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

Attorney for the 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' PETITION FOR RECONSIDERATION

COMES NOW, the Franklin Energy Storage Projects ("Franklin"), and pursuant to Rules 33 and 331 of the Idaho Public Utilities Commission's ("Idaho Commission") Rules of Procedure and pursuant to Idaho Code § 61-626 and hereby respectfully lodges its Petition for Reconsideration of Order No. 33785 ("Final Oder") issued on July 13, 2017 in the above captioned matter. For the reasons set forth in detail below, Franklin requests reconsideration of Order No. 33785 because those parts of Order No. 33785 discussed below are mistaken, unreasonable, unlawful, erroneous and not in conformity with the law. Commission Rule of Procedure 331 requires that Franklin state the nature and extent of evidence or argument it will present or offer if reconsideration is granted. Franklin does not believe that additional evidence

[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" or "Franklin").

is necessary for the Idaho Commission to reconsider its order. Therefore, because the issues raised herein are legal in nature, Franklin does not seek reconsideration by evidentiary hearing but is, however, prepared to present argument as the Idaho Commission may deem appropriate.

I
THE COMMISSION'S ORDER: BACKGROUND

Idaho Power initiated this docket via a Petition for Declaratory Ruling ("Petition") asking the Idaho Commission to declare that energy storage QFs that use solar renewable energy as their energy input source are, in fact, solar QFs for purposes of entitlement to contract terms and conditions pursuant to the Idaho Commission's implementation of PURPA:

> 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.[2]

Under the Idaho Commission's implementation scheme for PURPA projects, wind and solar Qualifying Facilities are restricted to published avoided rate contracts of just two-years. All other QF resource types are eligible, under the Idaho Commission's implementation scheme, to sell their output to Idaho Power pursuant to published avoided rates and twenty-year contracts. The Idaho Commission's ruling prohibiting access to twenty-year contracts is explicitly restricted to solar and wind QFs while all other QF types are eligible to execute twenty-year contracts. According to the Idaho Commission:

> After careful consideration, the Commission ultimately determined that it was appropriate to maintain the 100 kW eligibility cap for published avoided cost rates for wind and solar QFs.

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[2] Idaho Power *Petition for Declaratory Order* at p. 13. (Herein "Idaho Power's Petition.")

Order No. 32697 at p. 3. Emphasis provided.

> This commission is confident that, with other changes to the avoided cost methodologies incorporated in the Order, changing eligibility from 10 aMW for resources other than wind and solar is unnecessary at this time. 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. Maintaining a 10 aMW eligibility cap is also consistent with our long history of encouraging PURPA projects and renewable energy generation in Idaho.

Id. at p. 14. Emphasis provided.

> We 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).

Order No. 32176 at p. 9. Emphasis provided.

Thus, in order to maintain its PURPA implementation scheme and at the same time grant Idaho Power's Petition, the Idaho Commission would have to make a finding, either explicitly or implicitly, that energy storage QF facilities that use solar power as a primary energy input are, in fact, Solar QFs and not energy storage QFs. Its final Order in this matter the Idaho Commission does exactly that. It concluded that:

> 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 . . . 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.[3]

However, as shown below, the Idaho Commission has no authority to make such a ruling as it is preempted by PURPA from making any determinations as to the QF status of an energy storage

[3] Order No. 33785 at p. 12.

facility. In addition to being precluded from making any determination as to QF status, the Idaho Commission's ostensible implementation of FERC's orders regarding the QF status of energy storage facilities is fatally flawed and it highlights the impracticability of allowing individual state commissions to re-write federal law at the request of the utilities they are charged with regulating.

II.
THE COMMISSION ILLEGALLY RULED AS TO THE QF STATUS OF ENERGY STORAGE FACILITIES

The Idaho Commission appropriately conceded that "battery storage facilities' QF status is a matter within FERC's jurisdiction"[4] Idaho Power makes the same concession, "QF status is within the exclusive jurisdiction and properly before FERC, not this Commission, for determination"[5] While conceding FERC jurisdiction over QF status determinations, the Commission did not cite to nor reference legal authority to that effect. The Ninth Circuit Court of Appeals, however, has instructed:

> The Commission's [FERC] regulations carry out the statutory regime reposing in the Commission [FERC] exclusive authority to make QF status determinations. . . . Nowhere do these regulations contemplate a role for the state in setting QF standards or determining QF status.[6]

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[4] *Id.* at p. 11.
[5] Idaho Power *Petition for Declaratory Order* at p. 6.
[6] *Independent Energy Producers Ass'n v. California Pub. Utils. Comm'n* 36 F. 3d 848, 853 (1994)

Despite conceding to FERC its primacy as to the determination of QF status, the Idaho Commission's Order actually goes down that road when it makes its finding that the Franklin Energy Storage QFs are not energy storage QFs:

> Consequently, our ruling on the narrow declaratory issue before us should not be read to presume that this Commission deems battery storage facilities to be a legitimate qualifying facility eligible for the benefits of PURPA and subject to the Act's implementing regulations under FERC.[7]

The Commission's refusal to "presume" that energy storage facilities are "a legitimate qualifying facility" directly challenges FERC's role as the only entity that is legally authorized to make such findings (or in the vernacular of the Idaho PUC, such 'presumptions').

The Idaho Commission is explicitly preempted from making any findings (or presumptions) as to the QF status of the Franklin Energy Storage Facilities as that determination is exclusively FERC's to make. Again, according to the Ninth Circuit Court of Appeals:

> What the state may not do, however, is to intrude into the Commission's [FERC's] exclusive jurisdiction to make QF status determinations by denying to certified QFs the full avoided cost rates to which they are entitled.[8]

As noted above, according to the Idaho Commission's own PURPA implementation scheme, all QFs other than wind and solar QFs are entitled to twenty-year contracts and published avoided cost rates. What the Idaho Commission has done in its final Order is simply to deny, "to certified QFs the full avoided cost rates to which they are entitled." The Idaho Commission must take at face value the certified energy storage QF status of the Franklin energy storage facilities. It therefore may not deny these QFs their entitlement to full avoided cost rates that it

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[7] *Order No.* 33785 at pp. 10 – 11.
[8] *Independent Energy Producers,* supra at p. 859.

has specifically made available to all QFs other than wind and solar QFs. It simply has no legal basis to do otherwise.

It is undisputed that the Franklin projects are certified energy storage small power production facilities.[9] It is also undisputed that the Idaho Commission affords all QFs (except for solar QFs and Wind QFs) the right to insist on twenty-year contracts at fixed avoided cost rates – which is what the Franklin energy storage QFs have requested. In order for the Idaho Commission to deny the Franklin energy storage QFs their right to twenty-year fixed rate contracts the Idaho Commission had to "intrude" on FERC's "exclusive jurisdiction to make QF status determinations." According to the Idaho Commission, an energy storage QF is not an energy storage QF. Rather, according to the Idaho Commission, an energy storage facility's primary source of energy is the QF and not the storage facility itself:

> 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. [citation omitted] . . . Accordingly, we find it appropriate to base Franklin's and Black Mesa's eligibility under PURPA on its primary energy source -- solar.[10]

The Franklin energy storage QFs, however, are self-certified energy storage QFs. They are not self-certified solar QFs. Line 6a from FERC Form 556 for each of the Franklin energy storage QFs provides:

> The energy storage (battery) system will take its input from 100% renewable energy sources such as wind, solar, biogas, biomass, etc. The system is designed with flexibility to most efficiently utilize the resources available at the site, at the present time as well as in the future.[11]

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[9] *See* FERC Docket Nos. QF17-581 – 584.
[10] Order No. 33785 at p. 12.
[11] *See* Line 6a (explained at p. 19) FERC Form 556 in FERC Docket Nos. QF-17-851 – 854.

Because the Idaho Commission has no jurisdiction to adjudicate the Franklin energy storage facilities' "eligibility under PURPA," the Commission's decision is unlawful as it is not in conformity with federal law granting to FERC the exclusive jurisdiction to determine a QF's "eligibility under PURPA."

In sum, having determined, illegally, that the Franklin energy storage QFs are not eligible energy storage PURPA resources, the Idaho Commission then made the determination (also illegally) that they are actually solar QFs. According to the Idaho Commission, because solar QFs are not entitled to established Idaho Commission rates and contract terms that are available for non-solar and non-wind QFs, Idaho Power's Petition for Declaratory Rule must be granted. However, the Idaho Commission has no authority to make such determinations – it therefore should deny Idaho Power's Petition in its order on reconsideration.

III
THE IDAHO COMMISSION'S ANALYSIS, IN ADDITION TO BEING ILLEGAL, IS SERIOUSLY FLAWED

Not deterred by federal preemption of its refusal to 'presume' that energy storage QFs are legitimate QFs in their own right, but only QFs based on the source of the energy input to a storage facility, the Idaho Commission attempted to reconcile its analysis with FERC precedent dealing with storage facility QFs:

> 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 Power'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.[12]

Of course, it is axiomatic that there is no such thing as "*per se* renewable resources/small power production facilities under PURPA." By definition, all QFs must, to varying degrees, meet specific standards in order to achieve QF status. Those standards include specific requirments as to fuel efficiency restrictions, fossil fuel use restrictions, ownership limitations, and size limitations. No resource is privileged enough to claim to be a *per se* QF under PURPA and the Franklin energy storage facilities made no such claim - which highlights significant confusion in the Idaho Commission's order.

Perhaps the Idaho Commission's confusion stems from its fundamental misreading of FERC's *Luz* decision.[13] In *Luz* FERC determined that an energy storage QF must, like all other small power production QFs, comply with the fuel use standards under PURPA.[14] Because the Luz energy storage project was being energized with undifferentiated electricity purchased from the 'grid' it was unable to show that its use of fossil fuels was in compliance with FERC fossil fuel use restrictions. Hence FERC declared that although energy storage facilities are distinct QFs they:

> Are subject to the same fuel use limitations as all other small power production facilities. Fossil fuel used to produce electric energy which is utilized to initiate the storage process, whether it comes from a utility grid or on-site generating facilities must be counted in determining the total energy input of such a facility. Since the Applicant has not demonstrated that the utilization of electrical input from the grid in this instance will not result in a violation of the fossil fuel input limitation, we must deny the application.[15]

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[12] Order No. 33785 at p. 11.
[13] *Luz Development and Finance Corporation* 51 FERC ¶61,078.
[14] Fossil fuel use is limited for small power production facilities to only those minimum amounts required for "ignition, startup, testing, flame stabilization and control uses…" *Id.* at p. 6.
[15] *Id.*

The Idaho Commission appropriately observed that, according to FERC's Luz decision that:

> 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.[16] For this reason, in order to qualify as a PURPA resource, the primary energy source behind the battery storage must be considered.

Significantly, FERC did not rule that electric input to an energy storage QF is prohibited. Nor did it rule that such electric input casts a cloud as to the distinct QF status of such a facility. Rather, FERC looks to the primary energy source behind the energy storage system to determine if the energy storage system meets the fuel use criteria of a Qualifying Facility. Critically overlooked by the Idaho Commission is the fact that FERC does NOT consider the "primary energy source behind the battery" to be the QF. FERC only looks at the primary energy source behind the energy storagte system to confirm that the energy storage system is, itself, a QF. This is because FERC unequivocally and explicitly ruled that energy storage facilities are, despite the Idaho Commission's conclusion, QFs in their own right:

> 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.[17]

Here, of course, the Franklin energy storage facilities are also a renewable resource for purposes of QF certification. The significant difference between the Franklin energy storage facilities and the energy storage facilities at issue in *Luz* is that the Franklin energy storage facilities have, in fact, demonstrated their compliance with FERC's energy input requirements by using no 'grid'

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[16] Of course, FERC made no such finding regarding energy storage facilities, not all of which require electrical input.
[17] *Luz* supra at p. 10.

power and no fossil fuel input. However, because the Idaho Commission is bound by the certified status of the Franklin energy storage QFs, it is beyond the jurisdictional reach of the Idaho Commission to even make such an inquiry. As the Ninth Circuit Court of Appeals instructed:

> The state's authority to implement section 210 [PURPA] is admittedly broad, but nothing in the language of this section indicates that such authority includes the authority to make QF determinations.[18]

Idaho Power's Petition for Declaratory Order asked the Idaho Commission to do just that. And the Idaho Commission obliged Idaho Power by illegally finding that energy storage facilities that use solar power to charge the underlying storage devices are not energy storage QFs, but are instead solar QFs. This distinction is, of course, convenient to Idaho Power in that such a determination allows Idaho Power to avoid its Idaho Commission imposed obligation to non-solar and non-wind QFs to offer twenty-year contracts at fixed rates.

IV

PRAYER FOR RELIEF

For the reasons stated above, and pursuant to the Idaho Commission's statutory obligation to correct legal and factual errors in its final orders, the Franklin Energy Storage Projects respectfully request the Commission issue its order on reconsideration reversing its final order in this matter and denying Idaho Power's petition for declaratory relief.

WHEREFORE, the Franklin Energy Storage Projects respectfully request this Commission issue its order on reconsideration as prayed for above.

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[18] *Independent Energy Producers Ass'n,* supra at p. 856.

RESPECTFULLY SUBMITTED this 3rd of August 2017.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of August 2017, served the foregoing Petition for Reconsideration in Docket No. IPC-E-17-01 upon all parties of record in this proceeding by emailing a copy thereof and delivering a copy thereof in person:

Donovan Walker
Idaho Power Company
1221 West Idaho Street
Boise, Idaho
dwalker@idahopower.com
dockets@idahopower.com

Daphne Haung
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho
daphne.haung@puc.idaho.gov

Commission Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho
Diane.holt@puc.idaho.gov

By emailing a copy thereof:

Brian Lynch
Black Mesa Energy LLC
brian@mezzdev.com

David Bender
Earthjustice
dbender@earthjustice.org

Ben Otto
Idaho Conservation League
botto@idahoconservation.org

Peter Richardson