").
[2] Pacificorp, dba Rocky Mountain Energy filed no comments.

Staff states that:

> The issue of how to evaluate a battery storage facility under PURPA was addressed by FERC in an order cited by Franklin, *Luz Development and Finance Corporation,* 51 FERC P 61,078 (1990).[3]

Importantly, in *Luz,* FERC was *not* 'evaluating battery storage facilities' for the purpose of determining their eligibility for published rates and twenty-year contract terms under the Idaho PUC's implementation of PURPA. Rather, FERC was evaluating storage facilities in general to determine whether they were QFs and it ruled that energy storage facilities are distinct and separate QFs from their underlying energy inputs.

Staff correctly notes that:

> Staff also believes, consistent with FERC's analysis in *Luz*, that a battery storage facility can be a QF only if its energy source complies with PURPA and PURPA regulations.[4]

Franklin appreciates Staff's recognition of the physics associated with all battery storage systems in that they must utilize an independent energy input in order energize the batteries. Unfortunately, however, staff's analysis stops just short of recognizing FERC's conclusion as to the legal status of such a system under PURPA. Missing from Staff's analysis of the *Luz* decision is FERC's actual conclusion that energy storage facilities are distinct and separate QFs. FERC declared:

> In sum, energy storage facilities such as the proposed Luz battery system are a renewable resource for purposes of QF certification. However, such facilities are subject to the requirement that the energy input to the facility is itself biomass, waste, a renewable resource, a geothermal resource, or any combination thereof or a demonstration that any fossil fuel fired input constitutes nor more that 25 percent of the total energy input to the facility and such uses are consistent with those enumerated in section 3(17)(B) of the FPA. Luz has not attempted to show that the proposed facility will meet any of these requirements as Luz has based its claim to certification on an argument that the fuel

[3] Staff Comments at p. 7.
[4] Staff Comments at p. 8. (Avista makes essentially the same argument in its Comments.)

> standard, as we interpret it, is inapplicable. For these reasons, we will deny the application.[5]

A battery storage facility is a *distinct* QF. Any other reading of FERC's analysis in *Luz* would have rendered the entire decision superfluous had it ruled, as Staff and Avista suggest – that an energy storage facility QF assumes the characteristics of the source of its energy input. Were that the case, FERC would not have specified requirements as to the "energy input to the facility." Staff and Avista argue that the very source of the "energy input to the facility" is the QF rather than the energy storage system itself. Under the Avista/Staff analysis, FERC would not have addressed the nature of the "energy input to the facility" it would have simply said that the energy input *is the facility*. Thus, an energy storage system's legal status as a QF is *not* the same as the stand-alone legal status of the energy source(s) used to provide energy input into the battery system. According to FERC, battery storage QFs do not take on the legal (QF) status of the characteristics of the energy source used to energize the battery system.

Although, a distinct class of QFs, battery storage facilities must still utilize a PURPA authorized energy source as its input, but the battery storage facility is, itself, a distinct type of QF entitled to all of the benefits conferred on such status by PURPA. It follows from FERC's ruling in *Luz* that a battery storage QF that is energized by solar power is not a solar QF, likewise a battery storage QF that is energized by a combination of waste energy and wind energy is not a waste energy QF nor is it a wind energy QF nor is it a waste/wind energy QF – it is simply a battery storage QF. Idaho Power, Staff and Avista all agree that FERC has exclusive jurisdiction to determine QF status. Unfortunately, all three conveniently ignore the distinct legal status FERC

---

[5] *Luz* at p. 10.

has declared as to energy storage QFs. This Commission should not be misled by the utilities' attempt to conflate a battery storage QF that is energized by solar power with a solar QF.

For purposes of illustration, assume a pumped storage project that utilizes water pumped from a lower reservoir to a higher elevation reservoir for later release through a generator. FERC instructs, through its *Luz* decision, that the pumped storage facility is a member of a distinct class of energy storage QFs -- but only if the "energy input to the facility is itself biomass, waste, a renewable resource, a geothermal resource, or any combination thereof."[6] Assume also that the energy input into this storage system are solar panels. Under the *Luz* reasoning, the facility is easily classified as an energy storage QF. However, under the Idaho Power/Staff/Avista rationale the facility would be classified as a solar QF (and hence only entitled to a two-year power purchase agreement).

Next assume the energy to pump the water to the higher reservoir were provided from a combination of solar panels and biogas fired pumps. If the energy to pump the water to a higher reservoir is a combination of solar panels and biogas, it would make no difference under FERC's analysis -- the project would still be an energy storage QF. But in this situation, with biogas and solar energy inputs to the pumped storage energy facility, the Staff/Idaho Power/Avista approach would put the Commission in an impossible quandary. Which kilowatt hours generated by such a facility would be entitled to a twenty-year power purchase agreement and which kilowatt hours generated by the facility would be entitled to only a two-year power purchase agreement? Without classifying the entire facility as an energy storage QF, there would be no way to answer this question.

---

[6] *Id.*

This simple and highly plausible example highlights the problem with the Idaho Power/Staff/Avista approach. It illustrates why FERC's ruling in *Luz* is not only the controlling law, but also good common sense. Indeed, the pumped storage illustration is not hypothetical at all. It is exactly what the Franklin Energy Storage Facilities have proposed. The FERC Form 556 for each of the Franklin Energy Storage Facilities states:

> The energy storage system that comprises the energy storage Qualifying Facility is designed to, and will, received 100% of its energy input from a combination of renewable energy sources such as wind, solar, biogas, biomas, etc. The current initial design utilizes solar photovoltaic (PV) modules...[7]

It is true that the "initial design utilizes solar." However. at what point are the projects entitled to entitlement to "other QF" rates under the Avista/Idaho Power/Staff analysis? According to the Avista/Idaho Power/Staff argument these energy storage QFs are merely solar projects, apparently because the initial design is solar. When other energy inputs are added will their analysis (and hence the QF status of these projects magically change)? If so, at what point will the addition of other energy inputs trigger that change? Is it ten percent? Forty percent? Fifty percent or some other percentage? Would only one percent solar input disqualify the projects from entitlement to "other QF" status? These questions and examples serve to illustrate the real-world impracticability of the Idaho Power/Staff/Avista approach and underscore why the FERC *Luz* decision is so elegantly simply and reasonable.

Staff, Idaho Power and Avista all have confused the question of whether a battery storage facility assumes the QF characteristics of the underlying energy source. As noted above, such is not the case as the battery storage energy system is, according to FERC, in a distinct class of QFs

---

[7] FERC Form 556 at page 9, each at FERC Docket Nos. QF17-581, QF17-582, QF17-582 and QF17-584.

separate from the underlying energy inputs – as long as the underlying energy inputs are sourced from the laundry list of permissible resource types. It is significant that no party questions the validity of the QF status of the Franklin Energy Storage Projects and that all commenters agree that any question as to QF status is solely within the jurisdictional reach of FERC. Therefore the question of the QF status of the Franklin facilities is simply not for this Commission to answer.

II.

THE DISAGGREGATION ARGUMENT IS A MERE STRAW MAN FALLACY UNRELATED TO THE QUESTION BEFORE THE COMMISSION

Idaho Power and Staff extensively argue points they made previously in the multiple dockets in which this Commission considered and resolved issues surrounding the concept it labeled "disaggregation." Both also comment extensively detailing the criteria by which energy storage facilities should be evaluated in order to conclude that the Franklin Energy Storage Facilities have been inappropriately disaggregated. Such arguments were dismissed by the Commission when it specifically rejected the invitation made by Staff, (and others) to establish criteria by which to make its disaggregation findings.[8]

A. IDAHO POWER RELIES ON NON-EXISTENT RULES

Idaho Power alleges that the Franklin Energy Projects are attempting to circumvent Commission rules:

> 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.[9]

[8] Order No. 32262 at p. 8.
[9] Petition at P. 8.

> The Proposed Battery Storage Facilities' Schedule 73 applications are specifically designed in such a way as to circumvent the Commission's rules and requirements in its implementation of PURPA for the State of Idaho.[10]

As examples of such alleged 'rule and regulation' violations Idaho Power notes.

- The four proposed Franklin Energy Storage facilities are all located adjacent to, and the same vicinity as the previously proposed four 20 MW each, Jackpot Solar facilities.
- Their own application materials identify the interconnection facilities for the nearby Jackpot Solar facilities.
- The four proposed projects have the same developer.
- The four proposed projects have the same legal counsel.
- Another developer (Black Mesa) submitted similar documents.
- The developers were involved in other projects.

All of these points are completely irrelevant to the question of whether the Franklin Projects are solar or wind QFs or "Other Project" QFs as contemplated in the Commission's orders. More to the point, the assertion that any of these activities remotely violates a rule or regulation promulgated by this Commission is absurd. Indeed, it is telling that Idaho Power has not cited to any rule or regulation that the Franklin Energy Storage Projects have allegedly violated or have attempted to violate.

This Commission specifically chose not to establish "criteria" (such as those referenced by Idaho Power) for determining eligibility for twenty-year published rates. There are, simply, no rules for making that determination other than the single qualifying rule that solar and wind QFs are not entitled to twenty-year contracts and all "Other Projects" are entitled to twenty-year contracts. Idaho Power's list of criteria as justification for rejecting the entitlement of these

---

[10] Comments at P. 7.

projects to twenty-year contracts was specifically and unequivocally rejected by the Commission in favor of the simple bright light test that provides that *only* solar and wind QFs are not entitled to twenty-year contracts. In Order No. 32262[11] this Commission specifically rejected all of the recommendations put forth by the Commission Staff, Rocky Mountain Power, the Idaho Conservation League and the Renewable Northwest Project that it establish "Criteria to Allow Small Projects to Obtain a Published Rate."[12] In that order, the Commission rejected *all* of the arguments Idaho Power now offers in support of its assertion that the Franklin Projects are "vehicles used to circumvent the Commission's rules and requirements in its implementation of PURPA." Idaho Power is unable to cite to any of the alleged "rules and requirements" it claims the Franklin projects are 'circumventing,' because no such rules exist. Such phantom "rules and requirements" were specifically rejected by this Commission in favor of the simple bright line test for entitlement to twenty-year contracts – which is whether the projects are solar QFs or wind QFs.

B. STAFF ASKS THE COMMISSION TO IGNORE ITS OWN ORDERS

Staff unequivocally and significantly concedes that, "the Franklin and Black Mesa QFs are not solar QFs."[13] Based on that conclusion, and the clear and unequivocal ruling by this Commission that all QFs other than solar and wind are entitled to twenty-year contracts, Staff's concession supports Franklin's position that these, admittedly non-solar and non-wind QFs are entitled to the 10 aMW cap for published avoided cost rates and twenty-year contracts. However, staff argues that a direct and plain reading of the Commission's ruling that. . .:

---

[11] GNR-E-11-01, June 8, 2011.
[12] *Id.* at pp. 6 – 8.
[13] Staff Comments at p. 8.

> We maintain the eligibility cap at 10 aMW for QF projects other and wind or solar (including but not limited to biomass, small hydro, cogeneration, geothermal and waste-to-energy).

… is "simplistic."[14] Although Staff may be using the term "simplistic" in a pejorative sense, the Commission's ruling is, in fact, simple. It is easy to understand and free of nuance – "QF projects other than wind or solar" are entitled to the 10 aMW eligibility cap and twenty-year power purchase agreements. To quote an adage, "simple pictures are best." Staff urges the Commission to go beyond a "simplistic" reading of its straightforward order and to engage in some creative "statutory interpretation" in order to "derive the intent of the legislative body that adopted the act."[15] Staff references two Idaho Supreme Court decisions to support its argument that the simple, declarative statement that QFs other than wind and solar are eligible for the 10 aMW cap and twenty-year contracts needs embellishment and interpretation.[16]

It is true that the "objective of statutory interpretation is to 'derive the intent of the legislative body that adopted the act'… and 'provisions should not be read in isolation, but must be interpreted in the context of the entire document."[17] Staff then interprets the Commission's decision by concluding:

> [B]attery 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[18]. Accordingly, Staff believes Franklin and Black Mesa, as configured at the time of Idaho Power's petition, are not eligible for published avoided cost rates and 20-year contracts.[19]

---

[14] Staff Comments at p. 9.
[15] Staff Comments at p. 10.
[16] *Id.* Citing to *Hayes v. City of Plummer,* 159 Idaho 168, 170 (2015) and *Farber v. Idaho State Ins. Fund,* 147 Idaho 307 (2009).
[17] *Id.*
[18] Note that Staff has already conceded that these are *not* solar QFs.
[19] Staff Comments at p. 11.

Staff has divined the Commission's intent through the use of its statutory interpretation analysis in order to go beyond plain language of its orders. In essence, Staff bases its argument that the Commission's 'simplistic' order must be subject to Staff's interpretation. It is the foundation of the Staff's recommendation that the simple, explicit, declarative ruling that only applies to wind and solar QFs also encompasses non-wind and non-solar QFs such as energy storage QFs. However, Staff's selective quotation from the two Supreme Court cases is deceptive at best. Both cases, and the black letter law of statutory interpretation, provide that when applying a statute or rule, "Words should be given their 'plain, usual, and ordinary meanings' and only if the language is 'ambiguous may this court 'consider rules of statutory construction."[20] Where a statute is clear and unambiguous courts will give effect to its plain meaning. Indeed:

> The cardinal rule of statutory interpretation and construction; *the statute must be given its plain and obvious meaning* . . . As a result, inquiry into legislative intent may begin only where the statute is ambiguous on its face.[21]
>
> When statutory language is "plain and unambiguous," . . . a court's "sole duty is to *give effect to its plain and obvious meaning*"[22]

Significantly, Staff does not assert that the Commission's ruling is ambiguous. It is not. To the contrary, the Commission's ruling is 'simple' as well as direct, unequivocal and lacking in nuance. Staff's statutory interpretation exercise should therefore be rejected as it is unsupported by the very legal authority upon which it relies and violates the "cardinal rule of statutory interpretation." Franklin is therefore entitled to rely on the integrity, validity and plain meaning of the Commission's word (ruling) in organizing its affairs in complying with this Commission's

---

[20] *Hayes v. city of Plummer,* supra at 170 – 171.
[21] *Streeter v. Sullivan,* 509 So. 2d 268, 271 (Fla. 1987). Emphasis provided.
[22] *Davis v. Four Seasons Hotel Ltd.*, 810 F. Supp. 2d 1145, 1152 (Haw. 2011). Emphasis provided.

PURPA rule regarding non-wind and non-solar QF entitlement to published avoided cost rates and twenty-year power purchase agreements. Were the Commission to retroactively change its bright line test, the Franklin Energy Storage Projects will have been denied their due process rights.

As noted above, in prior dockets Staff has urged this Commission to establish detailed criteria rather than a bright line test to determine whether a QF project was engaged in 'disaggregation.' Staff failed. Instead of criteria, the Commission chose to establish a bright line test that only restricted solar and wind QFs to 100 kW for entitlement to published rates and two-year contracts. The Commission also specifically declared that "all other" QFs will remain entitled to published rates up to 10 aMW and will also be entitled to twenty-year contracts. By urging the Commission to engage in 'statutory interpretation' of its bright line test ruling, staff is actually relitigating those issues on which it lost. It is certainly free to do so in a future docket established for that purpose. It may not, however, do so retroactively in order to prevent the Franklin projects from relying on the integrity of established rulings from this Commission. In fact, both Staff and Avista ask the Commission to initiate a new docket for the purpose of establishing new rules that will be applicable to energy storage facilities. Franklin has no position as to such a recommendation -- with the caveat that such new generic dockets will only have prospective effect – the Franklin Projects having already established their full and unequivocal commitment to be legally obligated to perform under the terms of Idaho Power's Schedule 73.

//

//

//

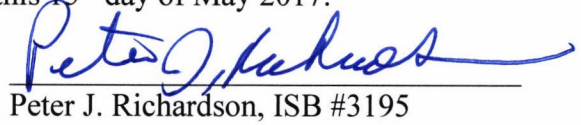
III.

CONCLUSION

Idaho Power's Petition for a Declaratory Ruling should be summarily dismissed by the Commission. That Idaho Power disagrees with a prior commission order establishing a bright line test by which all QFs other than solar and wind remain entitled to published avoided cost rates and twenty-year contracts does not create a "legal dispute." There is no dispute as to the meaning of the Commission's orders on entitlement to published avoided cost rates and twenty-year contracts. If the Commission's orders were ambiguous one might legitimately argue that a legal dispute could arise as to their meaning. However, that is not the case. The language in the Commission's orders is clear and unequivocal. It is too late for Idaho Power or the Staff to request reconsideration of those orders. The Commission should reject Idaho Power's backdoor effort at reconsideration under the guise of a petition for a declaratory ruling.

WHEREFORE, the Franklin Energy Storage Projects respectfully request this Commission issue its order denying Idaho Power's Petition for Declaratory Order.

RESPECTFULLY SUBMITTED this 15th day of May 2017.



Peter J. Richardson, ISB #3195
Attorney for Franklin Energy Storage Projects

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2017, I delivered true and correct copies of the enclosed FRANKLIN ENERGY STORAGE PROJECTS' REPLY COMMENTS in this Docket No. IPC-E-17-01 to the following persons via the service method indicated ("E" electronic; "H" hand delivery; "US" United States Mail, postage prepaid).

Diane Hanian (E, H)
Commission Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702
Diane.hanian@puc.idaho.gov

Camille Christen (E, H)
Daphne Huang
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702
Camille.christen@puc.idaho.gov
Daphne.huang@puc.idaho.gov

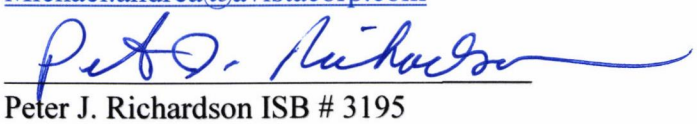
Donovan Walker (E, H)
Idaho Power Company
1221 West Idaho Street
Boise, Idaho 83702
dwalker@idahopower.com
dockets@idahopower.com

Brian Lynch (E, US)
Black Mesa Energy, LLC
PO Box 3271
Palo Verdes, CA 90274
brian@mezzdev.com

David Bender (E, US)
Earth Justice
3916 Nakoma Road
Madison, WI 53711

Ben Otto (E, US)
Idaho Conservation League
710 N. 6th Street
Boise, Idaho 83701
botto@idahoconservation.org

Michael G. Andrea (E, US)
Senior Counsel
Avista Corporation
1411 East Mission Street, MCS-33
Spokane, Washington 99202
Michael.andrea@avistacorp.com



Peter J. Richardson ISB # 3195
Attorney for Franklin Energy Storage Projects