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BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

BLACK MESA ENERGY, LLC Complainant, Vs. IDAHO POWER COMPANY, Defendant.	Case No. IPC-E-20-17 BLACK MESA ENERGY, LLC'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

COMES NOW, Black Mesa Energy, LLC ("Black Mesa") and respectfully moves the Idaho Public Utilities Commission ("IPUC" or "Commission"), pursuant to Administrative Rule 31.01.01.56 and the Idaho Rules of Civil Procedure 56(a) and (c) and the Commission's Notice of Briefing Schedule Order No. 34849, to grant summary judgment in Black Mesa's favor.

Black Mesa lodged its formal Complaint with this Commission on March 17, 2020, alleging that Idaho Power Company ("Idaho Power" or the "Power Company") has failed to comply with the Commission's established contracting procedures contained in Schedule 73 for the creation of a legally enforceable obligation ("LEO") between it and the two Black Mesa qualifying facilities ("QF") that are the subject of this complaint proceeding. Through this Motion, Black Mesa now requests that this Commission issue an order granting summary judgment in Black Mesa's favor and declaring that Black Mesa has formed two legally

enforceable obligations: (1) committing Idaho Power to purchase the net output of the Black Mesa Energy 1 storage QF for a 20-year term of power sales utilizing the Commission's published avoided cost rates for "other" facilities in effect on the date of the Complaint; and (2) committing Idaho Power to purchase the net output of the Black Mesa Energy 2 storage QF for a 20-year term of power sales utilizing the Commission's published avoided cost rates for "other" facilities in effect on the date of the Complaint.

In support of its Motion for Summary Judgment, Black Mesa submits the follow legal brief and the accompanying Declaration of Brian Lynch. Black Mesa stands ready to present oral argument on this Motion should the Commission determine to schedule such argument, or to present evidence at a hearing to the extent that the Commission may find any material facts remain unresolvable through summary judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

Black Mesa Energy LLC is developing proposed energy storage facilities known as the Black Mesa Energy 1 facility and the Black Mesa Energy 2 facility, each of which have a net output of 20 MW-AC and will be designed to generate less than 10 average monthly megawatts ("aMW").[1] The Black Mesa Energy 1 facility and the Black Mesa Energy 2 facility will utilize a common interconnection to Idaho Power's electrical system, but the electric generating equipment of the two facilities will be separated by a distance of at least one mile.[2]

Black Mesa has filed self-certification Form 556 with the Federal Energy Regulatory Commission ("FERC") for the Black Mesa Energy 1 and Black Mesa Energy 2 facilities as storage qualifying facilities under the Public Utility Regulatory Policies Act of 1978

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[1] Declaration of Brian Lynch In Support of Black Mesa Energy, LLC's Motion for Summary Judgment at ¶ 5.

[2] *Id.*

("PURPA").[3] On or about February 23, 2017, Black Mesa first completed and duly filed a Form 556 certifying its first configuration for its energy storage development project as a single storage QF (at that time referred to as the Black Mesa Energy facility) utilizing renewable resources in FERC Docket No. QF17-705-000. Subsequently, on January 21, 2020, Black Mesa recertified the initial storage QF in FERC Docket No. QF17-705-001 and changed the name of the facility to "Black Mesa Energy 1", and Black Mesa also filed a Form 556 certifying its second storage QF as "Black Mesa Energy 2" in FERC Docket No. QF20-535-000.[4] In these certification forms, Black Mesa certified the Black Mesa Energy 1 and Black Mesa Energy 2 facilities as "other renewable resource" – specifically as an "energy storage system Qualifying Facility," not as a wind or solar QF resource type, and explained each facility would utilize energy storage. FERC accepted the Form 556s.[5]

Black Mesa began its attempts to engage in discussions with Idaho Power regarding sale of power beginning in February 2017.[6] At that time, Black Mesa first submitted to Idaho Power the information required by Schedule 73 to receive a power purchase agreement ("PPA") (also referred to by Idaho Power as an Energy Sales Agreement or "ESA") and requested that Idaho Power comply with the contracting procedures contained in its Schedule 73 for the purpose of executing a PURPA PPA for a storage QF utilizing the published avoided cost rates for "other" facilities.[7] Instead of complying with Schedule 73, on February 27, 2017, Idaho Power filed an application to the Commission requesting a declaratory order that Black Mesa's proposed energy storage QF, and those of the similarly situated Franklin energy storage QFs, should be treated as

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3 *Id.* at ¶ 6.
4 *Id.*
5 *Id.*
6 *Id.* at ¶¶ 9-21.
7 *Id.* at ¶¶ 9-21.

solar QFs, and thus not entitled to published avoided cost rates for "other" facilities or a 20-year contract term.[8] Idaho Power's application triggered years of delay to resolve the litigation it had commenced, during which period Idaho Power refused to supply the requested PPA to Black Mesa.[9]

First, in response to Idaho Power's application, the Commission issued two orders declaring that all energy storage projects energized with solar energy are to be treated as though they are solar QFs without storage.[10] Under the Commission's determination, energy storage QFs with an energy input of solar energy are only entitled to a PURPA PPA term of two years of fixed prices that are available to solar QFs and not 20-year power sale terms with fixed prices that are available to all projects other than solar or wind QFs. Thus, the Commission determined that Black Mesa's energy storage facility was only entitled to a two-year contract based on the Commission's classification of the proposed facility as a solar facility.

However, the other QFs affected by the Commission's orders (the Franklin Storage QFs) brought suit against the Commission in the United States District Court for the District of Idaho, and the District Court ruled that the Commission's orders violated PURPA.[11] Among other findings, the court determined that, "By 'looking behind' Plaintiffs' QF status to examine the proposed input power generation profile of the facilities, the Commissioners violated PURPA by questioning Plaintiffs' qualifications or eligibility under PURPA, and by then deciding, for all substantive purposes, that each is a solar QF rather than an energy storage QF entitled to

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8 *Id.* at ¶¶ 9-21.

9 *Id.* at ¶¶ 9-21.

10 *See* IPUC Case No. IPC-E-17-01, Order No. 33785 & Reconsideration Order No. 33858.

11 *Franklin Energy Storage One, LLC v. Kjellander*, Case No.: 1:18-cv-00236-REB, 2020 U.S. Dist. LEXIS 8892 (Jan. 17, 2020).

treatment as an 'other QF.'"[12] Because the court found that PURPA's "jurisdictional divide" prohibits federal courts from applying the state's rules to a particular QF in an implementation challenge, the court decided not to order the contract terms and rates that must be afforded to the Franklin energy storage QFs.[13] The court explained "additional issues may be taken up in further proceedings [before the IPUC], subject to the rulings and constraints of this decision[.]"[14]

Promptly after the United States District Court rendered its decision, Black Mesa immediately reiterated its request for a PPA containing a fixed-rate 20-year power sale term utilizing the published, non-levelized, non-fueled avoided cost rates for "other" facilities for Black Mesa Energy 1 storage QF and submitted a similar request for its Black Mesa Energy 2 storage QF.[15] Idaho Power again refused to discuss the request pursuant to the provisions of Schedule 73, and instead it initiated a new proceeding to revise the Commission's PURPA implementation plan for "other" QFs, which was docketed as Case No. IPC-E-20-02.[16] Left with no other options, Black Mesa inserted the project-specific information for the Black Mesa Energy 1 storage QF and the Black Mesa Energy 2 storage QF into a PPA containing what it understood to be commonly approved terms and conditions for such PURPA PPAs, and it executed and submitted such a PPA for the Black Mesa Energy 1 storage QF and the Black Mesa Energy 2 storage QF to Idaho Power on or about January 24, 2020.[17] Idaho Power has not communicated any disagreement with the non-rate terms and conditions supplied in those

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12 *Id.* at *44.
13 *Id.* at **52-53.
14 *Id.* at *53.
15 Declaration of Brian Lynch In Support of Black Mesa Energy, LLC's Motion for Summary Judgment at ¶¶ 14-21.
16 *Id.*
17 *Id.*

executed PPAs, aside from entitlement to a 20-year contract term.[18]

Due to Idaho Power's clear expression of its refusal to engage with Black Mesa, Black Mesa filed a complaint against Idaho Power at the Commission on March 17, 2020. The complaint alleged two separate claims. The first claim seeks a determination that Black Mesa has formed a LEO committing Idaho Power to purchase the net output of the Black Mesa Energy 1 storage QF for a 20-year term of power sales utilizing the Commission's published avoided cost rates for "other" facilities in effect on the date of this complaint. Likewise, the second claim seeks a determination that Black Mesa has formed a LEO committing Idaho Power Company to purchase the net output of the Black Mesa Energy 2 storage QF for a 20-year term of power sales utilizing the Commission's published avoided cost rates for "other" facilities in effect on the date of this complaint. On each clam, Black Mesa requests that the Commission require Idaho Power to execute a standard PURPA power purchase agreement for the applicable Black Mesa storage QF containing: (a) the non-levelized, non-fueled, published avoided cost rates for "other" facilities in effect on the date of this complaint; (b) a 20-year power sale term containing fixed prices; and (c) the non-rate terms and non-term-length contract provisions proposed in the PPA unilaterally executed by Black Mesa for the applicable energy storage QF or such other non-rate and non-term-length provisions as the Commission determines, within the bounds of its lawful discretion, to be just and reasonable.[19]

Idaho Power responded to Black Mesa's Complaint by filing a Motion to Dismiss, which the Commission denied on July 10, 2020.[20] In doing so, the Commission has made it clear that both parties now have the opportunity to "highlight pertinent facts and make arguments about

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18 *Id.*

19 Black Mesa's Complaint at pp. 13-15.

20 Order No. 34715.

how the facts apply to the legal standard for creating a LEO."[21]

III. APPLICABLE LEGAL STANDARD

The Commission employs the same standard on summary judgment as that contained in the Idaho Rules of Civil Procedure.[22] Under that standard, the Commission "must grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[23] "[A]ll reasonable inferences that can be drawn from the record are to be drawn in favor of the nonmoving party, and disputed facts are liberally construed in the nonmoving party's favor."[24] However, a "party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, . . . or [by] showing that the materials cited do not establish the absence . . . of a genuine dispute . . . ."[25]

IV. ARGUMENT

There is no material dispute of fact that the Black Mesa QFs each created a LEO to sell energy and capacity to Idaho Power pursuant to the Commission's implementation of PURPA for "other" QFs entitled to published rates no later than the date of the complaint, March 17,

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21 *Id.* at 5. Black Mesa notes that the Commission's order denying Idaho Power's Motion to Dismiss contains an apparently inadvertent misstatement of the procedural history where it states: "In IPC-E-17-01, the Commission denied Black Mesa's claim that it had established a LEO at that point in time[.]" *Id.* at 3. While the Franklin QFs had asserted the creation of a LEO in the Case No. IPC-E-17-01, Black Mesa did not make an assertion of a LEO at that time which could have been addressed by the Commission. Rather, Black Mesa's filings in the docket were limited to a one-page comment on April 7, 2017, which did not allege formation of a LEO for what was at that time a single proposed QF.

22 *Grand View PV Solar Two, LLC v. Idaho Power Co.*, IPUC Case No. IPC-E-11-15, Order No. 32580, at 6-7 (June 21, 2012).

23 *Greenwald v. W. Surety Co.*, 164 Idaho 929, 937, 436 P.3d 1278, 1286 (2019) (quoting I.R.C.P. 56(a)).

24 *Id.*, 164 Idaho at 942, 436 P.3d at 1291 (internal quotation omitted).

25 *Id.* (quoting I.R.C.P. 56(c)(1)).

2020. On that date, and indeed up until Order No. 34794 was issued on October 2, 2020, the Commission's implementation of PURPA entitled such energy storage QFs to the published rates for "other" facilities, such as the Black Mesa QFs, sized up to 10 aMW. As explained below, the Black Mesa QFs are entitled LEOs under any reasonable application of the applicable legal standards, and the Commission should therefore grant summary judgment in Black Mesa's favor.

A. The Commission's Implementation of PURPA Entitled Energy Storage QFs up to 10 aMW to the Published Avoided Cost Rates for "Other" Facilities Until October 2, 2020

This case concerns the application of the Commission's implementation of the federal statute and regulations requiring public utilities to purchase energy generated by a select class of generators. Congress enacted PURPA to reduce the dependence of electric utilities on non-renewable energy inputs, in part, by encouraging the development of alternative energy sources such as cogeneration and small power production facilities called "Qualifying Facilities" or "QFs."[26] PURPA directs FERC to promulgate regulations encouraging the purchase by utilities of energy produced by QFs.[27] State regulatory commissions, such as this Commission, must implement PURPA by either adopting rules or by resolving disputes in a manner which complies with FERC's regulations.[28] This Commission implements PURPA via ad hoc orders with general applicability and has not promulgated any administrative rules specifically implementing PURPA's must-purchase provisions.

Until October 2, 2020, and during all times relevant to the creation of the Black Mesa QFs' LEOs, this Commission *had no distinct treatment or resource-specific implementation plan* for energy storage QFs. The Commission summarized the PURPA implementation scheme that

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26 *FERC v. Mississippi,* 456 U.S. 742, 745-46 (1982).
27 16 U.S.C. § 824a-3(a).
28 16 U.S.C. § 824a-3(f).

it had in place at all relevant times to the creation of the two Black Mesa LEOs as follows:

> This Commission [IPUC] has established two methods of calculating avoided cost, depending on the size of the QF project: (1) the surrogate avoided resource (SAR) methodology, and (2) the integrated resource plan (IRP) methodology. [citation omitted] The Commission uses the SAR methodology to establish standard or "published" avoided cost rates. [citation omitted] Currently, the eligibility cap for wind and solar QFs to access published avoided cost rates is set at 100 kilowatts (kW). *QF projects other than wind and solar are subject to a published rate eligibility cap of 10 average megawatts (aMW).*
>
> In 2015, this Commission reduced the term for individually-negotiated PURPA contracts (those not subject to published rates) in Idaho from 20 years to 2 years. The contract term for published rates remains at 20 years.[29]

More specifically, the historical antecedent to the Commission's current implementation of PURPA provided a single rate schedule of published rates for any QF of any non-fueled resource type up to 10 average monthly MW, and it provided a contract term length of 20-years regardless of facility capacity.[30] In Case Nos. GNR-E-10-03 and GNR-E-11-03, the Commission reduced the eligibility cap for published rates to 100 kW for wind and solar QFs, and it developed resource-specific capacity prices for certain categories of resources, including wind, solar, canal drop hydropower, and hydropower.[31] But the Commission has left in place the traditional published rates without such specially designed capacity calculations for all "other" facilities up to 10 aMW. In doing so, the Commission explained "changing eligibility from 10

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29 IPUC Case No. IPC-E-17-01, Order No. 33785 at 2-3 (July 13, 2017) (emphasis added; citations omitted).

30 *See* IPUC Case Nos. IPC-E-04-08 & IPC-E-04-10, Order No. 29632 at 12-14 (Nov. 22, 2004).

31 IPUC Case No. GNR-E-11-03, Order No. 32697 at 15 (Dec. 18, 2012) ("we find it reasonable to assign a value to a QF resource's ability to provide such capacity. A QF resource with a high capacity factor is not only providing the utility with energy, but also capacity that will allow the utility to avoid having to construct new generation to serve its customers during peak load hours").

aMW for resources other than wind and solar is unnecessary at this time."[32] Later, in August 2015, the Commission determined that all QF that were not eligible for published avoided cost rates – which included wind and solar QFs over 100 kW and any other resource type exceeding 10 aMW – would only be entitled to two-year contracts with rates calculated under the Integrated Resource Plan ("IRP") methodology.[33]

Thus, under this Commission's implementation plan that was in effect at the time Black Mesa created its two LEOs, the lay of the land was that wind and solar QFs that are 100 kW or smaller are entitled to published rates and a 20-year contract. On the other hand, wind and solar QFs larger than 100 kW have their rates set using the IRP methodology and are only entitled to two-year contracts. At the same time, the Commission's implementation scheme provided that any other QF, which it defined as QF projects "other than wind or solar" that are 10 aMW or smaller,[34] were entitled to published avoided cost rates and a 20-year contract. If a QF "other than wind or solar" is larger than 10 aMW, its rates were to be calculated using the IPR methodology, and it is only entitled to a two-year contract. It is not disputed that each of the Black Mesa energy storage QFs is proposed to be 10 aMW or less.

In implementing its policy for determining entitlement to either 20-year contracts or two-year contracts, the Commission established a simple dichotomy between either: (1) solar/wind, or (2) all other QFs (that is, all QFs other than wind or solar). Indeed, prior to its rulings in the Franklin docket (IPC-E-17-01), the Commission had never mentioned the phrase energy storage

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32 IPUC Case No. GNR-E-11-03, Order No. 32697 at 14 (Dec. 18, 2012) (stating that "[m]aintaining a 10 aMW eligibility cap is also consistent with our long history of encouraging PURPA projects and renewable energy generation in Idaho.").

33 IPUC Case Nos. IPC-E-15-01, AVU-E-15-01, & PAC-E-15-03, Order No. 33357 at 21-26 (Aug. 20, 2015).

34 IPUC Case No. GNR-E-11-03, Order No. 32697 at 14 (Dec. 18, 2012)

QFs in any of its orders implementing PURPA and thus had no specific treatment for such QFs different from the catch-all treatment for "other" QFs. The Commission made this point clear in its FERC filing in connection with the Franklin litigation. The Commission explained, in its FERC filing, that:

> Until Idaho Power petitioned the Idaho PUC for declaratory relief regarding Franklin's requested PURPA contracts, the Idaho PUC had not yet considered the eligibility cap for a battery storage QF to receive standard avoided cost rates and associated terms and conditions in a PURPA contract.
>
> In deciding which QF resource types should have a lower eligibility cap, the Idaho PUC specifically considered biomass, small hydro, cogeneration, geothermal, and waste-to-energy… The Idaho Commission did not address battery storage.[35]

Thus, back in 2017, when faced for the first time with the question of how such QFs (including Black Mesa's initial Project) fit into its two-pronged dichotomy, this Commission had just two legitimate choices. The first legitimate, and probably the most obvious choice, would have been to declare that the Commission meant what it said when it identified the first class of QF as being, "other than wind and solar" – i.e., all QFs other than wind or solar are entitled to published avoided cost rates and 20-year contracts, which would naturally encompass energy storage QFs such as the Black Mesa project. A second legitimate option, which is technically just a subset of the first option, would have entailed the Commission initiating a process through which it would adopt a new implementation plan and an avoided cost methodology with relevant contract terms applicable to new (i.e., not retroactively applied) energy storage QFs who subsequently request contracts. Instead, the Commission attempted to re-classify the Black Mesa and Franklin energy storage QFs as solar QFs rather than applying its original implementation scheme which would have properly classified those projects as "other" QFs.

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35 *Notice of Intervention and Protest of the Idaho Public Utilities Commission,* FERC Docket No. EL18-50, at pp. 8-9 (Jan. 16, 2018).

The result of the Commission's attempted classification of energy storage QFs as solar QFs was the United States District Court's ruling that the Commission exceeded its jurisdictional authority under PURPA and violated applicable federal law (PURPA).[36] The court went on to enjoin any attempt by the Commissioners to enforce the Commission's orders which purport to re-classify the Franklin energy storage QFs as solar QFs.[37] Although Black Mesa did not intervene or participate in the federal court litigation with the Franklin QFs, the Black Mesa project was identically situated with the Franklin QFs and was so identified by Idaho Power it its initial petition for declaratory ruling in 2017, as well as by the Commission's orders in that docket (IPC-E-17-01), which ultimately resulted in the court's injunction against the Idaho Commissioners. It would be a violation of the intent, if not the letter, of the court's injunction for this Commission to attempt to re-classify the Black Mesa projects as solar QFs that are not entitled to 20-year fixed-rate contracts at this point in time because such a re-classification of the Black Mesa projects would once again, as the court ruled, exceed the Commission's authority and constitute a renewed violation of PURPA.

Idaho Power has incorrectly suggested that by declining to affirmatively order use of the "other" rates for the Franklin QFs, the United States District Court left the Commission to refuse to provide the extant "other" rates to the Franklin QFs and other similarly situated energy storage QFs, such as the Black Mesa QFs. The only reason the court declined to issue further relief was its finding that "there is a jurisdictional divide" in a PURPA implementation challenge which precluded the court from ordering further specific relief.[38] In so ruling, the Court noted that the

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36 *Franklin Energy Storage One, LLC*, 2020 U.S. Dist. LEXIS 8892 at *54 ("Classifying such facilities as 'solar QFs' is outside the Commissioners' authority as state regulators and therefore in violation of federal law").

37 *Id.*

38 *Id.* at *52.

relief it was authorized to grant was limited in an implementation claim under Section 210(h) of 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."[39] 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."[40] 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."[41]

More recently, after the creation of the LEOs alleged in Black Mesa's complaint in this proceeding, the Commission has now adopted a new implementation plan with resource-specific treatment for energy storage QFs to be applied prospectively to future LEOs with energy storage QFs. That plan, which was adopted on October 2, 2020, in Order No. 34794, implemented a two-year contract term for energy storage QFs with a design capacity in excess of 100 kW – implementing PURPA for energy storage QFs similarly as for wind and solar QFs but with a significant distinction.[42] Specifically, Order No. 34794 adopted the "Duke Energy" method of calculating capacity rates for energy storage QFs under the IRP methodology, which allocates all capacity payments to Idaho Power's peak hours as opposed to averaging the capacity payments over all hours of the year.[43] Additionally, despite Staff's recommendation to limit the new category to battery storage QFs, the Commission's order made the separate category applicable

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39 *Id.* at *53.
40 *Id.*
41 *Id.* at *52 n.20.
42 IPUC Case No. IPC-E-20-02.
43 IPUC Case No. IPC-E-20-02, Order No. 34794, at 10 (Oct. 2, 2020).

to all types of energy storage QFs.[44]

This new implementation action removed energy storage QFs from the "other" category of published rate availability, and created a "separate" energy storage rate category.[45] The Commission's decision adopted on October 2, 2020, in Order No. 34794, unambiguously confirms the creation of the new plan for energy storage QFs, as opposed to a mere clarification of the previously effective implementation plan, stating as follows:

> We find it is reasonable to establish an energy storage QF category. There are a diversity of technologies, configurations, and operational guidelines that will cause the output generation profiles of energy storage QFs to vary greatly even within their own category, further justifying the distinction. Energy storage QFs have the ability to provide less intermittent, less variable, and more predictable energy than wind and solar QFs, but the output duration from energy storage QFs is more limited than the baseload-type resources that make up the 'other' category. As energy storage technologies evolve and additional projects are developed, further distinction between energy storage technologies may be warranted.[46]

The Order – which contains an effective date of October 2, 2020 – orders as follows: "IT IS HEREBY ORDERED that a separate energy storage QF category is established."[47] Indeed, the final characteristics of this separate energy storage QF category differed from the proposals of both Idaho Power and Staff during the proceeding, and therefore could not have been accurately predicted by any party prior to October 2, 2020.

Significantly for the Black Mesa LEO determination, this long-in-the-making implementation plan was not adopted, or even formally proposed, until after the Black Mesa QFs created LEOs with Idaho Power and filed a complaint on March 17, 2020. Energy storage

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44 *Id.* at 6 n. 2 & 10-11.

45 *See, e.g., id.* at 6 ("Staff recommended the Commission establish *a separate category* for battery storage QFs because battery storage QFs have output characteristics reasonably distinct from wind or solar QFs and reasonably distinct from QFs in the 'other' category" (emphasis added).)

46 *Id.* at 10-11.

47 *Id.* at 15.

qualifying facilities 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). In the absence of a storage-specific rate or policy in Idaho prior to October 2, 2020, Black Mesa was within its rights to form a LEO to the "other" rates. Any other conclusion would mean there was (and remained until October 2, 2020) no rates or contract terms available at all for storage QFs. Thus, Black Mesa was entitled to create a LEO to the published rates for "other" facilities and a 20-year contract term up until October 2, 2020.

B. Black Mesa Formed a LEO for Each of Its Two Energy Storage QFs Utilizing the Published Rates for "Other" QFs Up to 10 aMW Prior to the Commission's Creation of a Separate Rate Category for Energy Storage QFs

At all relevant times to Black Mesa's complaint, Black Mesa's proposed energy storage QFs fell under the Commission's implementation plan for "all other" QFs and hence are entitled to 20-year contracts at published avoided cost rates in effect at the time of their LEO creation. The Commission's relevant PURPA implementation orders provide that all QFs "other than wind and solar" QFs up to 10 aMW are entitled to published rates and 20-year contracts.[48] On the other hand, at the time of Black Mesa's LEO creation, only solar and wind QFs that were larger than 100 kW were restricted to a two-year contracts. As discussed below, Black Mesa's LEO creation efforts occurred in two stages, but the end result is that as of the date it filed its Complaint Black Mesa formed a LEO for each QF to the published avoided cost rates and 20-year contract terms available to "other" QFs at that time.

1. The LEO Rule Allows a QF to Unilaterally Create a LEO and Prevents Idaho Power from Delaying the Date on Which the QF Creates Its LEO

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48 IPUC Case No. GNR-E-11-03, Order No. 32697 at 14-15 (Dec. 18, 2012).

Under FERC's regulations, which this Commission implements, a QF is entitled to form a LEO to the rates, terms and conditions in effect at the time that it commits itself to sell power to the utility.[49] 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."[50] 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."[51] "[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."[52] 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, Black Mesa's complaint follows the process set forth in FERC's regulations and orders to establish a LEO. Specifically, under the LEO rule, "if the electric utility refuses to sign

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49 *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[.]").

50 *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 29 (2009).

51 *Virginia Electric and Power Co.*, 151 FERC ¶ 61,038, P 25 (2015).

52 *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 36 (2011).

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."[53]

2. Black Mesa First Attempted to Negotiate with Idaho Power in February 2017

As discussed above, Black Mesa initially sought a PURPA contract from Idaho Power on or about February 11, 2017, by submitting a fully completed Idaho Power Schedule 73 Application for a 20-year non-levelized, non-fueled, published avoided cost rate contract available to "other" facilities. That initial request was for a single 20 MW energy storage QF. Idaho Power admits that it received the Schedule 73 request for a contract from Black Mesa on or about February 13, 2017.[54]

In its Complaint, Black Mesa alleged: "Idaho Power never did respond to Black Mesa's request in accordance with Schedule 73" and instead it "filed an application … requesting a declaratory order that determines the contract term and avoided cost pricing methodology" for the Black Mesa energy storage QF.[55] Having been accused of not responding to the Schedule 73 request, Idaho Power's Answer stated: "Idaho Power *admits that it responded* to Black Mesa, within the required time and pursuant to Schedule 73, that it had filed a case with the Commission to determine the proper avoided cost rate and contract terms for Black Mesa's proposed projects."[56]

However, it is not possible to square Idaho Power's response to the allegation that it did not respond in accordance with the terms of Schedule 73 with its answer claiming that "it

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53 *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at P 40 (2013) (internal quotation omitted).

54 Idaho Power's Answer and Motion to Dismiss at ¶ 11.

55 Black Mesa's Complaint at ¶ 16.

56 Idaho Power's Answer and Motion to Dismiss at ¶ 16 (emphasis added).

responded to Black Mesa . . . pursuant to Schedule 73."[57] This inconsistency is highlighted by Idaho Power's allegedly responsive communication, reproduced in its entirety as follows:

> Idaho Power received your Schedule 73 Qualifying Facility Energy Sales Agreement Application ("Application") effective February 13, 2017, in which you have requested an indicative pricing proposal for the proposed 20 MW Black Mesa Energy battery storage project. In your Application you request a proposed contracting term of 20 years and published avoided cost Rate Option 4, Non-Levelized and Non-Fueled Rates.
>
> Idaho Power does not agree that your proposed project is eligible for published avoided cost Rate Option 4, Non-Levelized Non-Fueled Rates with a 20-year contract term. On February 27, 2017, Idaho Power filed an application to the Idaho Public Utilities Commission requesting a declaratory order that determines the contract term and avoided cost pricing methodology for which your proposed project may be eligible. See IPUC Case No. IPC-E-17-01.
>
> If you have any questions, please do not hesitate to contact me.
>
> Sincerely
>
> [signed]
>
> Michael Darrington
> Energy Contracts[58]

Although Idaho Power provided a communication, Idaho Power did *not* respond to Black Mesa's Schedule 73 request "*pursuant*" to the requirements of that Schedule. The Schedule specifically and unambiguously requires that Idaho Power:

> [S]hall, within 10 business days, notify the Customer [Black Mesa] in writing of any deficiencies [in the application]
>
> [and]
>
> Following satisfactory receipt of all information required in Section 1.a. the Company shall, within 20 business days, provide the Customer with an indicative pricing proposal … however, that for Qualifying Facilities eligible for Published Rates pursuant to the Commission 's eligibility requirements, the Company will provide such indicative pricing

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57 *Id.*

58 Black Mesa's Complaint at Ex. 4.

proposal within 10 business days.[59]

Idaho Power did not respond within 10 business days in writing of any deficiencies in Black Mesa's Application. Idaho Power did not, within 10 business days, provide Black Mesa with an indicative pricing proposal with eligible published rates. Idaho Power's "response" was to simply treat Schedule 73 as if it did not exist. Instead of responding as required, Idaho Power embarked on its three-year-long quest to convince the Commission to change its implementation scheme for "other" QFs to, for the first time, create a new rate category and contract term limit for energy storage QFs. For a response to have been properly made "pursuant to Schedule 73," Idaho Power would actually have had to comply with, and not completely ignore, the unambiguous instructions contained in that Schedule.

Of course, Idaho Power does not get to pick and choose which of its tariffs it will obey and which ones it will ignore, as it has done here. In addition to its obligations under PURPA and the QF's right to unilaterally create a LEO, Idaho Power must abide by the rates and schedules approved for use until such are lawfully changed. The foundational utility law precept known as the "filed rate doctrine" prohibits Idaho Power from ignoring its tariffs.[60] This doctrine is embodied in Idaho Code §§ 61-313 and 61-315, which provide that no public utility shall provide any service rendered to the public other than pursuant to the rates and charges applicable to such service as specified in its tariffs that are on file with the Commission and in effect at the time. Idaho Code § 62-313 specifically provides that:

> [N]o public utility shall . . . extend . . . to any corporation or person and form of contract or agreement or any rule or regulation of any facility of privilege except such as are specified in such schedule and as are regularly and uniformly extended to all corporations and persons…

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[59] Idaho Power's Schedule 73 Original Sheet 73-5 at Section 1.b, available at: https://docs.idahopower.com/pdfs/aboutus/ratesregulatory/tariffs/306.pdf.

[60] *See Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915).

The filed rate doctrine is a touchstone of utility regulation and is uniformly applied throughout the country, including Idaho.[61] No Commission order stayed application of Schedule 73 for energy storage QFs pending the proceeding Idaho Power had commenced.

Had Idaho Power complied with its tariff in response to Black Mesa's PURPA contract request in February 2017, Idaho Power would have given Black Mesa indicative pricing and allowed the Project to proceed to executing a 20-year contract containing published avoided cost rates. It certainly cannot be disputed, therefore, that but for Idaho Power's willful refusal to comply with the terms of its Schedule 73, that Black Mesa would have been provided indicative pricing PURPA contract terms and conditions.

Instead, Idaho Power sought a declaratory ruling from the IPUC that:

> [T[he Commission issue a declaratory order, without prejudice to Idaho Power's position on the validity of the underlying self-certifications, finding that, under the facts presented, the Proposed Battery Storage Facilities are subject to the same 100 kW published avoided cost rate eligibility cap applicable to wind and solar facilities.[62]

Although that ill-fated request ultimately resulted in a federal injunction against the Commissioners, it also failed in its entirety to respond to the Schedule 73 request for a standard offer 20-year PURPA contract. While Idaho Power's petition for declaratory ruling was winding its way through the courts and commissions, the Black Mesa PURPA contract was essentially put on ice by Idaho Power.

Nevertheless, Black Mesa continued to actively pursue development of its proposed project, and indeed was able to expand the development potential of the area by adding a second 10 aMW QF to its portfolio in the Black Mesa area and advance both facilities through the

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61 *AT&T v. Central Office Telephone*, 524 U.S. 214, 222-24 (1998); *Brian Emerick v. Idaho Power Co.*, IPUC Case No. IPC-E-00-03, Order No. 28329, at 4-5 (2000).

62 Idaho Power's Petition for Declaratory Order, IPUC Case No. IPC-E-17-01, at p.13.

interconnection and development process.[63] Indeed, during this time, Black Mesa received a Feasibility Study from Idaho Power for a 40 MW-AC joint interconnection proposed for use by the Black Mesa Energy 1 and Black Mesa Energy 2 facilities, which has now advanced to Facilities Study phase.[64] In 2019, Black Mesa also secured exclusive rights to finalize site control with Black Mesa Farms and initiated procurement strategies to ensure the facilities will still be able to qualify for expiring tax credits upon execution of PPAs.[65] As the Declaration of Brian Lynch demonstrates, the Black Mesa development team have taken all of the steps that could reasonably be required prior to having the necessary assurance of fully executed PPAs for the Black Mesa QFs.

3. Black Mesa Continued Its Attempts to Negotiate with Idaho Power Prior to Filing the Complaint in 2020

On January 18, 2020, the very day after the federal injunction prohibiting the Commission from re-classifying energy storage QFs as solar QFs was issued, Black Mesa "reiterate[d] its previous request for an Energy Sales Agreement pursuant to Schedule 73 as [initially] proposed on 2/10/17 with respect to Black Mesa Energy 1 storage QF."[66] Also on January 18, 2020, Black Mesa submitted to Idaho Power a completed Schedule 73 application with all supporting documents for the Black Mesa Energy 2 storage QF.[67] For this second QF project, Black Mesa also requested a PPA utilizing the non-levelized, non-fueled, published avoided cost rates for "other" facilities and a 20-year contract term.

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63 Declaration of Brian Lynch In Support of Black Mesa Energy, LLC's Motion for Summary Judgment at ¶¶ 22-28 (discussing development efforts in 2019).

64 *Id.*

65 *Id.*

66 *Id.* at ¶ 14; Black Mesa's Complaint at Ex. 5.

67 *Id.*

Ten days later, on February 3, 2020, Idaho Power responded to Black Mesa.[68] This time around, Idaho Power alleged a deficiency in Black Mesa's Schedule 73 Applications by asserting that Black Mesa failed to supply an adequate estimated 8,760 electrical output profile for the proposed facilities.[69] However, the very next day, on February 4, 2020, Black Mesa directly addressed Idaho Power's alleged deficiency by clarifying for Idaho Power that the Schedule 73 requests for the Black Mesa Energy 1 storage QF and the Black Mesa Energy 2 storage QF did in fact contain 8,760 electrical output profile estimates for the proposed facilities, and that such hourly generation profiles are consistent with the capability of the proposed battery storage facilities as described in the FERC Form 556s for such facilities.[70] Moreover, Idaho Power can easily supply published avoided cost rates and a draft PPA to a QF without an 8,760 electrical output estimate, which is used only to calculate non-standard rates through the IRP methodology. Thus, Black Mesa effectively put the "ball back into Idaho Power's court" to either recognize that the deficiency had been addressed or to again allege another (or continuing) deficiency in the Black Mesa Schedule 73 Application. This it did not do.

Exhibiting what now appears to be a pattern of willful refusals to abide by its tariffs, Idaho Power never did respond (directly or indirectly) to Black Mesa's deficiency-addressed requests for standard offer 20-year QF contracts. Instead, Idaho Power again ignored the requirements of its Schedule 73 which requires that it respond to Black Mesa's request for indicative pricing and tender of a power purchase agreement.

As noted in the prior section, the filed rate doctrine requires Idaho Power to abide by its

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68 *Id.* at ¶ 18; Idaho Power's Answer and Motion to Dismiss at Attach. 1.

69 Idaho Power's Answer and Motion to Dismiss at Attach. 1.

70 Declaration of Brian Lynch In Support of Black Mesa Energy, LLC's Motion for Summary Judgment at ¶ 19 & Ex. 1.

tariffs, but once again Idaho Power chose to ignore its obligations to respond to Black Mesa that are contained in its Schedule 73. Idaho Power admits: "It informed Black Mesa that it did not agree that Black Mesa was entitled to published rates and 20-year contracts, and that Idaho Power had filed a case with the Commission to determine the proper avoided cost rates and contract terms for energy storage projects."[71] But, at the time when Idaho Power filed this second case (Case No. IPC-E-20-02) with the Commission to create a new rate category and contract term limit specifically for energy storage QFs, the Commission already had a PURPA compliant implementation plan for energy storage projects – which as discussed above provided for Black Mesa's entitlement to published rates and 20-year contracts and the "other" published rates. Furthermore, the United States District Court's decision precludes the Commission from classifying the Black Mesa energy storage QFs as if they are something other than energy storage QFs (e.g., solar or wind QFs).

Idaho Power did not ask for and the Commission did not grant a stay or moratorium on approval of new PURPA contracts with energy storage QFs during the pendency of Idaho Power's second application in Case No. IPC-E-20-02. Nor did Idaho Power seek, or the Commission grant, any relief that even purported to have a retroactive effect. And as noted above, the final Order No. 33794 was not issued and legally effective until October 2, 2020.

4. Despite Idaho Power's Refusal to Execute PPAs, Black Mesa Created LEOs for Each of the Black Mesa QFs No Later than the Date it Filed the Complaint on March 17, 2020

As noted above, the LEO rule exists to allow a QF to create a LEO through its own unilateral actions and 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

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[71] Idaho Power's Answer and Motion to Dismiss at ¶ 21.

avoided cost is applicable."[72] Additionally, 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 LEOs in December 2010, to published rates available for all QFs sized up to 10 aMW, including wind QFs.[73] It made no difference that the Commission had already undertaken proceedings to adopt a new implementation plan that would eventually preclude wind QFs up to 10 aMW from *prospectively* creating LEOs to such published rates. Indeed, at the time the Cedar Creek LEOs were 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 LEOs for the Cedar Creek QFs.[74]

The Commission has a relatively straightforward standard for determining when a QF has unilaterally created a legally enforceable obligation on its part to deliver, and on the utility's part to purchase, all of the output from a QF project. That standard provides:

> The Commission found that a legally enforceable obligation cannot exist until a QF takes sufficient steps to show that it has obligated itself to provide energy to the utility and

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72 *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 36 (2011).

73 *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). 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.

74 *Id.* at 3.

that, but for the utility's conduct, the parties would have entered into a contract.[75]

The Commission's standard can be subdivided into the following three distinct tests: (1) the QF takes sufficient steps toward obligating itself to provide energy; (2) but for the utility's conduct a contract would have been executed; and (3) the QF's action in furtherance of its intent to obligate itself. Black Mesa has complied with each of these Steps.

It is hard to imagine more concrete evidence of having taken "sufficient steps" toward obligating itself to sell the output from its two QFs to Idaho Power than by demonstrating that Black Mesa completed and submitted Schedule 73 Applications asking Idaho Power to tender power purchase agreements. The Schedule 73 applications were submitted in 2017 (Black Mesa 1's predecessor only) and again in 2020 (for Black Mesa 1 and Black Mesa 2). Furthermore, and as explained in the prior section, when Idaho Power noted a possible deficiency in the 2020 Application, Black Mesa responded with additional information in writing and within 24 hours of having received notice of the alleged deficiency. Thus, Black Mesa fully complied with all of Idaho Power's (and this Commission's) requirements for obtaining power purchase agreements from Idaho Power. It would be an unfair trap and a violation of basic notions of due process to assert that compliance with *the only Commission established* methodology (Schedule 73) for obtaining a power purchase agreement is somehow an insufficient step toward obligating itself to provide energy.

Step Two requires a showing that "but for" Idaho Power's acts the Black Mesa projects would have proceeded to the contract execution phase of the process. Had Idaho Power responded, as required in Schedule 73, the Projects would have been able to move forward to a

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75 *XRG-DP-7, LLC et al. v. PacifiCorp*, IPUC Case No. PAC-E-10-08, Order No. 32657 at 7 (Oct. 5, 2012).

mutually executed contractual arrangement for each energy storage QF. However, Idaho Power never responded after Black Mesa's prompt response to its alleged "deficiency" in the Schedule 73 Application.[76] The "but for" test is also therefore satisfied. Idaho Power's failure to respond and to keep the give-and-take process moving forward as is required by Schedule 73 is the foundational reason Black Mesa does not have executed power purchase agreements with Idaho Power. Black Mesa placed the ball squarely in Idaho Power's court, and Idaho Power never returned the service.

Finally, under Step Three, the "QF's action in furtherance of its intent to obligate itself" has already been demonstrated through Black Mesa's Schedule 73 efforts noted above. However, Black Mesa went well above and beyond the base requirements of that Schedule. In addition to complying with both the letter and the spirit of the Commission's sole method (Schedule 73) for seeking a power purchase agreement, Black Mesa took the additional step of actually executing and tendering to Idaho Power two separate power purchase agreements for its two QFs.[77]

Neither the Commission's implementation plan for PURPA nor Idaho Power's Schedule 73 require the QF to go so far as to actually tender a contract in order to demonstrate "intent to obligate itself." Nevertheless, Black Mesa took this extraordinary step in order to quash any post-hoc assertion that it was not serious in its intent to obligate itself to selling the output from its two QFs to Idaho Power. In its letter transmitting the executed power purchase agreements, Black Mesa reiterated and explicitly expressed its intent to obligate itself to the creation of a LEO. That obligation took the form of unilaterally executed power purchase agreements that

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[76] Declaration of Brian Lynch In Support of Black Mesa Energy, LLC's Motion for Summary Judgment at ¶ 20.

[77] *Id.* at ¶ 16; Black Mesa's Complaint at Ex. 6.

are based on Idaho Power's prior approved QF contracts. Black Mesa asserted, in its transmittal letters, that:

> Black Mesa herby enters into a legally enforceable obligation to provide such capacity and energy to Idaho Power and is submitting executed Energy Sales Agreements for Each Project for your counter signature.
>
> These energy storage facilities have the capability to provide additional value to Idaho Power's system via limited dispatchability. While our commitment, evidenced by the enclosed executed contracts, is binding and enforceable, we are willing to discuss possible amendments to these obligations to accommodate Idaho power's load following and ancillary service needs.[78]

It is difficult to imagine a more explicit demonstration of a QF's intent to obligate itself.

Furthermore, Black Mesa's efforts to advance the development of the two facilities further evidences its actions in furtherance of its intent to obligate itself. Black Mesa has incurred substantial financial expense and reasonably advanced the development despite the lack of fully executed PPAs, and even attests to its ability to bring the facilities online within one year of a final non-appealable order granting the LEOs should the Commission deem that necessary and Idaho Power cooperate with such efforts.[79]

In sum, the summary judgment record compels a conclusion that there is no material dispute of fact and Black Mesa has satisfied the applicable legal requirements for the creation of a LEO to the published avoided cost rates for "other" QFs and 20-year contract terms for each of its QFs.

5. Idaho Power Relies on a Fatally Inconsistent Argument in Its Attempt to Thwart QFs' Rights to Utilize this Commission's Established Implementation of PURPA

The Commission should reject Idaho Power's argument in opposition to Black Mesa's

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78 Black Mesa's Complaint at Ex. 6.

79 Declaration of Brian Lynch In Support of Black Mesa Energy, LLC's Motion for Summary Judgment at ¶¶ 22-28.

LEOs, which amounts to an argument that Idaho Power can unilaterally stall creation of a LEO for over three years while it attempts to change the extant PURPA implementation plan applicable to prospective QFs.

The foundational issue facing the Commission is summarized at Paragraph 28 of the Black Mesa Complaint:

> 28. Idaho Power has illegally refused to abide by its own IPUC-approved process for executing power purchase agreements with QFs.

Idaho Power, of course, mechanically denied the allegation contained in the Complaint's Paragraph 28. However, beyond its rote denial, the Power Company went on to explain in its Answer to Paragraph 28 that:

> 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.[80]

Idaho Power repeated this same defense throughout its Answer. At Paragraphs 30 and 31 of the Complaint, Black Mesa asserted that:

> 30. Black Mesa committed itself to sell energy and capacity from its Black Mesa Energy Storage 1 to Idaho Power.
>
> 31. Consequently, Black Mesa has committed Idaho Power to buy from its Black Mesa Energy 1 Storage QF.[81]

Again, Idaho Power asserts in response that:

> 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.[82]

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80 Idaho Power's Answer and Motion to Dismiss at ¶ 28.

81 Black Mesa's Complaint at ¶¶ 30-31. Mirror image allegations on behalf of Black Mesa Energy 2 energy storage QF are made at Paragraphs 39 and 40.

82 Idaho Power's Answer and Motion to Dismiss at ¶ 31; *accord id.* at ¶ 37, 40.

The fatal inconsistency of Idaho Power's defense is obvious. In the first phrase of the sentence, Idaho Power admits to the existence of, "*the avoided cost rate and contract terms and conditions required and approved by the Commission*."[83] Then in the second phrase of the sentence, Idaho Power directly contradicts itself by admitting that it "*has asked the Commission to set and approve the same*."[84] Of course, it is impossible to refuse to offer to purchase at rates/contract terms that are in existence while at the same time the approval of those rates/contract terms is still pending approval by the Commission.

This inconsistency is fatal to Idaho Power's claim that Black Mesa has not created a LEO. It highlights Idaho Power's bad faith attempt to sabotage the QFs' attempts to secure power purchase agreements under the unambiguous process set forth in Schedule 73. On the one hand, the Idaho Power admits (as it must) to the existence of Commission-approved rates/contract terms, while on the other hand, Idaho Power refuses to honor those existing rates/contract terms because it asked the Commission to approve completely different rates and contract terms. But, as discussed previously, Idaho Power never requested, and the Commission never purported to grant, any moratorium on its previously effective implementation scheme for "other" QFs, or any retroactive applicability of the new implementation scheme that creates a new rate category and term limitation for energy storage QFs. Thus, for all of the reasons set forth above, the Black Mesa QFs lawfully created 20-year LEOs to the published rates available for "other" QFs in effect on the date of the Complaint.

V. CONCLUSION

Black Mesa respectfully requests that this Commission issue an order granting summary

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83 *E.g.,* Idaho Power's Answer and Motion to Dismiss at ¶ 28 (emphasis added).

84 *Id.* (emphasis added).

judgment in Black Mesa's favor and declaring that Black Mesa has formed two legally enforceable obligations: (1) committing Idaho Power to purchase the net output of the Black Mesa Energy 1 storage QF for a 20-year term of power sales utilizing the Commission's published avoided cost rates for "Other" facilities in effect on the date of the Complaint; and (2) committing Idaho Power Company to purchase the net output of the Black Mesa Energy 2 storage QF for a 20-year term of power sales utilizing the Commission's published avoided cost rates for "Other" facilities in effect on the date of the Complaint.

DATED this 14th day of December 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th of December 2020, a true and correct copy of the within and foregoing BLACK MESA ENERGY'S MOTION FOR SUMMARY JUDGMENT in Docket No. IPC-E-20-07 was served, pursuant to Commission Order No. 34602, exclusively via electronic mail to:

Idaho Public Utilities Commission
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By: _____
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