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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)) Comments of Idaho Conservation League) and Sierra Club and Conditional Request) for Hearing)

Idaho Conservation League ("ICL") and the Sierra Club submit these comments pursuant to the Idaho Public Utilities Commission's ("Commission") Modified Procedural Order issued March 23, 2017. ICL and Sierra Club oppose Idaho Power Company's request for a declaratory order that would improperly restrict the contract terms and pricing for battery storage facilities providing energy under the Public Utilities Regulatory Policies Act ("PURPA").

Idaho Power's petition requests that the Commission "issue an order determining the proper contract terms, conditions and avoided cost pricing to be included in the [PURPA] contracts [for] battery storage facilities." Pet. at 1. The Petition contends that battery facilities should "be subject to the same 100 kilowatt… published rate eligibility cap applicable to wind and solar generation" established in Order No. 32262 and the corresponding two year maximum contract term established in Order No. 33357. Pet. at 2. Thus, the Petition seeks to revise the

prior orders and extend the 100 kilowatt (kW) cap for published rates and 20 year contract terms for wind and solar to battery storage facilities also.

The declaratory ruling procedure is not the appropriate process for modifying the prior orders to include battery storage. Furthermore, even if the correct procedure were used, the Commission should decline to extend Orders 32697 and 33357. In fact, the Commission should begin a new proceeding to rescind Order No. 33357 because it exceeded the Commission's jurisdiction. Order 33357 deprived Qualifying Facilities ("QFs") of their right to sell to Idaho utilities by limiting contract length to less than the minimum length that would allow QFs to finance their projects, in violation of federal law.

Moreover, substantial evidence now exists that the Commission's prior order limiting contract lengths for wind and solar QFs larger than 100 kW to two years has effectively eliminated all such projects within Idaho. During the same period, jurisdictions outside Idaho that rejected similar constraints on QFs continue to experience new QF development. This evidence demonstrates that longer contracts would allow QF projects a reasonable opportunity to attract capital but the current two-year contracts do not. The Commission cannot find on the record in this case that battery storage QFs can attract the necessary capital if also limited to only two-year contracts. In fact, the Commission should revisit its prior findings in Order 33357.

Conditional Request for Hearing: To the extent that the Commission does go forward and 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. No hearing is needed if this Commission rejects the Petition.

I. A Declaratory Ruling Is Not the Appropriate Procedure For the Relief Idaho Power Requests.

There is no specific statute authorizing the Commission to issue declaratory rulings. Rather, that authority derives (if at all) inherently from other authorities of this Commission. See Pet. at 5 (citing "Title 61 of Idaho Code and the Idaho Uniform Declaratory Judgments Act of 1933" as the basis for the requested relief).[1] That inherent, derivative, authority must yield to specific statutory procedures when provided by the legislature; otherwise the specific statutory procedures become superfluous. Here, the legislature provided a process for rescinding, altering or amending prior orders. Idaho Code § 61-624. That procedure controls and should not be ignored in favor of an extra-statutory declaratory ruling proceeding.

The Petition in this case effectively asks the Commission to alter or amend its Order Numbers 32697 and 33357 to include battery storage QFs to the limited category of "wind and solar" QFs subject to a 100 kW limitation for published avoided cost rates and longer contract terms.[2] While the Petition contends that battery storage facilities' qualification for the published avoided cost rates and contract length were not determined by Order Nos. 32697 and 33357, Pet. at 7, the Petition also concedes that the Commission "previously directed that published avoided cost rates be distinguished by resource type." Pet. at 3 (citing Order No. 32697 at 15; Order No. 32802 at 5-8.) That distinction by resource type was specific to solar and wind only below 10 MW. Order No. 33357 at 25 (limiting "IRP based contracts" to two years but allowing longer contracts for published avoided cost rates); Order No. 32697 at 14 (rejecting at 100 kW limit on

[1] The Declaratory Judgments Act applies specifically to "courts of record," Idaho Code § 10-1201, which are specifically defined and do not include this Commission. Idaho Code §§ 1-101, 1-102.

[2] As the Petition concedes, this Commission does not have jurisdiction to determine whether the storage facilities are qualifying facilities; that determination lies exclusively with FERC. Pet. at 6 ("QF status is within the exclusive jurisdiction and properly before FERC, not this Commission, for determination.") Therefore, the only question is whether the Commission's prior orders should extend to battery storage along with the wind and solar QFs specifically addressed in the orders.

the published avoided cost rate "for resources other than wind and solar" and subjecting only wind and solar QFs under 10 aMW to IRP based contracts); Order No. 32176 at 9 (temporarily suspending published avoided cost rates for facilities larger than 100 kW "for wind and solar only"). Petitioner thus argues to now extend those orders to battery storage facilities because the generation profile of the storage facilities is "nearly identical, and generally matches" that of a solar generating facility, and some are located on the same site as a prior proposed solar facility, and, therefore, should be treated the same as a solar facility. Pet. at 4, 7-10. That requires a revision to the categories adopted in Order Number 32697, and consequently Order No. 33357. Idaho Code § 61-624 provides the procedure for doing so. Idaho Power should have filed a complaint under that statute, and a hearing should be held as provided by that statute, rather than proceeding under the current petition for declaratory ruling.

II. The Commission Should Not Extend Its Prior Orders to Cover Battery Storage Facilities and Should, Instead, Rescind The Contract Length Limits From Order No. 33357 As Exceeding The Commission's Jurisdiction.

A. The Delegation to the Commission to Implement Certain Portions of PURPA and FERC's Regulations Does Not Extend to Dictating Maximum Contract and Enforceable Obligation Lengths.

This Commission's authority is broad when implementing those powers specifically given to it by PURPA and FERC's regulations. But there is no basis to assume, as the Commission did in Order No. 33357, that the Commission's jurisdiction and authority to implement PURPA grants it authority to impose any policy, obligation, or limit on the rights conveyed under PURPA whenever FERC's rules fail to expressly prohibit the Commission from doing so. Such assumption of jurisdiction unless specifically denied runs contrary to the structure of PURPA and the law against assumed agency jurisdiction. Moreover, even where the Commission has jurisdiction and authority to act under PURPA, it must do so to implement FERC's rules, not to contradict or limit them, nor to adopt policies directly contrary to those FERC seeks to implement.

1. The Commission's Delegated Authority to Implement PURPA is Specific To Determining Avoided Cost Rates, Determining When A QF's Enforceable Obligation Arises, and Deciding Which Procedural Mechanisms To Use.

States have broad authority under PURPA and FERC regulations to determine avoided cost rates based on the factors identified by FERC, to determine whether and when an obligation is enforceable under state contract law, and to decide the manner in which to implement FERC's regulations (i.e., through rulemaking, orders, or adjudicating individual cases). *Independent Energy Producers Assoc. v. Cal. Pub. Utilities Comm'n.*, 36 F.3d 848, 856 (9th Cir. 1994); *Rosebud Enterprises v. Idaho Pub.Utilities Comm'n*, 128 Idaho 609, 612, 917 P.2d 766, 769 (1996); *A.W. Brown v. Idaho Power Co.*, 121 Idaho 812, 814, 828 P.2d 841, 843 (1992). These authorizations to the states to implement PURPA do not imply additional authorization to dictate limits to the rights of QFs. *Cf. Independent Energy Producers Assoc. Inc.*, 36 F.3d at 856-57 (rejecting argument that a state's discretion to set avoided cost rates or that the listing of considerations in 18 C.F.R. § 292.304(e) implies authority to impose additional conditions on the

QF); *Conn. Light & Power Co.*, 70 FERC 61,012, 61,027 (1995) ("PURPA gave the states responsibility *only* for 'implement[ing]' the Commission's rules." (emphasis original)). As the Idaho Supreme Court made clear in *Idaho Power Co. v. Idaho Public Utilities Commission*, the Commission has only those powers "specifically granted to it," with no presumption of additional jurisdiction. 102 Idaho 744, 639 P.2d 442, 448 (1981) (citing *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979); *United States v. Utah Power & Light Company*, 98 Idaho 665, 570 P.2d 1353 (1977); *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 571 P.2d 753 (1977)).

The Commission's prior Order No. 33357 exceeded the Commission's authority delegated under PURPA by limiting QF's rights under 18 C.F.R. § 292.304(d)(2)(ii) to two years. There is no statute, regulation, FERC order, or case providing such authority. Order No. 33357 is therefore beyond the authority delegated to the Commission. The Commission should not compound that extra-jurisdictional order by extending it further to battery storage QFs larger than 100 kW, as sought in the Petition.

2. Case law Provides Broad Discretion Only Within Specific Areas, Not Wide Ranging Authority to Impose Limits In Areas Not Specifically Delegated.

None of the cases cited in the Commission's prior orders recognize sweeping power to dictate all terms of a QF's right to sell power unless explicitly addressed by FERC's rules. In Order No. 33357 the Commission cited *Idaho Power*, 316 P3d at 1280, 1284, 1286, *Afton Energy v. Idaho Power Co.,* 107 Idaho 781, 785-86, 693 P.2d 427, 431-32 (1984) (Afton I/III), *Rosebud*, 128 Idaho at 627, 917 P.2d at 784; and *A.W. Brown*, 121 Idaho at 814, 828 P.2d at 843, and claimed that those cases provided implicit authority to impose any limits or restrictions on QFs unless specifically denied that power by FERC regulations. Order No. 33357 at 12; Order

No. 33419 at 7. Under that premise, the Commission then stated that the relevant question was whether FERC has specifically directed the Commission to impose a minimum length of contract. *Id.* But, those cases are not nearly so sweeping and the conclusion the Commission drew from them of virtually unlimited power unless expressly limited by FERC is unsupported.

The cases cited in Order Nos. 33357 and 33419 recognize only that the Commission has discretion in the *manner in which* FERC rules are implemented and the details of what a QF has obligated itself to do and when it's obligation is enforceable. *Idaho Power*, 155 Idaho at 782, 784, 316 P.3d at 1280, 1284. The *Idaho Power* court stated:

> State agencies that regulate utilities are required to implement FERC rules, but they have discretion in determining the manner in which the rules will be implemented, and they may comply by issuing regulations, be resolving disputes on a case-by-case basis, or by other action reasonably designed to give effect to FERC's rules.

155 Idaho at 786, 316 P.3d at 1284 (citing *FERC v. Mississippi*, 456 U.S. at 751); see also *Id.* at 782, 316 P.3d at 1280 (same); *Afton*, 693 P.2d at 431-32 ("FERC's regulations interpret [§210(f)] to require that state 'implementation may consist of the issuance of regulations, an undertaking to resolve disputes between qualifying facilities and electric utilities… or any other action reasonably designed to implement such subpart…' "). The *Idaho Pow*er court's citation to *FERC v. Mississippi*, 456 U.S. at 767, similarly refers to the Supreme Court's statement that:

> [I]t has always been the law that state legislative and judicial decision makers *must give preclusive effect to federal enactments* concerning nongovernmental activity, no matter what the strength of the competing local interests. This requirement follows from the nature of governmental regulation of private activity. "[I]ndividual businesses necessarily [are] subject to the dual sovereignty of the government of the Nation and of the State in which they reside," *when regulations promulgated by the sovereigns conflict, federal law necessarily controls*. This is true though Congress exercises its authority "in a manner that displaces the States' exercise of their police powers," or in such a way as to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important,"—or, to put it still more plainly, in a manner that is "extraordinarily intrusive." Thus it may be unlikely that the States will or easily

> can abandon regulation of public utilities to avoid PURPA's requirements. But this does not change the constitutional analysis: as in *Hodel v. Virginia Surface Mining & Recl. Assn.*, "[t]he most that can be said is that the ... Act establishes a program of cooperative federalism that allows the States, *within limits established by federal minimum standards*, to enact and administer their own regulatory programs, structured to meet their own particular needs."

FERC, 456 U.S. at 766-67 (emphasis added) (internal citations omitted). Thus, the cases the Commission relied on to find authority to limit QF's rights under 18 C.F.R. § 292.304(d)(2)(ii) actually provide that, within the requirement of 16 U.S.C. § 823a-3(f), the state can decide the *method* of implementing FERC's rules within the limits established by FERC.

The cases the Commission cited also recognize a second, limited, scope of state authority: to make a fact-specific determination as to legally enforceable obligation formation. The *Idaho Power* case specifically involved the Commission's determination that an enforceable obligation was not formed before a grandfathering date for prior published rate qualification. 155 Idaho at 786. For that purpose the court quoted *Power Resource Group, Inc. v. Public Utility Commission of Texas*, 42 F.3d 231, 238 (5th Cir. 2005) and *Rosebud Enterprises v. Idaho Public Utilities Commission*, 128 Idaho 609, 623-24, 917 P.2d 766, 780-81 (1996), for the proposition that:

> "[S]tates 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 on which a legally enforceable obligation is incurred under State law."

Idaho Power, 155 Idaho at 786, 316 P.3d at 1284.

Power Resources Group also involved a state commission making a determination of when an enforceable obligation arose. 422 F.3d at 238. Addressing that specific authority of the state, the court quoted *West Penn Power Company*, 71 FERC 61,153, 61,495 (1995), that "[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." *West Penn*, in turn, also involved a state's determination of when an enforceable obligation was incurred for purposes of determining the point in time to calculate avoided cost rates. *Id.* at 61,494. The reference to "determin[ing] the specific parameters of individual QF power purchase agreements" refers to the Pennsylvania Commission's prior "fact-based determinations" of "the time a legal obligation for the sale of power is incurred." *Id.* at 61,494-95.[3] The same quote is found in *Rosebud Enterprises*, which upheld this Commission's determination that a QF was entitled to indicative pricing as of a specific, historic, date. 128 Idaho at 623-24, 917 P.2d at 780-81. According to the court, "Conferment of grandfathered status on qualifying facility is essentially an IPUC finding that a legally enforceable obligation to sell power existed by a given date. Such a finding is within the discretion of the state regulatory agency." *Id.*

These cases all address the recognized authority of a state commission to determine when an enforceable obligation is created. But that specific authorization from FERC does not also confer an expansive authority to limit a QF's rights under 18 C.F.R. § 292.304(d)(2)(ii) to only two years. No decision of the Idaho Supreme Court, nor of FERC, grants that authority to this Commission. *Cf. Afton Energy, Inc.*, Case No. U-1006-199, Order No. 17478 at § II (August 3, 1982) (agreeing with Idaho Power's argument that the Commission's "authority (and, indeed, the duty) to require a utility to purchase power from a qualifying [facility]" does not mean that the Commission has jurisdiction to dictate the terms of that contract).

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[3] There may be misperception about the phrase "to determine the specific parameters of individual QF power purchase agreements" in *West Penn Power* because of the different meanings of the word "determine." However, it is clear from the context of the discussion in *West Penn*, as well as the statutory structure in 16 U.S.C. § 823a-3(a), (b) and (f) that FERC means that it is the state's role to make factual findings, calculate, or ascertain the parameters of agreements, not to establish limits for power purchase agreements different from those provided in FERC's rules. *See* WEBSTER'S NEW WORLD COLLEGE DICTIONARY 375 (3rd Ed.)

Therefore, under the actual holdings of the cases cited in prior Commission Order Nos. 33357 and 33419, the Commission is authorized to impose a maximum two-year time limit on QFs' right under 18 C.F.R. § 292.304(d)(2)(ii) to sell to utilities under predetermined long-term avoided costs if that limitation is a "manner" of implementing PURPA, a determination of when an enforceable obligation is formed, or falls within another specific authorization from FERC through which the Commission has discretion to limit a QF's rights under 18 C.F.R. § 292.304(d)(2)(ii). We respectfully suggest that it is none of these and, therefore, request that the Commission not only reject the Petition's request to extent Order No. 33357 to battery storage QFs over 100 kW, but open a proceeding to revisit the Order and eliminate the restrictions that order places on the right of QF solar and wind developers under 18 C.F.R. § 292.304(d)(2)(ii) for projects greater than 100 kW.

B. Even if FERC Had Delegated Authority To Impose Maximum Contract or Obligation Lengths, The Commission Must Still Exercise Any Discretion While Doing So Within The Limits Set By PURPA and FERC.

1. The Commission's Explicit Intent In Limiting QF Rights Under 18 C.F.R. § 292.304(d)(2)(ii) Conflicts With FERC's Intent In Adopting That Provision.

When it adopted the two year maximum for avoided cost projections under 18 C.F.R. § 292.304(d)(2)(ii), the Commission first recognized that when adopting regulations under 16 U.S.C. § 823a-3(a) and (b), FERC "acknowledged that avoided costs calculated when the parties energy into [a] contract might result in avoided costs over the term of the contract being greater than actual avoided costs at the time of delivery" Order No. 33357 at 23; Order No. 33419 at 6-7.[4] But, rather than accepting FERC's determination that long-term avoided costs are

[4] While this Commission cited 16 U.S.C. § 824a-3(b) for its "finding" that 20-year avoided cost contracts "are inconsistent with the public interest," Order No. 33419 at 7, that statute actually gives FERC, and not this Commission, the authority to determine what is in the public interest and determine whether to allow long-term

nevertheless just, reasonable and in the public interest, this Commission disagreed with FERC's conclusions. *Id.* In direct contrast to FERC's conclusions, this Commission concluded that short-term contracts with frequently adjusted avoided costs are more accurate, and therefore preferable and in the public interest. Order No. 33357 at 23[5]; Order No. 33419 at 7. This directly conflicts with FERC's findings under 16 U.S.C. § 823a-3(a) and (b) that long-term avoided cost contracts are in the public interest, *even if* long-term avoided cost projections turn out to be incorrect compared to time-of-deliver avoided costs, because locked-in long-term rates are necessary to realize Congress's purpose of encouraging QF development. *New York State Electric and Gas* and rejected by FERC. 71 FERC ¶ 61,027 *14-*15 (1995) ("NYSEG").

In fact, the Commission's conclusions in Order No. 33357, that long-term avoided cost contracts are not in the public interest because the Commission has historically over-projected avoided costs compared to time-of-delivery avoided costs, and that frequent renewal of short-term contracts ensures more accurate avoided costs, is essentially the same as the argument made by the utility in *NYSEG* and rejected by FERC. The utility company in *NYSEG* argued that

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avoided cost contracts. 16 U.S.C. § 824a-3(b) provides that the "rules prescribed under subsection (a) shall ensure" that avoided cost rates are "just and reasonable… and in the public interest…" The "rules prescribed under subsection (a)" are the rules that FERC adopts. 16 U.S.C. § 823a-3(a). Nothing in that statute gives this Commission authority to determine that FERC's rules are not in the public interest. To the contrary, once FERC determined that long-term contracts with long-term projected avoided costs are in the public interest in 18 C.F.R. 292.304(d)(2)(ii), this Commission's role is to implement that policy decision. 16 U.S.C. § 823a-3(f).

[5] The Commission's reasoning that because the parties agreed that zero variable cost resources (i.e., wind and solar) drive down marginal energy costs over time, the avoided cost rates calculated before those resources are built must have been too high, is also incorrect. Order No. 33357 at 22-23 (claiming this conclusion is "axiomatic"). The Commission's reasoning ignores the fact that future avoided costs are lower *because of* additional wind and solar generation. That is, it is actually "axiomatic" that adding zero variable cost resources cause the generation curve to shift to the right, which drives down future avoided costs because *after the wind and solar are built* the load and generation curves intersect at a lower marginal cost. The avoided cost rate for the next wind or solar project is based on what the marginal capacity and energy costs would be without that generation. Future avoided cost rates will be based on the marginal energy and capacity costs after that generation has forced costs down. Therefore, the fact that wind and solar built today result in lower future avoided costs does not mean that avoided cost projections made today—before the wind and solar cause marginal price reductions—are wrong. In any event, the Commission cannot refuse to provide QFs long-term avoided cost projections they are entitled to under 18 C.F.R. § 292.304(2)(d)(ii) even if the Commission believes it incorrectly projected such avoided costs in the past.

contracts with QFs must include "protective measures to ensure" that over the length of a contract, long-term avoided cost projections included in contracts do not exceed avoided costs at the time of delivery. *Id.* at *3. This is essentially the same as this Commission's conclusion that short-term contracts with frequent renewals, limiting the availability of long-term avoided cost rates, is more accurate than long-term avoided cost contracts and QFs should be limited to short-term contracts. Order No. 33357 at 23; Order No. 33419 at 7. FERC rejected that argument in *NYSEG*, explaining that its rules acknowledge and accept that long-term avoided costs may prove incorrect when compared to avoided costs at the time of delivery, but finding those concerns are outweighed by the competing interest of promoting QF development:

> At the time [FERC's] regulations were promulgated, the Commission anticipated that avoided costs could change over time and balanced the relevant competing interests. The Commission intended the regulations described above "to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the *need for [QFs] to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs*." The Commission recognized that, if the avoided cost of energy at the time it is delivered is less than the price provided in the contract, a utility may be required to pay a rate for purchases that would subsidize the QF at the expense of the utility's other ratepayers. However, the Commission also was:
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> > cognizant that in other cases, the required rate will turn out to be lower than the avoided costs at the time of purchase. The Commission does not believe that the reference in the statute to incremental cost of alternative energy was intended to require a minute-by-minute evaluation of costs which would be checked against rates established in long-term contracts between [QFs] and electric utilities.
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> *Many commenters have stressed the need for certainty with regard to return on investment in new technologies. The Commission agrees with these latter arguments*, and believes that, in the long run, "overestimations" and "underestimations" will balance out. ... The import of [18 C.F.R. § 292.304(b)(5)] is to ensure that a [QF] which has obtained the certainty of an arrangement is not deprived of the benefits of its commitment as a result of changed circumstances. This provision can also work to preserve the bargain entered into by the electric utility.

Id at *14-*15 (emphasis added) (internal citations omitted). Similarly, FERC recently reconfirmed in *Windham Solar LLC and Allco Finance Ltd.*, that:

> [FERC's regulations] pertaining to legally enforceable obligations "are intended to reconcile the requirement that the rates for purchases equal to the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments, by necessity, on estimates of future avoided costs" and has explicitly agreed with previous commenters that "stressed the need for certainty with regard to return on investment in new technologies." Given the "need for certainty with regard to return on investment" coupled with Congress' directive that the Commission 'encourage' QFs, a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors.

157 FERC 61,134 ¶8 (Nov. 22, 2016) (quoting Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880; 16 U.S.C. § 824a-3(a); 18 C.F.R. § 292.304(d)(2)); *see also JD Wind 1, LLC*, 130 FERC 61,127, 61,631 (2010) (long-term avoided cost contracts or enforceable obligations are consistent with PURPA even where costs turn out to be different than projected); *W. Penn Power Co.*, 71 FERC at 61,495-96 ("As we confirmed in [NYSEG], the provisions of section 292.304 allowing long-term fixed rate contracts for QFs – 'lock-ins'… mean what they say… in promulgating the regulations, we expressly considered and rejected the argument now made by West Penn that changed circumstances would require resetting of established rates to match the latest avoided cost determinations.").

Moreover, the Commission's requirement of frequent review of avoided costs for QFs, consistent with the time period for reviewing utility costs in IRP and rate cases, directly contradicts Congress and FERC's decision that QFs should not be subjected to the same type of periodic cost-of-service reviews as regulated utilities. 45 Fed. Reg. 12214, 12222 (Feb. 25, 1980) (quoting Conf. Report on H.R. 4016, H. Rep. No. 1750, 95th Cong., 2d Sess. (1976)).

The fact that the Commission's Order No. 33357 intends to limit a QF's right to long-term avoided cost rates, and instead requires sequential renewals with shorter term avoided cost

calculations, attempts to impose this Commission's policy preferences over those of FERC means that this Commission exceeded its jurisdiction. *See e.g., Windham Solar LLC*, 157 FERC 61,134 ¶¶ 5-6 and n.7 (2016) (rejecting a state rule effectively precluding the QF from obtaining a long-term avoided cost determination and, instead, forcing the QF to accept short-term, real-time, pricing rates). Attempts to undo policy decisions made by FERC—rather than implementing FERC's policy decisions—exceeds the Commission's jurisdiction and authority. *Cf Tri-State Generation and Transmission Assoc.*, 155 FERC ¶ 61,269 at ¶¶ 17-19 (2016) (finding that a decision ostensibly within the discretion of the utility, when intended to frustrate a QF's rights set forth in a prior FERC order, violated PURPA); *FLS Energy Inc.*, 157 FERC ¶ 61,211 ¶¶ 24-26 (finding Montana Commission's policy, while not explicitly prohibited by FERC rules, nevertheless violated PURPA because it indirectly achieved what the state is prohibited from doing directly).

Because Order No. 33357 exceeded the Commission's jurisdiction and authority, the Commission should not seek to extend it to battery storage QFs larger than 100 kW. Rather, it should open a new proceeding and revise or revoke Order No. 33357.

2. Order No. 33357 Denies QFs Their Right Under PURPA To A Contract or Enforceable Obligation With Avoided Costs Predetermined Over A Sufficient Period of Time To Allow Projects To Be Financed and Viable.

FERC rules providing QFs the right to sell to a utility based on long-term avoided cost rates determined before a QF project is built recognize that QFs must be able to evaluate the financial feasibility of their project with reasonable certainty, which requires estimating the expected returns based on the known price that the utility will pay. 45 Fed. Reg. at 12,218, 12,224. Therefore, while long-term, locked-in, avoided cost rates impose a risk on utilities that future electricity costs may be less than the long-term rate projected at the time the QF was developed, FERC nevertheless found such long-term avoided cost rates to be in the public interest because PURPA was intended to promote alternative generation from QFs, which requires long-term price certainty. *NYSEG*, 71 FERC 61,027, *14-*16 and fn. 49-50 (rejecting argument that long-term avoided costs must be limited or redetermined based on short-term, time-of delivery avoided costs, citing the regulation's intent to balance avoided cost accuracy with "the need for [QFs] to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs." (quoting 45 Fed. Reg. 12,214, 12,224 (Feb. 5, 1980)). FERC has recently confirmed that QFs are entitled to a long-term avoided cost contract sufficiently long to allow it a reasonable opportunity to attract capital to be viable.

> [T]he Commission has long held that its regulations pertaining to legally enforceable obligations 'are intended to reconcile the requirement that the rates for purchases equal to the utilities' avoided cost with the need for qualifying facilities to be able to enter into contractual commitments, by necessity, on estimates of future avoided costs' and has explicitly agreed with previous commenters that 'stressed the need for certainty with regard to return on investment in new technologies.' Given the 'need for certainty with regard to return on investment' coupled with Congress' directive that the Commission 'encourage' QFs, a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors.

Windham Solar LLC and Allco Finance Ltd., 157 FERC 61,134 ¶ 8 (Nov. 22, 2016) (quoting Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880; 16 U.S.C. § 824a-3(a); 18 C.F.R. § 292.304(d)(2)).

FERC was clear in its *Windham Solar* order that FERC's rules entitle QFs to contracts that are *at least* long enough to allow QFs a reasonable opportunity to attract capital. *Id.* FERC's determination that QFs must be provided the long-term income certainty needed to make those project viable is consistent with Congress's intent in enacting PURPA to counteract the reluctance of traditional utilities to purchase power from and sell to non-traditional facilities and to remove financial barriers imposed upon alternative energy sources by state and federal utility authorities. *Indep. Energy Producers Ass'n*, 36 F.3d at 850 (citing *FERC*, 456 U.S. at 750-51). This Commission must implement that determination by FERC. 16 U.S.C. § 823a-3(f).

There is nothing in the record in this case to support a finding that two years is sufficient time to allow a battery storage QF to attract capital. Therefore, even assuming that the Commission has authority to restrict a QF's right under 18 C.F.R. § 292.304(d)(2)(ii) to two years, it can still only do so after a finding (based on a record supporting it) that two years is sufficient to allow a QF to attract the capital needed to make the project viable. There is no such evidence in this docket. Moreover, there was no such finding and no evidence to support such finding in Docket IPC-E-15-01 that wind and solar QFs can attract capital with a contract term of only two years. The Commission cannot extend Order No. 33357 to battery storage QFs in this docket and should open a new proceeding to revisit Order No. 33357.

A new proceeding to revisit Order No. 33357 would show that wind and solar QFs are not viable with contracts of only two years. In fact, development in Idaho dropped off after the Commission limited QFs' rights under 18 C.F.R. § 292.304(d)(2)(ii) to five and then two years.

As of January 20, 2015, there were thirty-six proposed solar PURPA projects in Idaho proposing power purchase agreements to Idaho Power. Each was at least 1 MW and each proposed a 20-year PPA. *See* Exhibit 3 of R. Allphin in Docket IPC-E-15-01 (filed January 30,

2015) (attached hereto as Exhibit A). But after this Commission's February 6, 2015, Order No. 33222, which limited wind and solar QFs larger than 100 kW to five year contracts on an interim basis, effective February 5, 2015, and Order 33357 further limiting those QFs to two years, not a single one of the proposed QFs obtained a contract with Idaho Power. *See* IPC Resp. to SC/ICL Data Req. 1.3 (attached hereto as Exhibit B). The limited contract term is the only change that this drop off can be attributed to. Notably, all thirty-six proposed solar projects as of January 20, 2015, post-date Order No. 32176, which limited published avoided cost rates to solar projects under 100 kW. Therefore, the drop off cannot be attributed to the lower avoided costs provided through the IRP methodology. Moreover, since the Commission limited QFs to five year contracts on February 5, 2015, and then two year contracts in August, 2015, no wind and only a handful of solar QFs larger than 100 kW sought indicative pricing in Idaho and none progressed to a contract. *See* IPC Resp. to SC/ICL Data Req. 1.6 (Exhibit B[6]). However, other QFs not subject to the two-year maximum contract—a hydro and a biomass project—did progress to a contract. Id.

That the two-year contract limit is responsible for making wind and solar QF development infeasible in Idaho can also be seen by comparing Idaho to other states in the region that rejected utility requests to make similar dramatic contract term reductions and QFs have continued to develop projects. In Idaho Power's Oregon service territory, the Oregon Commission did not limit QF's right to long-term contracts and also refused to deny solar QFs smaller than 3 MW the benefit of a published avoided cost rates. Oregon Public Utilities Commission, Docket UM 1725, Order 16-129 at 8 (Or.PUC March 29, 2016); in Docket UM

[6] Exhibit B contains only the non-confidential, redacted version of IPC's production request.

1734, Order 16-130 at p. 8 (Or.PUC, March 29, 2016). QFs have been developed and continue to be developed in Oregon.

The Utah Public Service Commission rejected a request by PacifiCorp sister utility, Rocky Mountain Power, to limit QF contract terms to three or five years. *In the Matter of the Application of Rocky Mountain Power for Modification of Contract Term of PURPA Power Purchase Agreements with Qualifying Facilities*, Docket No. 15-035-53 (January 7, 2016). The Utah Commission instead adopted a fifteen-year contract term. Consequently, solar QFs continue to be able to finance and develop viable projects in Utah. According to Rocky Mountain Power in Utah, there are approximately 50 potential projects representing over 2,200 MW of QF development in Utah. *See In the Matter of: Rocky Mountain Power's Notice and Request for Extension of Deadlines Related to Schedule 38, Removal from QF Pricing Queue. Sections I.B.9 and I.B.10.e.*, Docket No. 17-035-13 (Utah Pub.Serv.Comm.); *In the Matter of: Rocky Mountain Power's 2016 Avoided Cost Input Changes Quarterly Compliance Filing*, Docket No. 16-035-29, QF Queue & Partial Displacement Calculation, March 31, 2017 (Utah Pub.Serv.Comm.)

The Wyoming Commission also rejected requests to limit QF contract terms in that state to only three years. *In re Application of Rocky Mountain Power for Modification of Contract Term of PURPA Purchase Agreements with Qualifying Facilities*, Docket No. 20000-481-EA-15 (Record No. 14220), Mem. Opinion, Finding of Fact, Decision and Order (Wy.P.S.C. June 23 2016). QF developers continue to build projects in Wyoming. See e.g., *In the Matter of the Power Purchase Agreements between Rocky Mountain Power and Boswell Springs, LLC*, Docket No. 14697 (Wy.Pub.Serv.Comm.) (80 MW QF Project PPA); *In the Matter of the Contract Filing of Rocky Mountain Power, a Division of PacifiCorp, For a Purchase Power Agreement*

with Sweetwater Solar, Inc., Docket No. 14368 (Wy.Pub.Serv.Comm.) (80 MW solar QF Project PPA).

Of those commissions asked in 2015 to limit QF contracts to two to five years, only Idaho did so. And, only Idaho saw wind and solar QF development stop. This further confirms that longer term contracts with prices known at the outset are necessary to allow QFs to develop viable projects and limiting contracts to only two years of known avoided cost rates makes QF project infeasible.

Conclusion

The Commission cannot use the declaratory ruling procedure in this case. Moreover, the Commission cannot extend Order No. 33357 to battery storage QFs because that order exceeded the Commission's jurisdiction. Even if the Commission had jurisdiction to limit QFs' rights under 18 C.F.R. § 292.304(2)(d)(ii), it cannot do so without first holding a hearing and making a record that affected QF projects are viable with only two year contracts. For the same reasons, the Commission should revisit Order No. 33357 for wind and solar projects.

Respectfully submitted on April 27, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April 2016, I delivered true and correct copies of the foregoing COMMENTS to the following persons via the method of service noted:

Hand delivery:
Jean Jewell
Commission Secretary
Idaho Public Utilities Commission
427 W. Washington St.
Boise, ID 83702-5983
(Original and seven copies provided)

Electronic Mail:

Donovan Walker, Lead Counsel
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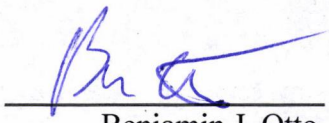

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Exhibit A

BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

CASE NO. IPC-E-15-01

IDAHO POWER COMPANY

ALLPHIN, DI TESTIMONY

EXHIBIT NO. 3

Idaho Power Company
Proposed PURPA Solar - As of January 20, 2015
Idaho

	Project Name	Project Developer	MWac	Term (Years)	State	Estimated Operation Date	Estimated Obligation (includes integration)	Estimated 2 Year Obligation (includes integration)
1	Project A1	Developer A	80	20	Idaho	12/01/16	$194,097,773	$9,903,565
2	Project A2	Developer A	28	20	Idaho	12/01/16	$67,364,680	$3,418,565
3	Project A3	Developer A	30	20	Idaho	12/31/16	$58,638,038	$2,561,512
4	Project A4	Developer A	30	20	Idaho	12/31/16	$57,091,198	$2,435,210
5	Project B1	Developer B	20	20	Idaho	10/30/16	$48,117,629	$2,441,832
6	Project B2	Developer B	20	20	Idaho	10/30/16	$47,758,118	$2,413,450
7	Project C1	Developer C	20	20	Idaho	12/31/16	$53,382,246	$2,318,923
8	Project C2	Developer C	20	20	Idaho	12/31/16	$53,283,030	$2,337,229
9	Project C3	Developer C	20	20	Idaho	12/31/16	$49,203,964	$2,150,196
10	Project C4	Developer C	20	20	Idaho	12/31/16	$49,360,962	$2,148,558
11	Project C5	Developer C	20	20	Idaho	12/31/16	$48,760,343	$2,084,643
12	Project C6	Developer C	20	20	Idaho	12/31/16	$51,486,568	$2,208,705
13	Project C7	Developer C	20	20	Idaho	12/31/16	$51,493,788	$2,178,763
14	Project C8	Developer C	20	20	Idaho	12/31/16	$51,355,246	$2,169,541
15	Project C9	Developer C	20	20	Idaho	12/31/16	$51,797,624	$2,148,386
16	Project C10	Developer C	20	20	Idaho	12/31/16	$48,438,230	$2,048,049
17	Project D1	Developer D	6	20	Idaho	12/31/16	$13,450,419	$652,511
18	Project D2	Developer D	7.5	20	Idaho	12/31/16	$16,813,024	$815,639
19	Project D3	Developer D	10	20	Idaho	12/31/16	$22,417,366	$1,087,519
20	Project D4	Developer D	10	20	Idaho	12/31/16	$22,417,366	$1,087,519
21	Project E1	Developer E	13	20	Idaho	12/31/16	$29,142,575	$1,413,775
22	Project E2	Developer E	20	20	Idaho	12/31/16	$44,834,731	$2,175,038
23	Project E3	Developer E	13	20	Idaho	12/31/16	$29,142,575	$1,413,775
24	Project E4	Developer E	20	20	Idaho	12/31/16	$44,077,867	$2,113,543
25	Project E5	Developer E	20	20	Idaho	12/31/16	$43,264,238	$2,047,317
26	Project E6	Developer E	20	20	Idaho	12/31/16	$43,264,238	$2,047,317
27	Project E7	Developer E	20	20	Idaho	12/31/16	$43,264,238	$2,047,317
28	Project E8	Developer E	20	20	Idaho	12/31/16	$43,264,238	$2,047,317
29	Project E9	Developer E	20	20	Idaho	12/31/16	$42,356,002	$1,972,577
30	Project E10	Developer E	20	20	Idaho	12/31/16	$41,372,078	$1,893,106
31	Project E11	Developer E	20	20	Idaho	12/31/16	$41,372,078	$1,893,106
32	Project E12	Developer E	13	20	Idaho	12/31/16	$26,891,851	$1,230,519
33	Project F1	Developer F	70	20	Idaho	12/31/16	$138,908,196	$6,145,736
34	Project G1	Developer G	3	20	Idaho	12/31/16	$5,863,804	$256,151
35	Project H1	Developer H	1	20	Idaho	12/31/16	$1,818,839	$74,315
36	Project I1	Developer I	20	20	Idaho	12/31/16	$36,376,776	$1,486,292
		Subtotal	**755**				**$1,711,941,939**	**$78,867,516**

Exhibit No. 3
Case No. IPC-E-15-01
R. Allphin, IPC
Page 1 of 2

	Idaho Power Company Proposed PURPA Solar - As of January 20, 2015 Oregon							
	Project Name	Project Developer	MWac	Term (Years)	State	Scheduled Operation Date	Estimated Obligation (includes integration)	Estimated 2 Year Obligation (includes integration)
37	Project J1	Developer J	10	20	Oregon	06/15/16	$30,282,970	$2,004,849
38	Project E13	Developer E	20	20	Oregon	12/31/16	$41,372,078	$1,893,106
39	Project K1	Developer K	10	20	Oregon	12/31/16	$31,889,203	$2,084,319
40	Project K2	Developer K	10	20	Oregon	12/31/16	$31,889,203	$2,084,319
41	Project K3	Developer K	10	20	Oregon	12/31/16	$31,889,203	$2,084,319
42	Project K4	Developer K	10	20	Oregon	12/31/16	$31,889,203	$2,084,319
43	Project K5	Developer K	10	20	Oregon	12/31/16	$31,889,203	$2,084,319
44	Project K6	Developer K	10	20	Oregon	12/31/16	$31,889,203	$2,084,319
45	Project K7	Developer K	10	20	Oregon	12/31/16	$31,889,203	$2,084,319
46	Project K8	Developer K	10	20	Oregon	12/31/16	$31,889,203	$2,084,319
47	Project K9	Developer K	10	20	Oregon	12/31/16	$31,889,203	$2,084,319
48	Project K10	Developer K	10	20	Oregon	12/31/16	$31,889,203	$2,084,319
		Subtotal	**130**				**$390,547,080**	**$24,741,148**
		Total	**885**				**$2,102,489,019**	**$103,608,664**

Exhibit B

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Attorney for Idaho Power Company

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 IDAHO POWER COMPANY'S **REDACTED** RESPONSE TO THE FIRST SET OF DATA REQUESTS OF THE IDAHO CONSERVATION LEAGUE AND THE SIERRA CLUB

COMES NOW, Idaho Power Company ("Idaho Power" or "Company"), and in response to the First Set of Data Requests of the Idaho Conservation League and the Sierra Club to Idaho Power Company dated April 4, 2017, herewith submits the following information:

REQUEST NO. 1.3: For each of the projects identified in Allphin Exhibit 3 filed in Docket No. IPC-E-15-01, please state the current status of the project, including but not limited to:

(1) whether the project proponent obtained a contract or legally enforceable obligation;

(2) the date of the contract or legally enforceable obligation; and

(3) The date on which the project either first produced electricity transferred to Idaho Power or is projected to first produce electricity to transfer to Idaho Power.

RESPONSE TO REQUEST NO. 1.3:

(1) None of the proposed projects that were the subject of Allphin Exhibit No. 3 obtained an ESA with Idaho Power.

(2) N/A.

(3) N/A.

The response to this Request is sponsored by Michael Darrington, Energy Contracts Leader, Idaho Power Company.

REQUEST NO. 1.6: Please provide the following:

(1) Each potential QF that has requested an energy sales agreement since February 5, 2015;

(2) The fuel or generation source for each potential QF that requested an energy sales agreement since February 5, 2015;

(3) The nameplate generation size of each potential QF that requested an energy sales agreement since February 5, 2015;

(4) Each potential QF that submitted a written request for indicative pricing since February 5, 2015;

(5) The fuel or generation source for each potential QF that submitted a written request for indicative pricing since February 5, 2015;

(6) The nameplate generation size of each potential QF that submitted a written request for indicative pricing since February 5, 2015;

(7) Each potential QF that has requested an energy sales agreement since August 20, 2015;

(8) The fuel or generation source for each potential QF that requested an energy sales agreement since August 20, 2015;

(9) The nameplate generation size of each potential QF that requested an energy sales agreement since August 20, 2015;

(10) Each potential QF that submitted a written request for indicative pricing since August 20, 2015;

(11) The fuel or generation source for each potential QF that submitted a written request for indicative pricing since August 20, 2015;

(12) The nameplate generation size of each potential QF that submitted a written request for indicative pricing since August 20, 2015; and

(13) The approximate location of each QF identified in response to subparts 1-12, above.

RESPONSE TO REQUEST NO. 1.6: The table below lists the projects that have submitted either a Schedule 73 (Idaho) or Schedule 85 (Oregon) QF ESA Application ("Application"), arranged by date the Application was deemed complete. Projects identified by name executed an ESA with Idaho Power that was filed with the applicable state's public utilities commission. All others remain confidential.

Project Name or Confidential Identifier	Date Schedule 73 or Schedule 85 Application Received, Including Request for an Indicative Pricing Proposal	Date of Request for Draft Energy Sales Agreement	Facility Type	Location	Nameplate (MW)
Project D5	2/17/2015	N/A	Solar	Idaho	10.00
Project D6	2/17/2015	N/A	Solar	Idaho	10.00
Project D4	3/2/2015	N/A	Solar	Idaho	10.00
Project D3	3/2/2015	N/A	Solar	Idaho	10.00
Baker City Hydro	3/5/2015	3/5/2015	Hydro	Oregon	0.24
Project D2	3/20/2015	N/A	Solar	Idaho	7.50
Project D1	3/20/2015	N/A	Solar	Idaho	6.00
Project M1	4/7/2015	4/27/2015	Solar	Oregon	5.00
Malheur River Solar	4/7/2015	4/27/2015	Solar	Oregon	10.00
Olds Ferry Solar	4/7/2015	4/27/2015	Solar	Oregon	5.00
Project M5	4/7/2015	4/27/2015	Solar	Oregon	10.00
Project M6	4/7/2015	4/27/2015	Solar	Oregon	10.00
Arcadia Solar	4/16/2015	7/14/2015	Solar	Oregon	5.00
Little Valley	4/27/2015	7/14/2015	Solar	Oregon	10.00
Jamieson Solar	4/27/2015	7/14/2015	Solar	Oregon	4.00
Evergreen Solar	4/27/2015	7/14/2015	Solar	Oregon	10.00
Moores Hollow Solar	4/27/2015	7/14/2015	Solar	Oregon	10.00
John Day Solar	4/27/2015	7/14/2015	Solar	Oregon	5.00
Project N2	4/27/2015	N/A	Solar	Oregon	10.00
Project Q1	4/27/2015	7/14/2015	Solar	Oregon	6.00

Project Q2	4/27/2015	7/14/2015	Solar	Oregon	5.00
Fairway	5/6/2015	4/27/2015	Solar	Oregon	10.00
North Gooding Main	5/16/2015	5/16/2015	Hydro	Idaho	1.22
Project R1	6/15/2015	N/A	Solar	Idaho	0.10
Project R2	6/15/2015	N/A	Solar	Idaho	0.10
Project R3	6/15/2015	N/A	Solar	Idaho	0.10
Project R4	6/15/2015	N/A	Solar	Idaho	0.10
Project R5	6/15/2015	N/A	Solar	Idaho	0.10
Project R6	6/15/2015	N/A	Solar	Idaho	0.10
Project R7	6/15/2015	N/A	Solar	Idaho	0.10
Project R8	6/15/2015	N/A	Solar	Idaho	0.10
Project R9	6/15/2015	N/A	Solar	Idaho	0.10
Project R10	6/15/2015	N/A	Solar	Idaho	0.10
Project S1	8/31/2015	N/A	Solar	Idaho	16.00
Project T1	9/15/2015	10/29/2015	Solar	Oregon	10.00
Project U1	6/3/2016	7/7/2016	Solar	Idaho	20.00
Project U2	6/3/2016	7/7/2016	Solar	Idaho	20.00
Project U3	6/3/2016	7/7/2016	Solar	Idaho	20.00
Project U4	6/3/2016	7/7/2016	Solar	Idaho	20.00
Brush Solar	7/21/2016	7/21/2016	Solar	Oregon	2.75
Vale I Solar	7/21/2016	7/21/2016	Solar	Oregon	3.00
Morgan Solar	8/5/2016	8/5/2016	Solar	Oregon	3.00
SISW LFGE	8/11/2016	11/17/2016	Biomass	Idaho	5.00
Project T5	11/2/2016	1/11/2017	Solar	Oregon	15.00

The response to this Request is sponsored by Michael Darrington, Energy Contracts Leader, Idaho Power Company.