Benjamin Otto, ISB No. 8292
Idaho Conservation League
710 N 6th St., Boise, ID 83701
(208) 345-6933, Ext. 12
botto@idahoconservation.org

David Bender, WI Bar# 1046102
Admitted *pro hac vice*
Earthjustice
3916 Nakoma Road
Madison, WI 53711
(415) 977-5727
dbender@earthjustice.org

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 Reply Comments of Idaho Conservation League and Sierra Club

Sierra Club and Idaho Conservation League provide these reply comments responding to arguments raised by Staff and Idaho Power. Sierra Club and Idaho Conservation League stand by their comments filed on April 27, 2017 (hereinafter "SC/ICL Comments"), and do not waive any argument or issue previously preserved by responding here to only some of the arguments made by other parties.

I. The Commission Should Not Extend The Two-Year Limit On Predetermined Avoided Cost Rates To Battery Storage Because The Commission Lacked Authority to Impose That Condition on Wind and Solar QFs Larger Than 100 kW.

As noted in Sierra Club and Idaho Conservation League's comments filed April 27, 2017, the Commission is limited to the authority expressly conveyed on it to implement the Public

Utilities Regulatory Policies Act ("PURPA"). That authority does not include limiting a Qualifying Facility's ("QF") right under 18 C.F.R. § 292.304(d)(2)(ii) to predetermined avoided cost rates to only two years. SC/ICL Comments at 4-10.

Staff's comments incorrectly assert that because FERC's rules *do not withhold authority* to restrict the length of time over which a QF can obligate itself and receive predetermined avoided cost rates, this Commission therefore has that authority. Staff Comments at 2 ("PURPA and FERC's implementing regulations are silent as to contract length; consequently, the issue is in the discretion of the state commissions. *See Afton Energy, Inc. v. Idaho Power*, 107 Idaho 781, 785-86, 693 P.2d 427, 431-32 (1984); *Idaho Power*, 155 Idaho at 782, 316 P.3d at 1280."). Staff's comment conflicts with state and federal law that an agency cannot find authority from a lack of withholding of authority. PURPA exempts QFs from most state regulation and subjects QFs to limited state authority to *implement* FERC's rules. 16 U.S.C. §, 823a-3(e), (f); SC/IPC Comments at 5-10. Congress' grant of limited authority to *implement* FERC's rules does not contain additional authority to *supplement* FERC's rules by imposing restrictions or limitations on the rights afforded by FERC to QFs. Nor does FERC confer that authority to the state, except in narrow and explicit categories. *See e.g.,* 18 C.F.R. §§ 292.303(d) (authorizing a state to adopt a different data disclosure rules through a specific public hearing process); 45 Fed. Reg. 12,214, 12,218 (Feb. 25, 1980) (specifically noting that 292.303(d) authorizes the states to adopt different reporting standards). In short, there is no grant of authority in PURPA or in FERC's regulations that authorizes this Commission to limit the rights in 18 C.F.R. § 292.304(d)(2)(ii) and the Commission cannot derive authority from a vacuum.

As with any administrative agency, this Commission does not obtain authority through the *lack* of a statute or rule *withholding* authority. *Cf. La. Pub. Serv. Comm'n v. FCC,* 476 U.S.

355, 374, 106 S.Ct. 1890, 1901–02, 90 L.Ed.2d 369 (1986) ("an agency literally has no power to act ... unless and until Congress confers power upon it"); *Texas v. U.S.*, 809 F.3d 134, 186 (5th Cir. 2015) (as revised) (rejecting an argument that "congressional silence has conferred on [the agency] the power to act. To the contrary, any such inaction cannot create such power." (citation omitted)); *Natural Res. Def. Council v. E.P.A.*, 749 F.3d 1055, 1064 (D.C. Cir. 2014) (the court does not presume a delegation of power absent an express withholding of that power); *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013) (rejecting congressional silence as a grant of authority to an agency); *Am. Bar Ass'n v. FTC,* 430 F.3d 457, 468 (D.C.Cir.2005) ("Plainly, if we were 'to *presume* a delegation of power' from the absence of 'an express *withholding* of such power, agencies would enjoy virtually limitless hegemony....' " (emphasis original) (quoting *Ry. Labor Execs. Ass'n v. Nat'l Mediation Bd.,* 29 F.3d 655, 671 (D.C.Cir.1994))); *Sierra Club v. EPA,* 311 F.3d 853, 861 (7th Cir. 2002) ("Courts 'will not presume a delegation of power based solely on the fact that there is not an express withholding of such power.' " (quoting *Am. Petroleum Inst. v. EPA,* 52 F.3d, 1113, 1120 (D.C.Cir.1995)); *Halverson v. Slater,* 129 F.3d 180, 187 (D.C.Cir.1997) (rejecting arguing that agency authority for a rule can be derived from silence); *Ry. Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670–71 (D.C. Cir. 1994) (rejecting argument that an agency's authority can be implied or presumed from an absence of explicit withholding of power as improperly giving agencies "virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."); *see also* SC/ICL Comments at 4-10 (citing Idaho cases limiting state agency authority to that specifically provided).

Moreover, the two cases cited in Staff's comment fail to support the proposition that the Commission has authority to add substantive provisions to those established by FERC—

specifically, the authority to limit a QF's right to obligate itself and receive a predetermined avoided cost rate under 18 C.F.R. § 292.304(d)(2)(ii) to only two years at issue here. Rather, the Supreme Court in *Afton* merely confirmed that sections 292.303(a), 292.304(d) and (e)(iii) provide *explicit* authority for the Commission to order Idaho Power to contract with a QF for the full thirty-five year period the QF proposed. *Afton Energy*, 107 Idaho 781, 785-86 and nn. 3, 5-7, 693 P.2d at 431-32. The court said nothing about additional implied authority based on the lack of a rule withholding such authority. Moreover, the discussion in *Afton* actually suggests that PURPA grants each QF the right to fixed, long term, contracts with predetermined avoided cost rates pursuant to 18 C.F.R. § 292.304(d)(2). 107 Idaho at 431 n.7. The Commission's two year limit on QF's rights under 18 C.F.R. § 292.304(d)(2)(ii) is therefore inconsistent with *Afton*.

Furthermore, the *Idaho Power* decision cited in Staff's comment similarly provides no support for Staff's contention that by omitting a time period in 18 C.F.R. § 292.304(d)(2)(ii) FERC authorized the Commission authority to impose its own limit. The portion of *Idaho Power* cited by Staff's comments simply repeats the Supreme Court's holding in *FERC v. Mississippi*, 456 U.S. 742 (1982), that the state can satisfy its obligation to implement FERC rules by choosing the procedural mechanism (i.e., through rules, orders, adjudication, or other actions). 155 Idaho 780, 782, 316 P.2d 1278, 1280 (citing *FERC*, 456 U.S. at 751). Choosing a method of *implementing* FERC's rules does not provide authority to impose additional rules or limit rights that FERC granted without limitation.

Because the Commission lacks authority to limit a QF's right to long-term predetermined avoided cost rates, is should not extend any such limits to battery storage facilities.

II. The Record Does Not Support the Necessary Finding That QFs Larger Than 100 kW Are Financially Viable With Only A Two Year Contract.

The Commission has no authority to limit a QF's rights under 18 C.F.R. § 292.304(d)(2)(ii). But, even assuming the Commission could impose such a limit, it still could not exercise that authority in a way that frustrates the intent behind PURPA or FERC's rules. SC/IPC Comments at 10-19. PURPA and FERC's implementing rules seek to encourage QF development. *Id.*; see also *Independent Energy Producers Assoc. v. Cal. Pub. Utilities Comm'n.*, 36 F.3d 848, 850 (9th Cir. 1994) (the intent behind PURPA includes removing financial barriers to alternative energy producers imposed by state and federal authorities). One way that FERC does so is by providing QFs a right to a the long-term, predetermined, avoided cost rate that a QF can "lock-in" at the beginning of its obligation in order to attract the necessary financing to make projects viable. SC/IPC Comments at 10-19; *Windham Solar LLC and Allco Finance Ltd.*, 157 FERC 61,134 ¶ 8 (Nov. 22, 2016) ("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."). Any restrictions imposed by the Commission that frustrate that right, by preventing a QF from obtaining reasonable financing, is unlawful. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (a state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (quoting *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941)).

Here, there is no record to support a finding that a two-year limit on battery storage QFs would allow QFs to be financed and viable. In fact, the record shows the opposite: after imposing the two-year limit, no QFs subject to that limit were developed. SC/ICL Comments at 16-17. In contrast, in other states where commissions rejected attempts to severely limit QF contract terms, wind and solar QFs continue to be viable. SC/ICL Comments at 17-19.

Therefore, even if the Commission had authority to impose time limits on a QF's right under 18 C.F.R. § 292.304(d)(2)(ii)—which it does not—applying the Commission's prior two-year limit to storage would still be unlawful because it frustrates the intent and purpose behind PURPA by imposing a constraint that makes otherwise viable QF projects unviable.

The Commission cannot extend the reach of the prior, unlawful, two-year limit to the battery QFs in this case without a record that a two year contract limit does not frustrate Congress and FERC's policy of promoting QFs through long term, predetermined, avoided cost rates. At a minimum, that would require a full evidentiary hearing, which would almost certainly confirm that a two year contract limit actually stands as an obstacle to accomplishing Congress and FERC's goal of promoting QF development. The Commission should not extend the two-year contract limit to battery storage projects.

Respectfully submitted on May 15, 2017.

__/s/ David C. Bender_____
David Bender
Earthjustice
3916 Nakoma Road
Madison, WI 53711
dbender@earthjustice.org

_/s/ Benjamin Otto_____
Benjamin J Otto
Idaho Conservation League
710 N 6th St.
Boise, ID 83701
botto@idahoconservation.org

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2017, I delivered true and correct copies of the enclosed IDAHO CONSERVATION LEAGUE AND SIERRA CLUB REPLY COMMENTS in this Docket No. IPC-E-17-01 to the following persons via the service method indicated.

HAND DELIVERY
Diane Hanian (Original and 7 copies)
Commission Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702
Diane.hanian@puc.idaho.gov

EMAIL DELIVERY
Camille Christen
Daphne Huang
Idaho Public Utilities Commission
472 West Washington Street
Boise, Idaho 83702
Camille.christen@puc.idaho.gov
Daphne.huang@puc.idaho.gov

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

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

Peter Richardson
Richardson Adams
515 N. 27th Street
Boise, Idaho 83702
peter@richardsonadams.com

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