Peter J. Richardson (ISB No. 3195)
Gregory M. Adams (ISB No. 7454)
Richardson Adams, PLLC
515 N. 27th Street
Boise, Idaho 83702
Telephone: (208) 938-7900
Fax: (208) 938-7904
peter@richardsonadams.com
greg@richardsonadams.com

Attorneys for Complainant Black Mesa Energy, LLC

BEFORE THE

IDAHO PUBLIC UTILITIES COMMISSION

BLACK MESA ENERGY, LLC, Complainant, vs. IDAHO POWER COMPANY, Defendant.	Case No. IPC-E-20-17 ANSWER OF BLACK MESA ENERGY, LLC TO IDAHO POWER COMPANY'S MOTION TO DISMISS

INTRODUCTION

COMES NOW, Black Mesa Energy, LLC ("Black Mesa") and answers Idaho Power Company's ("Idaho Power" or the "Company") Motion to Dismiss filed with the Idaho Public Utilities Commission (the "Commission" or "IPUC") on April 23, 2020.[1] As explained below, Idaho Power's Motion to Dismiss fails to meet the basic procedural requirements for such a dispositive motion and certainly fails to establish as a substantive matter that Black Mesa's complaint can be summarily dismissed based on the facts alleged in the complaint. Indeed, although titled as a "Answer and Motion to Dismiss," Idaho Power's pleading contains no legal argument whatsoever and instead follows the general structure of an answer to a complaint. The

[1] In Order No. 34663, the Commission ordered that Black Mesa's deadline to file its Answer to Idaho Power's Motion to Dismiss is extended from May 7, 2020, until May 15, 2020.

Commission should deny Idaho Power's Motion to Dismiss and allow the parties to file and argue complete dispositive substantive motions, and if necessary, hold further proceedings necessary to resolve any disputed material facts.

LEGAL STANDARD FOR COMMISSION'S REVIEW

Due to the lack of argument or legal authority supplied in Idaho Power's Motion, it is difficult to characterize it. Rule 56 of the Commission's Rules of Procedure specifically allows for the filing of a motion to dismiss. IDAPA 31.01.01.056. That rule requires, however, that all motions to dismiss must "[r]efer to the particular provision of statute, rule, order, notice, or other controlling law upon which they are based." IDAPA 31.01.01.056.02. As explained in detail below, Idaho Power has completely failed to meet this threshold requirement for lodging a motion to dismiss under the Commission's rules.

The Commission also looks to court rules of civil procedure in motion practices involving qualifying facility ("QF") complaint proceedings. *See Grand View PV Solar II v. Idaho Power Co.*, IPUC Case No. IPC-E-11-15, Order No. 32580, at 6-7 (June 21, 2012). Under court rules, a motion to dismiss that points to evidence beyond the pleadings, such as the voluminous attachments to Idaho Power's Answer and Motion to Dismiss, is reviewed under the same standard as a motion for summary judgment even when titled a motion to dismiss. The rule states:

> If, on a motion under Rule 12 (b)(6) [a motion to dismiss for failure to state a claim] or 12 (c) [a motion for judgment on the pleadings] matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

I.R.C.P. 12(d).

Summary judgment "is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Ackerman v. Bonneville County*, 140 Idaho 307, 310, 92 P.3d 557, 560 (Ct. App. 2004). "When ruling on a motion for summary judgment, the trial court must determine whether the evidence, when construed in the light most favorable to the nonmoving party, presents a genuine issue of material fact or shows that the moving party is not entitled to judgment as a matter of law." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009). "The moving party bears the burden of proving the absence of material facts." *Id.* "If the evidence is conflicting on material issues or supports conflicting inferences, or if reasonable minds could reach differing conclusions, summary judgment must be denied." *Doe v. Sisters of Holy Cross*, 126 Idaho 1036, 1039, 895 P.2d 1229, 1232 (Ct. App. 1995).

Similarly, in Idaho, a "court may grant a motion to dismiss for failure to state a claim . . . only when it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." *Harper v Harper,* 122 Idaho 535, 536, 835 P.2d 1346, 1347, *emphasis provided*, (Ct. App. 1992). All reasonable inferences are drawn in favor of the non-moving party – here, Black Mesa. *Losser v. Bradstreet,* 145 Idaho 670, 673, 183 P.3d 758, 761 (2008). In ruling on a motion to dismiss, the issue, "is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Losser,* at 145 Idaho 673, 673 P.3d at 761. "A motion to dismiss must be resolved solely from the pleadings and all facts and inferences from the record are view in favor of the non-moving party." *Taylor v. McNichols,* 149 Idaho 826, 832-33, 243 P.3d 642, 648-49 (2010). A motion to dismiss should "be granted only in the unusual case in which the plaintiff includes

allegations showing on the face of the complaint that there is some insurmountable bar to relief." *Harper,* 122 Idaho at 536, 835 P.2d at 1347.

As the above summary of the legal standards applicable to Idaho Power's Motion to Dismiss, Idaho Power has an extraordinarily high hurdle to overcome before its Motion to Dismiss can be granted. That it has failed to overcome that hurdle is apparent, as discussed in detail below.

ARGUMENT

I. IDAHO POWER'S MOTION IS DEFECTIVE ON ITS FACE BECAUSE IT ARTICULATES NO PLAUSIBLE LEGAL BASIS UPON WHICH IT RELIES

As noted above, Rule 56 of the Commission's Rules of Procedure requires that all motions to dismiss reference the specific provision of the statute, rule, order, notice, or other controlling law upon which they rely. Idaho Power has failed to do so. Idaho Power's Motion contains the following sections: "I. INTRODUCTION, BACKGROUND, and FACTS," "II. ANSWER," and "III. AFFIRMATIVE DEFENSES." The only section that contains any reference to any legal authority is contained in the "INTRODUCTION, BACKGROUND, and FACTS," but that section merely contains an incomplete recitation of background regarding the U.S. District Court's recent decision that the Commission violated the Public Utility Regulatory Policies Act of 1978 ("PURPA") by characterizing storage QFs as solar QFs. *Idaho Power's Answer and Motion to Dismiss* at 3-6 (discussing *Franklin Energy Storage One, LLC v. Kjellander*, Case No.: 1:18-cv-00236-REB, 2020 U.S. Dist. LEXIS 8892 (Jan. 17, 2020)).

In this section on the background, Idaho Power's only citations are to two Commission orders (Order Nos. 33785 and 33585) and to the decision and order in which the District Court

enjoined the Commission from enforcing those two orders. *Idaho Power's Answer and Motion to Dismiss* at p. 3. Among the court's rulings quoted by Idaho Power are the following excerpts:

> The Court finds that the Defendant IPUC Commissioners violated the Public Utility Regulatory Policies Act of 1978 … when they issued final order numbers 33785 … and 33585….
>
> Defendants [IPUC Commissioners] are permanently enjoined from enforcing or applying either of such IPUC orders to Plaintiff's facilities as if such facilities are classified as something other than energy storage QFs….

Id. (quoting *Franklin Energy Storage One, LLC*, 2020 U.S. Dist. LEXIS 8892).

Idaho Power then apparently suggests that the District Court's order it cites is inapplicable to Black Mesa and does not affirmatively mandate the relief requested by Black Mesa, stating as follows:

> [T]he Court also stated, "The Court **specifically declines** to order Defendants [the IPUC] to require utilities under their jurisdiction to afford energy storage QFs all rights and privileges afforded to 'other QFs' under the IPUC's PURPA implementation plan." [citation omitted] The setting of avoided cost rates and the contractual terms and conditions of purchase are the exclusive jurisdiction and responsibility of the IPUC.

Id. at p. 6 (emphasis in Idaho Power's Motion).

There is no question that this Commission has been permanently enjoined from enforcing or applying Order Nos. 33785 and 33585 to the energy storage QFs that are the subject of the *Franklin* decision cited by Idaho Power. Apparently, Idaho Power believes that because the Commission has been prohibited from applying solar QF status to the Franklin energy storage QFs, that it is now free to make such an illegal application of solar QF status to the Black Mesa energy storage QFs. Thus, Idaho Power makes irreconcilably contradictory arguments. It argues that the *Franklin* decision does not apply to Black Mesa because that decision is specifically limited to the two referenced Commission orders. At the same time, however, it argues that the

Franklin decision does apply in that the Court refused to order the Commission to offer any specific contract rate or term. Idaho Power's confused and contradictory reading of the *Franklin* decision is hardly a concrete reference to a legal authority supporting its Motion to Dismiss. At most, Idaho Power's argument might negate reliance on the *Franklin* decision as res judicata requiring the Commission to grant the Black Mesa QFs' complaint, but it certainly no reference to an affirmative authority supporting dismissal of the complaint, as required by this Commission's own rules.

Idaho Power's assertion that the "setting of avoided cost rates and the contractual terms and conditions of purchase are the exclusive jurisdiction and responsibility of the IPUC," *id.* at 6, is meaningless in the context of its Motion to Dismiss. Black Mesa's complaint relies on the avoided cost rates and contractual terms that *this Commission* has already established, as well as the Federal Energy Regulatory Commission's ("FERC") directives that this Commission must enforce Black Mesa's creation of a legally enforceable obligation (or "LEO") to those rates. *Black Mesa's Complaint* at ¶¶ 5-8, 26-43 (citing, *inter alia*, 18 C.F.R. § 292.304(d)(2)(ii)). The essence of Black Mesa's complaint is that Idaho Power has refused to honor this Commission's approved and adopted avoided cost rates and contractual terms, including the 20-year contract term available to all QFs sized up to 10 average monthly megawatts other than QFs certified by FERC as wind and solar QFs. At the appropriate time, and in the appropriate pleading context, Black Mesa will offer further analysis and argument dealing with the relationship between the District Court's ruling and this Commission's obligations under PURPA.

However, at this point, it is important to further note that Idaho Power fails to explain the *reason* the District Court declined to order further relief to the affected QFs in *Franklin*, which further demonstrates why the *Franklin* decision is not an affirmative basis for dismissal of Black

Mesa's complaint. The Federal District Court did not decline to issue further relief because it found this Commission's reasoning or application of the law was correct; it declined to issue further relief because it found "there is a jurisdictional divide" in a PURPA implementation challenge which precluded the Court from ordering further specific relief. *Franklin Energy Storage One, LLC*, 2020 U.S. Dist. LEXIS 8892 at *52. In so ruling, the Court noted that the relief it was authorized to grant was limited in such an implementation claim under PURPA – "a QF may bring judicial actions before FERC and in federal court against state regulatory commissions to require implementation of PURPA's rules but not their application." *Id.* at *53. Instead, the Court directed that "additional issues may be taken up in further proceedings [before the IPUC], subject to the rulings and constraints of this decision, if Plaintiffs choose to pursue such further proceedings." *Id.* However, the Court left open the possibility that "if Plaintiffs are denied contracts on the terms they desire and they perceive such denial is grounded in a violation of PURPA jurisdictional lines, they may be able to again seek recourse using the avenues PURPA affords." *Id.* at *52 n.20.

In sum, nothing in the District Court's decision stands for the proposition that the Commission should summarily dismiss Black Mesa's complaint that it is entitled to a LEO under the Commission's existing implementation of PURPA for "other" QFs as a matter of law, and this sole authority cited by Idaho Power's Motion is woefully inadequate to support such dismissal.

II. IDAHO POWER'S MOTION FAILS TO MEET THE LEGAL STANDARD TO SUPPORT A MOTION TO DISMISS

As noted above, the legal standard for the movant of a motion to dismiss is difficult to meet. All facts alleged by Black Mesa must be assumed to be true and all inferences from those

facts must be viewed in Black Mesa's favor. As observed by the Idaho Supreme Court, "A court may grant a motion to dismiss for failure to state a claim … only when it appears beyond doubt that the plaintiff can provide no set of facts in support of the claim which would entitle the plaintiff to relief." *Harper* 122 Idaho at 536, 835 P.2d at 1347. Furthermore, to the extent that Idaho Power relies on the voluminous evidentiary attachments supplied with its Answer and Motion to Dismiss, the law is clear that Idaho Power's Motion to Dismiss would be treated as a motion for summary judgment and must be denied in order to give Black Mesa "a reasonable opportunity to present all the material that is pertinent to the motion." I.R.C.P. 12(d).

In any event, accepting Black Mesa's allegations as true, Idaho Power's Motion fails to overcome whatever standard the Commission applies. One of the foundational assertions, of course, in Black Mesa's complaint is found at the first sentence of Paragraph 13 of its complaint, to wit: "Black Mesa alleges each of its energy storage facilities is entitled to 'other' published avoided cost rates and contract term by virtue of its FERC certification status as an 'other' facility." Black Mesa further alleges that its output profile will be distinct from solar and wind QFs, which, although not necessary to prove the claim, further entitles its storage QFs to qualify as "other" QFs under the Commission's current implementation of PURPA. *Id.* These factual assertions must be assumed to be true under the Commission's analysis of Idaho Power's Motion to Dismiss. Idaho Power has not – in either its Motion to Dismiss or its Answer – refuted Black Mesa's assertions.

To the contrary, other than a generic denial in its Answer, Idaho Power fails to even suggest that Black Mesa is *not* an "other facility" that is entitled to IPUC-approved avoided cost rates and contractual terms under the Commission's currently adopted PURPA implementation plan. Indeed, Idaho Power fails to identify any other rates or contract terms that would be

available to storage QFs such as the Black Mesa QFs. Idaho Power is asking the Commission to dismiss the complaint on the ground that no rates are available to storage QFs – despite the existence of a catch-all rate class for such "other" QFs – and that such QFs cannot therefore prove creation of a LEO to any rates at this time or under any set of facts whatsoever. For example, in Paragraph 10 of its Complaint, Black Mesa makes one of its central assertions that its facilities are storage QFs as certified with FERC. Idaho Power's Answer to that assertion (at ¶ 10) only states that it "has insufficient information or knowledge regarding the truth" of this assertion regarding Black Mesa's QF status as storage facilities. This cursory response to Black Mesa's complaint is surely insufficient to overcome the requirement that the Commission assume all factual assertions in favor of Black Mesa, as the non-moving party, and that it make all inferences in favor of Black Mesa. In sum, Idaho Power supplies no argument or authority as to why the Black Mesa QFs are not storage QFs that would logically fall within the category of "other" rates under the Commission's currently effective plan implementating PURPA, as alleged in the complaint.

Likewise Idaho Power provides no meaningful argument as to why the complaint fails, as a matter of law, to allege the creation of a LEO and entitlement to 20-year contract terms. Under FERC's regulations which this Commission implements, a QF is entitled to form a LEO to the rates and terms and conditions in effect at the time that it commits itself to sell power to the utility. *See* 18 C.F.R. § 292.304(d)(2)(ii); *FERC v. Idaho PUC*, Case 1:13-cv-00141-EJL-REB, Doc. No. 49-1 (D. Ct. Id., Dec. 24, 2013) (memorandum of understanding agreeing that a LEO may predate the execution of a contract); *Blind Canyon Aquaranch v. Idaho Power Company*, Case No. IPC-E-94-1, Order No. 25802 (Nov. 1994) (finding that "but for the actions of Idaho Power, which actions we generously characterize as non-facilitating, [the QF] would have

otherwise had a signed contract containing the average non-levelized avoided cost rates in effect prior to January 14, 1994 [and] [i]t is those rates that Blind Canyon is entitled to receive[.]").

Since 1980, FERC has consistently maintained that under the LEO rule each QF "has the right to choose to sell pursuant to a legally enforceable obligation, and, in turn, has the right to choose to have rates calculated at avoided costs calculated at the time that obligation is incurred." *JD Wind 1, LLC*, 129 FERC ¶ 61,148 at P 29 (2009). Under the LEO rule, "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations." *Virginia Electric and Power Co.*, 151 FERC ¶ 61,038, P 25 (2015). "[T]he phrase legally enforceable obligation is broader than simply a contract between an electric utility and a QF and that the phrase is used to prevent an electric utility from avoiding its PURPA obligations by refusing to sign a contract, or . . . delaying the signing of a contract, so that a later and lower avoided cost is applicable." *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 36 (2011). Any contrary rule would allow the reluctant utility to delay the date on which the rates are calculated – or as in this case, attempt to delay until the only option offered to the QF is a two-year contract term specifically designed to be unfinanceable and unviable for all QFs.

Further, the complaint follows the process set forth in FERC's regulations and orders to establish a LEO. Specifically, "if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a noncontractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA." *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at P 40 (2013) (internal quotation omitted).

Notably, Idaho Power did not even engage with the Black Mesa QFs at all in this case. This is not a case where Idaho Power proposed contract terms and conditions that were unacceptable to the QF, and the parties were unable to finalize an agreement before a change in policy or rates took effect. Instead, there was no opportunity to negotiate with Idaho Power because Idaho Power has consistently raced to the Commission upon receipt of any contract request from a storage QF in an attempt ensure that no storage QF receives anything other than an unlawfully short two-year contract term, as opposed to negotiating a contract containing the existing rates for "other" facilities. Similarly, Idaho Power's "Motion to Dismiss" does not even engage with the LEO rule or provide any response to the allegations that a LEO was formed, merely denying the existence of a LEO without any substantive argument. *See Idaho Power's Answer and Motion to Dismiss* at ¶¶ 22, 25, 27, and 29-31.

III. THE EXISTENCE OF THE COMMISSION'S ENERGY STORAGE AVOIDED COST RATE CASE (IPC-E-20-02) FOR FUTURE LEGALLY ENFORCEABLE OBLIGATIONS FURTHER VALIDATES BLACK MESA'S CLAIMS

Idaho Power makes the incongruous argument that the existence of IPC-E-20-02[2] (the "Energy Storage Rate Case") lends support for its Motion to Dismiss. However, the very existence of the Energy Storage Rate Case obviates all of Idaho Power's arguments against Black Mesa's complaint.

Idaho Power again makes contradictory statements in its pleading. Idaho Power asserted the following in the Answer portion of its pleading:

> Idaho Power is not refusing to purchase from Black Mesa at the avoided cost rate and contract term and conditions required and approved by the Commission, and has asked the Commission to set and approve the same.

[2] The case is titled: "Idaho Power—Petition to Establish Avoided Cost Rates Applicable to PURPA Energy Storage Qualifying Facilities."

Idaho Power's Answer and Motion to Dismiss at p. 14. Yet, in the Motion to Dismiss portion of its pleading, Idaho Power asserts that:

> Black Mesa is *not* entitled to the relief requested in the Complaint. The Commission has an open proceeding to determine the proper avoided cost rate and contract term eligibility for proposed energy storage facilities. Black Mesa's Complaint should therefore be dismissed.

Id. at p. 6, emphasis in original.

It is, of course, impossible for Idaho Power to credibly claim that it is "not refusing to purchase from Black Mesa at the avoided cost rate and contract term and *conditions approved by the Commission*" while at the same time conceding there is a proceeding before the Commission to "set and approve the same."

Of course, energy storage qualifying facilities and the rates and contract terms and conditions applicable to energy storage qualifying facilities all existed before the Commission initiated (at Idaho Power's behest) a docket to adopt a new policy to set rates that are specific and unique to those types of qualifying facilities under the catch-all category of "all other QFs." Energy storage QFs have existed at least since FERC recognized their existence in 1990 in *Luz Development and Finance Corporation*, 51 FERC ¶ 61,078 (1990). Barring a storage-specific rate or policy in Idaho at this time, Black Mesa was within its rights to (and unequivocally did) form a LEO to the "other" rates. Any other conclusion would mean there was (and remains to this day) no rates or contract terms available at all for storage QFs. The Commission cannot assign the solar rates and two-year contract term to Black Mesa's storage facilities absent an extant order implementing such change in policy for Idaho storage QFs.

The existence of a newly opened docket to set rates for such facilities at some time in the future cannot retroactively reach back in time to change the fact that Black Mesa created a LEO

to such "all other QF" rates and contract terms and conditions as it so asserts in its Complaint. Under basic notions of due process, the Commission changes its implementation of PURPA on a *prospective* basis and recognizes the rights to create a LEO to the currently approved rates and policies when the utility refuses to negotiate. Applying the results (or even staying pending results) of the Energy Storage Rate Case to the Black Mesa projects, in addition to constituting a blatant violation of Black Mesa's due process rights, would also be a clear cut violation of this Commission's prohibition against retroactive ratemaking. The first Black Mesa request for a LEO was made over three years ago in 2017 and was augmented and repeated on January 17, 2020. Of course, both dates are well in advance of Idaho Power's initiating the Energy Storage Rate Case on January 21, 2020.

In addition, the outcome, timing and eventual conclusion of the new Energy Storage Rate Case are all speculative and uncertain. It is unreasonable and a violation of this Commission's obligations under PURPA and Black Mesa's constitutional due process rights to hold in abeyance its existing rights to an "all other QF" contract pending the resolution of that docket. Indeed, nothing substantive has occurred in that case to date. If Idaho Power could lawfully refuse the right of QFs to enter into a LEO by initiating new cases at the Commission, Idaho Power could completely defeat all rights to create a LEO by ensuring it continuously had an open generic PURPA matter at the Commission.

Notably, the Commission has formerly recognized the right to form a LEO under the Commission's existing implementation scheme while ongoing proceedings are pending before the Commission to make generic changes to the Commission's implementation of PURPA. In the *Cedar Creek* case, this Commission ultimately found that five wind QFs created a LEO in December 2010, to published rate contracts for wind QFs sized up to 10 aMW. *In Re Firm*

Energy Sales Agreement Between Rocky Mountain Power and Cedar Creek Wind, LLC et al., Case Nos. PAC-E-11-01 et al., Order No. 32419, at p. 8 (Dec. 21, 2011).[3] At the time the LEO was formed, proceedings had already been initiated by the utilities to reduce the eligibility cap for wind QFs to 100 kW, and the Commission had even issued an order lowering the eligibility cap prior to issuing its order finding a LEO for the Cedar Creek QFs. *Id.* at 3.

Thus, the existence of the Energy Storage Rate Case to prospectively alter the Commission's implementation of PURPA for a certain subset of "other" QFs that utilize energy storage does not foreclose or impact Black Mesa QFs' formation of a LEO, as alleged in the complaint.

CONCLUSION

Black Mesa respectfully requests the Commission deny Idaho Power's Motion to Dismiss.

Respectfully submitted this 15th day of May 2020.

RICHARDSON ADAMS, PLLC

Peter J. Richardson (ISB No. 3195)
Gregory M. Adams (ISB No. 7454)

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[3] The Commission's order explains:

> Based upon the Parties' assertions in the Settlement Stipulation and our review of the record, we find that the record reveals that Cedar Creek had perfected a legally enforceable obligation no later than December 13, 2010. As such, Cedar Creek was entitled to the published avoided cost rates available to 10 aMW QFs in effect as of December 13, 2010.

Id.

CERTIFICATE OF SERVICE

I HEREBY certify that I have on this 15th day of May, 2020, served the foregoing ANSWER OF BLACK MESA TO IDAHO POWER'S MOTION TO DISMISS in Case IPC-E-20-17, by electronic mail to the following:

Diane Hanian
Idaho PUC Secretary
Diane.hanian@puc.idaho.gov
Edward Jewell, Deputy Attorney General
Edward.jewell@puc.idaho.gov

Donovan Walker
Senior Counsel, Idaho Power Company
dwalker@idahopower.com
dockets@idahopower.com

Peter J. Richardson (ISB No. 3195)