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IDAHO PUBLIC
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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** **REPLY COMMENTS OF THE COMMISSION STAFF**

On February 27, 2017, Idaho Power Company filed a petition asking the Commission to issue a declaratory order regarding proper contract terms, conditions, and avoided cost pricing for five battery storage facilities that requested contracts under the Public Utility Regulatory Policies Act of 1978 (PURPA). Consistent with its scheduling order, the Commission received comments from the battery storage facilities, and then from Avista Corporation, Idaho Power, Staff, and joint-intervenors Sierra Club and Idaho Conservation League (ICL). Order No. 33729; *see* Order No. 33743 (granting intervention to Sierra Club and ICL). Commission Staff now submit reply comments.

Staff Reply Comments

In its initial comments, Staff included a background section about PURPA, and a summary of Idaho Power's petition in this matter, that are not repeated here.

1. Idaho Power's Comments

Idaho Power provided comments responding to those by Franklin and Black Mesa. In the Company's comments, it states that a "Declaratory Judgment is within the Commission's jurisdiction and authority and is necessary and proper in this case to resolve a real and substantial controversy between the parties as to the proper avoided cost rate and contract terms and conditions for the Proposed Battery Storage Facilities." Idaho Power Comments at 8. Staff's comments are consistent with Idaho Power's position. The Company's other comments in support of its requested relief reflect the arguments in its petition.

2. Avista's Comments

Avista Corporation supports Idaho Power's petition. In its comments, Avista states that battery storage facilities "should be classified, and treated, in the same manner as the facilities that provide the primary energy source for such battery storage facilities." Avista Comments at 5, 3-4 (discussing *Luz Development and Finance Corporation*, 51 FERC P 61,078 (1990)). In other words, battery storage facilities using wind or solar facilities as their primary energy source should be treated as wind or solar QFs. Staff's comments, which recommended that the published rate eligibility cap for the Franklin and Black Mesa facilities be determined based on their energy sources, align with Avista's analysis.

If the Commission rejects the proposal to treat battery storage facilities in the same manner as their primary energy source, then Avista recommends that the Commission "initiate a generic proceeding to determine the appropriate treatment of such facilities." *Id.* at 5. Likewise, given the broader implications of issues raised in this case, Staff recommended that the Commission initiate a general investigation into the appropriate contract terms for other battery storage QFs. Staff Comments at 11.

Finally, Avista recommends that the Commission put a "moratorium on energy storage QFs with nameplate capacities above 100 kW to protect utility customers during [a generic] proceeding." Avista Comments at 5-6. Staff would instead recommend that the Commission allow energy storage QFs larger than 100 kW to enter PURPA contracts, but that it temporarily set the threshold for published avoided cost rates for battery storage facilities at 100 kW, pending the outcome of the generic proceeding. This would ensure that Idaho Power complies with its

obligation to purchase under PURPA while also protecting ratepayers by ensuring accurate avoided cost rates.

3. Sierra Club's and ICL's Comments

Sierra Club and ICL oppose Idaho Power's petition, arguing that the Company is asking to modify prior Commission Order Nos. 32262 and 33357, and that a petition for declaratory order is therefore not the appropriate process. Sierra Club/ICL Comments at 1-2. This latter argument – that a petition for declaratory order is improper – relies entirely on the first argument being true – that the Company's requested relief is actually modification of Commission orders. Staff disagrees with this underlying assertion. Idaho Power's petition is a proper request to resolve a legal dispute, and Sierra Club and ICL have not shown that the petition must instead be construed as a request to modify the Commission's orders.

The Idaho Supreme Court has recognized the Commission's authority to resolve legal disputes with declaratory orders under the Uniform Declaratory Judgments Act, *Idaho Code* §§ 10-1201 *et seq*. *Utah Power & Light v. Idaho Pub. Util. Comm'n*, 112 Idaho 10, 12, 730 P.2d 930, 932 (1986). The Company's petition here seeks relief under the Idaho Uniform Declaratory Judgments Act, *Idaho Code* §§ 10-1201 *et seq*. Petition at 5. As discussed in Staff's comments, the elements for a declaratory order are satisfied here: there is an "actual or justiciable," "real and substantial," "definite and concrete" legal controversy between Idaho Power and the Franklin and Black Mesa QFs regarding the terms that should apply to their PURPA contracts. *See* Staff Comments at 3, 7.

Sierra Club and ICL assert that the Commission's "inherent, derivative" authority under the Idaho Uniform Judgments Act "must yield to" the statutory process for "rescinding, altering or amending prior orders" under *Idaho Code* § 61-624, because otherwise the procedures set forth in *Idaho Code* § 61-624 "become superfluous." Sierra Club/ICL Comments at 3. Section 61-624 provides that "The commission may at any time, upon notice to the public utility affected, and after opportunity to be heard . . . rescind, alter or amend any order or decision made by it." *Idaho Code* § 61-624. It is unclear how Idaho Power's petition for a declaratory order to resolve its contractual dispute with QFs renders superfluous the Commission's power to modify an order under Section 61-624. Sierra Club and ICL offer no cogent explanation for their argument.

As discussed in Staff's Comments (and thus not repeated here), Idaho Power's legal dispute with Franklin and Black Mesa can be resolved, *consistent with* FERC's analysis in *Luz*, and with the Commission's Order Nos. 32262 and 32176.[1] *See* Staff Comments at 7-11. Thus there is no reason – as Sierra Club and ICL contend – for Idaho Power to seek modification of Order No. 32262. More perplexing is Sierra Club's and ICL's contention that Idaho Power's petition seeks to modify Order No. 33357 regarding PURPA contract length. Sierra Club/ICL Comments at 1-2.

Order No. 33357 is the final order from consolidated proceedings before the Commission on petitions by Idaho Power, Avista, and PacifiCorp, to shorten PURPA contract lengths for projects with IRP-based avoided cost rates.[2] Under the Commission's Order No. 33357, the contract term for projects with IRP-based avoided cost rates is two years. The contract term for projects eligible for published rates remains at twenty years. Order No. 33253.

If Franklin and Black Mesa are eligible for published rates under Order No. 32262, then they would get 20-year terms under Order No. 33357. If Franklin and Black Mesa are not eligible for published rates under Order No. 32262, then they would get two-year terms under Order No. 33357. The parties may disagree about which published avoided cost rate eligibility cap – 100 kW or 10 aMW – should apply under Order No. 32262, but there is no dispute that, under Order No. 33357, projects that are ineligible for published rates get two-year contract terms. The issue of "whether to limit the length of contracts for battery storage facilities" is not before the Commission in this case, thus there is no need for a hearing to address it, as conditionally requested by Sierra Club and ICL. Sierra Club/ICL Comments at 2.

Sierra Club's and ICL's remaining arguments challenge the *validity* of Order No. 33357. *Id.* at 4-19. Their challenge is plainly outside the issues raised by Idaho Power's petition – which concern the proper published rate eligibility cap for the battery storage QFs – and is thus beyond the scope of this case. In addition to exceeding the scope of this proceeding, Sierra Club's and ICL's request to modify Order No. 33357 is barred by *Idaho Code* § 61-625 which precludes collateral attack on a Commission order that is final and conclusive.

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[1] Order Nos. 32262 and 32176 addressed disaggregation of solar and wind projects by lowering the published avoided cost rate eligibility caps for solar and wind projects.

[2] Following a petition to reconsider Final Order No. 33357, the Commission issued Order No. 33419.

The Commission's Order No. 33357 provided:

> THIS IS A FINAL ORDER. Any party interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in [this case] may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in [this case].

Order No. 33357 at 33. In Order No. 33419, the Commission provided:

> THIS IS A FINAL ORDER ON RECONSIDERATION. Any party aggrieved by this final Order on Reconsideration or other final or interlocutory Orders previously issued in this Case . . . may appeal to the Supreme Court of Idaho pursuant to the Public Utilities Law and the Idaho Appellate Rules.

Order No. 33419 at 27. The time for reconsideration, appeal, or other challenge to either order, entered August 20, 2015 and November 5, 2015, respectively, has passed. *Idaho Code* §§ 61-626, 61-627. The attempt by Sierra Club and ICL to bootstrap an otherwise impermissible, late challenge to Order No. 33357 through Idaho Power's petition in this case must be rejected.

Respectfully submitted this 15th day of May 2017.

Daphne Huang
Camille Christen
Deputy Attorneys General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 15TH DAY OF MAY 2017, SERVED THE FOREGOING **REPLY COMMENTS OF THE COMMISSION STAFF,** IN CASE NO. IPC-E-17-01, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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